

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ELDORA J. MAGGIANI,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 03-180-B-W

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income (“SSI”) appeal raises the issue whether substantial evidence supports the commissioner’s determination that the plaintiff, who alleges disability stemming from fibromyalgia, depression and anxiety, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from a chronic pain syndrome, fibromyalgia

¹ This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on October 20, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

syndrome, obesity, depression and an anxiety disorder, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 2, Record at 21; that she retained the residual functional capacity (“RFC”), *inter alia*, to perform routine, repetitive work, Finding 4, *id.*; that she was unable to perform her past relevant work, Finding 5, *id.*; that although she was unable to perform the full range of sedentary work, she was capable of making an adjustment to work that exists in significant numbers in the national economy, Finding 9, *id.*; and that she therefore had not been under a disability at any time through the date of decision, Finding 10, *id.* The Appeals Council declined to review the decision, *id.* at 5-7, making it the final determination of the commissioner, 20 C.F.R. § 416.1481; *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. § 1383(c)(3); *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 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner’s findings regarding the plaintiff’s residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff argues that the administrative law judge erred in failing to consider or transmit to a vocational expert most, if not all, of the mental limitations found by two Disability Determination Services (“DDS”) non-examining psychologists, David. R Houston, Ph.D., and Thomas A. Knox, Ph.D. *See generally* Statement of Specific Errors (“Statement of Errors”) (Docket No. 12). I find no reversible error.

I. Discussion

At hearing, the administrative law judge asked vocational expert Sharon Greenleaf whether a person who, among other things, “because of some problems that she’s described as – with her concentration – that she would only be able to do routine, repetitive work” could perform any entry-level jobs in the national economy. Record at 57-58. Greenleaf testified that such a person could perform work as a receptionist, general office clerk, assembler, dispatcher and cashier. *See id.* at 58-59. The plaintiff’s counsel then asked Greenleaf to factor in “the possibility of unscheduled breaks occurring of fatigue maybe once or twice a week, [and] the possibility of leaving the job early or coming in late due to fatigue once or twice a week.” *Id.* at 59-60. Greenleaf testified that such additional restrictions would affect a person’s ability to hold the foregoing entry-level jobs, explaining that in “any job you have to be able to show up on a regular basis and stay. I mean, people get, you know, sick time and so forth but it’s usually not as frequent as one to two times a week that they can take breaks or leave or come in late.” *Id.* at 60.

The plaintiff posits that Greenleaf’s initial testimony cannot stand as substantial evidence of ability to perform work existing in significant numbers in the national economy inasmuch as it was elicited in response to a flawed hypothetical question – one omitting restrictions found by Drs. Houston and Knox. *See generally* Statement of Errors; *see also, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (it is bedrock Social Security law that the responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to the medical evidence of

record; “To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.”).

I am unpersuaded. Although the administrative law judge unfortunately does not explicitly discuss the findings of either Dr. Houston or Dr. Knox, *see* Record at 16-20, it is apparent that he did adopt those findings in large measure. Dr. Houston, Dr. Knox and the administrative law judge all rated the plaintiff as having mild restriction of activities of daily living, moderate difficulty in maintaining social functioning, and no episodes (or, at least, insufficient evidence of episodes) of decompensation. *See id.* at 18, 180, 219. The administrative law judge found that the plaintiff had moderate difficulties in maintaining concentration, persistence or pace, *see id.* at 18, while Dr. Houston assessed her difficulty level in that sphere as mild, *see id.* at 180, and Dr. Knox rated it as mild to moderate, *see id.* at 219.

With respect to mental RFC (“MRFC”), Dr. Houston found moderate limitation in the plaintiff’s ability to (i) understand and remember detailed instructions, (ii) carry out detailed instructions, (iii) maintain attention and concentration for extended periods, (iv) complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods – but only with respect to complex tasks, (v) accept instructions and respond appropriately to criticism from supervisors, (vi) get along with co-workers or peers without distracting them or exhibiting behavioral extremes, and (vii) respond appropriately to changes in the work setting. *See id.* at 184-85. As Dr. Houston crystallized these individual findings: “She can carry out non-complex tasks. She is able to handle/tolerate a small group setting. Routine changes are well accommodated.” *Id.* at 186.

Dr. Knox found the same individual limitations as had Dr. Houston, although he added no caveat to the plaintiff's moderate limitation in ability to complete a normal workday and workweek. *See id.* at 223-24.

In addition, Dr. Knox assessed the plaintiff as (i) moderately limited in ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances and (ii) moderately to markedly limited in ability to interact appropriately with the general public, *see id.* – two areas with respect to which Dr. Houston had found her not significantly limited, *see id.* at 184-85. For his part, Dr. Knox crystallized his individual findings as follows: “Although she suffers from depression, anxiety, + Personality Disorder, she retains the ability to learn, remember, + carry out simple instructions and tasks. She can interact appropriately [with] a small number of coworkers + supervisors, + is able to adapt to minor changes in routine.” *Id.* at 225.

