

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

SHARON L. TREBILCOCK,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 04-18-P-S

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises the issue whether substantial evidence supports the commissioner’s determination that the plaintiff, who alleges that she is disabled by fibromyalgia and depression, is capable of returning to past relevant work as a front-desk assistant at an animal hospital. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

Pursuant to the commissioner’s sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

¹ This action is properly brought under 42 U.S.C. § 405(g). 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.

law judge found, in relevant part, that the medical evidence established that on the date the plaintiff's insured status expired (March 31, 2002) she had fibromyalgia and an affective 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"), Findings 1 & 3, Record at 17; that as of her date last insured she lacked the residual functional capacity ("RFC") to lift and carry more than twenty pounds occasionally or more than ten pounds on a regular basis, stand or walk for more than an hour at a time (up to a total of six hours in an eight-hour workday), carry out more than simple, occasionally detailed, non-complex work instructions, or do work that would not allow for occasional interference with attention or concentration attributable to mild to moderate pain distraction, Finding 5, *id.* at 18; that in her past work as a front-desk assistant, as generally performed in the national economy, she was not required to perform tasks that were not within her RFC, Finding 6, *id.*; that her impairments as of her date last insured did not prevent her from performing her past relevant work, Finding 8, *id.*; and that she therefore was not under a disability at any time through her date last insured, Finding 9, *id.* The Appeals Council declined to review the decision, *id.* at 4-6, 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 evaluation process, at which stage the burden is on the plaintiff to show that she cannot perform her past relevant work. *Goodermote*, 690 F.2d at 7; 20 C.F.R. § 404.1520(e). In considering the issue, the commissioner must make a finding of the plaintiff's 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 contends that the administrative law judge erred in (i) relying on a job that cannot be performed within the limitations found, (ii) omitting from a hypothetical question to a vocational expert certain limitations found, (iii) failing to make any evaluation of upper-extremity or sitting limitations, (iv) neglecting to consider evidence from a treating source, Stephen Keefe, D.O., and (v) failing to make the detailed inquiry or findings required by SSR 82-62. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 7). I agree that reversal and remand is warranted on the bases of both the first and second points of error. I need not and do not reach the plaintiff's additional bases for remand.

I. Discussion

Before reaching the points that I find to warrant remand and reversal, I address at the outset the key contention made at oral argument by counsel for the commissioner: that the plaintiff implicitly conceded at hearing that she could return to past relevant work as a front-desk assistant. This evidently was based on the following testimony:

Q [Administrative Law Judge] . . . With those limitations, could such a person return to any of the past work that you've described?

A [Vocational Expert] Yes. She could perform the front desk assistant.

CLMT: I looked for those when we first got here.

REP: No. You don't need to.

VE: Oh, all right. Sorry.²

EXAMINATION OF CLAIMANT BY ADMINISTRATIVE LAW JUDGE:

Q Oh, so you think that is something you could do?

A No. When we first moved here, I looked for those and nobody in our area was hiring at the time, and the, any ones that are close to us are about 25 miles away from where I live.

Record at 303-04. I am unpersuaded. That the plaintiff looked for this type of work unsuccessfully – even if she attributed her lack of success to a paucity of job openings within commuting distance – is not tantamount to substantial evidence that she retained the RFC to perform that kind of work. Nor did the administrative law judge see it that way. He considered the testimony in question in the context of assessing credibility, using it to buttress his conclusion that the plaintiff had exaggerated her symptoms and factoring it, in that way, into his ultimate determination of RFC. *See id.* at 16. To the extent he then went on to make an otherwise flawed Step 4 finding, the plaintiff's "concession," which already had been factored into the mix, does not rescue it.

A. Inability To Perform Job With Restrictions Found

In her first point of error, the plaintiff suggests that her case is materially indistinguishable from *Hall-Grover v. Barnhart*, No. 03-239-P-C, 2004 WL 1529283 (D. Me. Apr. 30, 2004) (rec. dec., *aff'd* May 24, 2004), in which this court found restriction to the performance of only "simple repetitive work" seemingly inconsistent with the demands of a job categorized by the Dictionary of Occupational Titles (U.S.

