



which were severe but which did not meet or equal the criteria of any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Finding 3, Record at 21; that the plaintiff’s statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, *id.*; that she lacked the residual functional capacity to lift and carry more than 20 pounds occasionally or more than 10 pounds on a regular basis, sit for more than a total of four hours in an eight-hour work day, or crouch, climb, balance, stoop, kneel, or crawl more than occasionally, Finding 5, *id.*; that in her past work as a secretary the plaintiff was not required to perform any tasks that were beyond her residual functional capacity, Finding 6, *id.*; that her impairments did not prevent her from performing her past relevant work, Finding 8, *id.* at 22; and that she had not been under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 9, *id.* The Appeals Council declined to review the decision, *id.* at 7-9, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner’s decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 4 of the sequential review process, at which stage the burden is on the plaintiff to show that she cannot perform her past relevant work. *Goodermote*, 69 F.2d at

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administrative record.

7; 20 C.F.R. § 404.1520(e). In considering the issue, the commissioner must make a finding of the plaintiff's residual functional capacity ("RFC"), a finding of the physical and mental demands of past work and a finding as to whether the plaintiff's RFC would permit performance of that work. 20 C.F.R. § 404.1520(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service Rulings* 1975-1982 ("SSR 82-62"), at 813.

The plaintiff does not attack the administrative law judge's findings at Step 4. All of the errors alleged by the plaintiff arise at Step 2 of the sequential review process. Plaintiff's Itemized Statement of Errors ("Itemized Statement") (Docket No. 5) at 3-8. Necessarily implied in the plaintiff's claims, therefore, is an assertion that the outcome at Step 4 would have been different but for the alleged errors at Step 2. This implication is critical because, at Step 2, a claimant need only show that an alleged impairment would have "more than a minimal effect on [her] ability to work," *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986), while, at Step 4, a claimant must show that her impairments had the effect of preventing her from returning to her past relevant work, an obviously higher evidentiary standard. Although the claimant bears the burden of proof at Step 2, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *Id.*

### **Discussion**

The plaintiff relies on the "medical source opinion" of Tracy Hawkins, D.O., Itemized Statement at 4-8 & n.8, which is presented in a letter from Dr. Hawkins to the plaintiff's attorney dated nine days before the hearing before the administrative law judge, Record at 27, 585, that, *inter alia*, "[d]epression/anxiety disorders at this point significantly affect [the plaintiff's] mental state and reduce her ability to maintain concentration as well as perform work requiring thought and memory processing," *id.* at 587. The only mention of a mental impairment at the hearing was the statement of the plaintiff's attorney that she had "been

dealing with depression, she's been dealing with anxiety . . . ." *Id.* at 32. The plaintiff was not asked to testify about any mental impairment, and the administrative law judge was under the impression that she "alleged an inability to work . . . due to back pain, high blood pressure, and porphyria cutanea tarda"<sup>2</sup> only. Record at 17. Nonetheless, the administrative law judge does refer to a possible mental impairment, as follows:

Ms. Leary has been prescribed Zoloft for symptoms of depression. She has never undergone any other treatment for psychological problems. The record does not reflect more than occasional complaints of mood problems, and treating sources frequently indicate that the claimant denied any difficulties with depression or anxiety (Exhibit 21F). The undersigned finds that Ms. Leary's depression is no more than mild.

*Id.* at 18.<sup>3</sup> Exhibit 21F is Dr. Hawkins' records. *Id.* at 585-672. The plaintiff faults the administrative law judge for failing to comply with 20 C.F.R. § 404.1520a(e) with respect to her depression, Itemized Statement at 3-4, but that procedural requirement applies only after the administrative law judge has found a medically determinable mental impairment to exist. 20 C.F.R. § 404.1520a(b). Here, the administrative law judge found no such impairment.