The administrative law judge found, and transmitted in his hypothetical question to Greenleaf, a limitation to routine, repetitive work. *See Finding 4, id.* at 21; *id.* at 57. This, in turn, addressed all aspects of Dr. Houston's MRFC assessment as crystallized except for limitation to a small group setting, and all aspects of Dr. Knox's MRFC assessment as crystallized except for limitation to working with a small number of co-workers and supervisors.²

To the extent the administrative law judge diverged from Drs. Houston's and Knox's MRFC assessments, he offered an explanation: “Due to new and material evidence, including the testimony at hearing, the findings of the medical experts at the state Disability Determination Services are found to be no

² At oral argument, the plaintiff's counsel contended that the administrative law judge omitted restrictions found by Drs. Knox and Houston pertaining not only to social functioning but also to ability to maintain activities within a schedule, maintain regular attendance and be punctual. However, both Drs. Knox and Houston presumably factored such limitations into their crystallizations of what the plaintiff still could do; in any event, Dr. Houston found the plaintiff moderately limited with respect to schedule, attendance and punctuality only to the extent she undertook complex tasks, *see Record* at 185, which are excluded by the administrative law judge's limitation to “routine repetitive” work, *see Finding (continued on next page)*

longer consistent with the record as a whole. Therefore, their findings are given less weight by the undersigned.” *Id.* at 19. While, again, unfortunately, the administrative law judge did not elaborate on these newly emerged inconsistencies, the Record supports his implicit decision to omit limitations aimed at compensating for difficulties with co-workers and supervisors.³

At hearing, the plaintiff testified that she had never had problems either getting along with supervisors or co-workers or taking instruction from supervisors. *See id.* at 40-41. This testimony constitutes affirmative evidence that the plaintiff was not, in fact, limited in dealings with supervisors and co-workers. In addition, among materials submitted at hearing was a March 11, 2003 note from a counselor observing that the plaintiff had been admitted into the DSAT’s Women’s Group in November 2002 and had been “a pleasure to work with and a positive member of the DSAT women’s group.” *Id.* at 145-46.⁴

Finally, while the plaintiff points to Greenleaf’s testimony that a person who would have to take unscheduled breaks twice a week and come in late or leave early twice a week would have difficulty performing the cited jobs, *see* Statement of Errors at [3]-[4], I am unable to find any evidence of record

4, *id.* at 21.

³ At oral argument, the plaintiff’s counsel underscored the failure of the administrative law judge to articulate which findings of Drs. Houston and Knox he accepted, which he rejected, and why. Her point is well-taken; however, a failure of articulation – while hardly to be emulated or encouraged – does not constitute reversible error when, as here, the court nonetheless readily can discern substantial support for the administrative law judge’s findings in the Record. *See, e.g., Bryant ex rel. Bryant v. Apfel*, 141 F.3d 1249, 1252 (8th Cir. 1998) (“We have often held that [a]n arguable deficiency in opinion-writing technique is not a sufficient reason for setting aside an administrative finding where . . . the deficiency probably ha[s] no practical effect on the outcome of the case.”) (citations and internal quotation marks omitted).

⁴ I am mindful that an administrative law judge, as a layperson, is not qualified to translate raw medical data into functional restrictions and typically must rely on medical experts to do so for him. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (although an administrative law judge is not precluded from “rendering common-sense judgments about functional capacity based on medical findings,” he “is not qualified to assess residual functional capacity based on a bare medical record”). However, in this case, no expert was needed to assess the significance of the plaintiff’s testimony that she never had had problems with supervisors or co-workers. That said, I am troubled that the administrative law judge found, for purposes of his Psychiatric Review Technique Form assessment, that the plaintiff had moderate difficulties in social functioning, yet included no corresponding limitation in his MRFC determination. While, in different circumstances, such a discrepancy could constitute reversible error, I am satisfied in this case that the Record supports the omission of a restriction on social functioning.

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that the plaintiff had those specific problems, nor was the plaintiff's counsel able to point to any at oral argument. Thus, the administrative law judge committed no error in declining to adopt those particular restrictions or in ignoring Greenleaf's testimony on that point.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

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 25th day of October, 2004.

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

Plaintiff

ELDORA J MAGGIANNI

represented by **JACQUELINE L. GOMES**
LAW OFFICE OF JACQUELINE
GOMES
55 STROUDWATER STREET
WESTBROOK, ME 04092
207-854-1210

Email: gomeslaw@maine.rr.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **ESKUNDER BOYD**
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: eskunder.boyd@ssa.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

HUNG TRAN
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
(617)565-4277
Email: hung.t.tran@ssa.gov
TERMINATED: 02/25/2004
ATTORNEY TO BE NOTICED

THOMAS D. RAMSEY
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
617/565-4277
Email: thomas.ramsey@ssa.gov
ATTORNEY TO BE NOTICED