That finding, however, as the plaintiff suggests, Itemized Statement at 5-6, is not supported by substantial evidence. The two state-agency psychologists who reviewed the plaintiff's medical records, without benefit of Dr. Hawkins' summary letter, both found that a mental impairment existed, but that it was

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<sup>2</sup> Porphyria cutanea tarda is an inherited disorder resulting from a disturbance in porphyrin metabolism, causing increased formation and excretion of porphyrin, a nitrogen-containing organic compound that forms the basis of respiratory pigments. *Taber's Cyclopedic Medical Dictionary* (14th ed. 1983) at 1138. As a result, the skin is damaged by light; affected individuals develop fragile skin, sores, blisters and tiny cysts on areas exposed to the sun. See [dermnetz.org/systemic/porphyria-cutanea-tarda.html](http://dermnetz.org/systemic/porphyria-cutanea-tarda.html).

<sup>3</sup> The plaintiff contends that the fact that the administrative law judge "made no finding whatsoever as to her claimed anxiety impairment," by itself, is sufficient reason to order remand. Itemized Statement at 4. Dr. Hawkins, the only source of medical evidence that the plaintiff may have suffered from an anxiety disorder, refers to "depression/anxiety disorders," Record at 585, as the single source of any possible effects on the plaintiff's ability to perform work activities, without making any distinction. In any event, the court need not determine whether either, or both, of these alleged mental (continued on next page)

not severe. Record at 267, 270, 277, 279, 389, 392, 399, 401. Coupled with Dr. Hawkins' statement, and undisputed by any other medical evidence in the record, this evidence does require the administrative law judge to perform the written analysis required by section 404.1520a(b)-(e), which he did not do in this case. This error requires remand unless the evidence could not support both a finding at Step 2 that the plaintiff's depression was severe and a different outcome at Step 4.

Resolution of these questions is made more difficult by the manner in which Dr. Hawkins, the only medical source suggesting any work-related limitations due to depression,<sup>4</sup> describes those limitations. In order to evaluate the severity of the mental impairment, the administrative law judge must rate the degree of functional limitation in each of four functional areas: activities of daily living; social functioning; concentration, persistence or pace; and episodes of decompensation. 20 C.F.R. § 404.1520a(c)(3). Dr. Hawkins merely states that the plaintiff's "[d]epression/anxiety disorders" reduced "her ability to maintain concentration as well as perform work requiring thought and memory processing." Record at 587. Does this constitute a "mild" or a "moderate" impairment in the third functional area, the only one of the four which it can reasonably be construed to address? If it is "mild," then the impairment is not severe. If it is "moderate," then the impairment is severe. 20 C.F.R. § 404.1520a(d)(1).

The administrative law judge should have found the plaintiff's mental impairment to be severe at Step 2. His conclusion that Dr. Hawkins' statement that the plaintiff had "significant" depression and/or anxiety was "contradicted by her own notes, which frequently show that the claimant's mental statute was

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impairments existed or was severe. The lack of consideration of either requires remand for the reasons set forth in the text.  
<sup>4</sup> To the extent that the plaintiff relies on the prescription by Richard J. Dubocq, M.D., of Zoloft, apparently for "fatigue/stress," in 1999, Itemized Statement at 5 n.9 & Record at 553, that information was available to the state-agency psychologists who found no impairment greater than "mild" in any of the four functional areas, Record at 277, 399. The administrative law judge would have been entitled to rely on this evidence, as well as the opinion of the consulting physician who examined the plaintiff for the state disability agency on May 1, 2002, that the plaintiff's depression was *(continued on next page)*

normal, and that she denied problems with mood,” Record at 20, goes to the Step 4 issue. The plaintiff contends that this treatment of Dr. Hawkins’ opinion fails to comply with 20 C.F.R. § 404.1527(d)(2) and SSR 96-2p because it does not give good reasons for rejecting Dr. Hawkins’ conclusion nor does it specify the weight given to her opinion. Itemized Statement at 6-7.<sup>5</sup> It is quite clear that the administrative law judge gave very little weight to Dr. Hawkins’ opinion on this point. The reason given for rejecting that opinion, that it is not supported by Dr. Hawkins’ notes, is supported by the record and accordingly is a “good reason.” Contrary to the plaintiff’s contention, Itemized Statement at 8, it is not necessary for the administrative law judge to explicitly set forth each of the factors listed in 20 C.F.R. § 404.1527(d) in explaining his reasons for rejecting the conclusion of a treating physician. The plaintiff does not cite, nor do I find, First Circuit case law indicating that there are circumstances under which an administrative law judge must slavishly discuss each of the section 404.1527(d)(2) criteria.<sup>6</sup>

Because I cannot conclude that consideration of the plaintiff’s mental impairment as severe would not have changed the outcome of this claim at Step 4, I will not address further the plaintiff’s arguments

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“controlled at this time on Zoloft,” Record at 283, to find that the mental impairment was not severe. The problem is that there is no indication that the administrative law judge engaged in any such analysis.

<sup>5</sup> I reject the plaintiff’s contention that Dr. Hawkins’ opinion on this issue “could have” been given controlling weight. Itemized Statement at 7. Controlling weight is given to the opinion of a treating physician only when the opinion is “well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record.” 20 C.F.R. § 404.1527(d)(2). Dr. Hawkins’ opinion is not consistent with the opinions of the state-agency psychologists and is not insulated from that comparison by being sought by counsel and submitted for the first time at or immediately before the hearing conducted by the administrative law judge, well after the state-agency reviews would have been completed. Social Security Ruling 96-2p deals only with the circumstances under which a treating physician’s opinion must be given controlling weight, Social Security Ruling 96-2p, reprinted in *West’s Social Security Reporting Service Rulings* (Supp. 2004) at 111, and thus adds nothing to the plaintiff’s argument.

<sup>6</sup> Tellingly, while not directly addressing this issue, the First Circuit has upheld rejection of treating-physician opinions on the basis of consideration of select section 404.1527(d) factors. *See, e.g., Morales v. Commissioner of Soc. Sec.*, 2 Red. Appx. 34, 36 (1st Cir. 2001) (administrative law judge supportably rejected treating-physician RFC assessments on basis they were not corroborated by clinical studies or findings and were refuted by rest of record evidence); *Keating v. Secretary of Health & Humans Servs.*, 848 F.2d 271, 276 (1st Cir. 1988) (“A treating physician’s conclusions regarding total disability may be reject by the Secretary especially when, as here, contradictory medical advisor evidence appears in the record.”).

concerning Dr. Hawkins' opinion and its treatment at that stage of the sequential review process. I will address one other Step 2 issue raised by the plaintiff, however.

The plaintiff asserts, in conclusory fashion, that remand is required because the administrative law judge failed to consider whether the plaintiff's alleged impairments of porphyria cutanea tarda ("PCT"), diabetes, hypertension and depression constituted a severe impairment when combined. Itemized Statement at 8. The administrative law judge found that the plaintiff has "no persistent functional limitations related to" her PCT. Record at 18. He found that her diabetes and hypertension were well-controlled with medication. *Id.* In order for a group of non-severe impairments to constitute a severe impairment when combined, the combination must significantly limit the claimant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(c). The plaintiff points out that she "occasionally had blurry vision from her diabetes, that her hypertension was uncontrolled at times and that otherwise she was heavily medicated for her various ailments." Itemized Statement at 8. There is nothing inherent in being heavily medicated or in suffering from occasional uncontrolled hypertension that necessarily significantly limits the ability to do basic work activities. The plaintiff cites only one report of blurred vision in the record, *id.*, which she made upon seeking treatment for her diabetes in April 4, 2001, Record at 241. There is no further mention of this symptom in the medical records; Dr. Hawkins does not mention it in her letter setting forth what Dr. Hawkins considered to be the limitations imposed by the plaintiff's impairments. *Id.* at 585-87. In the absence of evidence that any of the alleged non-severe impairments caused any significant limitation on the plaintiff's ability to do basic work activities, as well as any evidence that the presence of these impairments together caused some such limitation, the failure of the administrative law judge explicitly to consider this possibility is at most a harmless error. *See Roderer v. Sullivan*, 908 F.2d 975 (table), 1990 WL 105583

(7th Cir. July 25, 1990), at \*\*4 (conclusion that combination of impairments not severe upheld where administrative law judge found that each of individual alleged impairments was not disabling).

**Conclusion**

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case remanded for further proceedings consistent with this opinion.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 13th day of December, 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Plaintiff**

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