² In context, it seems more likely that this remark was made by the plaintiff. However, it is immaterial whether it was or was not.

Dep't of Labor, 4th ed. rev. 1991) (“DOT”) as having a General Educational Development (“GED”) reasoning level of 3. *See Hall-Grover*, 2004 WL 1529283, at *3; Statement of Errors at 2-3. I agree.

In this case, as in *Hall-Grover*, the job in question has a GED reasoning level of 3. *See* Record at 303 (testimony of vocational expert Jane Gerrish that person with hypothetical restrictions posited by administrative law judge could return to job of front-desk assistant in animal hospital, which corresponds to DOT § 245.367-010); DOT § 245.367-010 (job has GED reasoning level of 3). While *Hall-Grover* was found to be restricted to “simple repetitive work,” *Hall-Grover*, 2004 WL 1529283, at *3, the plaintiff in this case was found to be capable of performing a job entailing “no more than simple instructions, occasionally detailed, not complex,” Record at 303 & Finding 5, *id.* at 18. Nonetheless, a person capable of carrying out even “occasionally detailed” instructions seemingly would be incapable of performing a job with a GED reasoning level of 3, which requires a worker to “[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form” and to “[d]eal with problems involving several concrete variables in or from standardized situations.” DOT § 245.367-010. Indeed, a job with the less demanding GED reasoning level of 2 requires a worker to “[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions” and to “[d]eal with problems involving a few concrete variables in or from standardized situations.” Appendix C, § III to DOT. A person who can carry out only “occasionally detailed” non-complex instructions thus would seem incapable even of performing a job with a GED reasoning level of 2.

At the very least, in this case, as in *Hall-Grover*, the administrative law judge should have queried the vocational expert as to whether her description of the job in issue varied from that of the DOT and acknowledged and resolved any inconsistencies. *See Hall-Grover*, 2004 WL 1529283, at *4 (“[B]efore relying on VE or VS evidence to support a disability determination or decision, our adjudicators must . . .

[i]dentify and obtain a reasonable explanation for any conflicts between occupational evidence provided by VEs and VSs and information in the [DOT]” and “explain in the determination or decision how any conflict that has been identified was resolved.”) (quoting Social Security Ruling 00-4p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2003) (“SSR 00-4p”), at 243)).

This error undermines confidence that the Step 4 decision of the commissioner is supported by substantial evidence, necessitating reversal and remand.

B. Failure To Include Restrictions in Hypothetical Question to Vocational Expert

Apart from this error, the plaintiff identifies a second problem that, in my view, independently necessitates reversal and remand for further proceedings. As the plaintiff observes, *see* Statement of Errors at 4, the administrative law judge relied for his Step 4 finding on Gerrish’s response to a hypothetical question in which he worded a restriction significantly differently than it is worded in his decision, *compare* Finding 5, Record at 18 (finding plaintiff unable to “do work which would not allow for occasional interference with attention or concentration due to mild to moderate pain distraction”) *with id.* at 303 (asking Gerrish to assume, “She will have occasional mild to moderate pain, but those symptoms would allow enough attentiveness and responsiveness to carry out normal work as claimant’s within that residual functional capacity satisfactor[il]y.”).

At oral argument, counsel for the commissioner contended that the restriction as posited to Gerrish was simply another way of saying the same thing – that the plaintiff was restricted by mild to moderate pain that only occasionally would cause vocational limitations. I am unpersuaded. The plaintiff correctly characterizes the restriction as transmitted to Gerrish as a “self-fulfilling prophecy,” Statement of Errors at 4; Gerrish essentially was asked to assume that the plaintiff’s pain would have no perceptible impact on her ability to function at work, *see* Record at 303. Gerrish never was asked whether – in line with the

restriction found in the decision – a person hampered by occasional interference with attention or concentration would be able to perform the job of front-desk assistant at an animal hospital. That omission undermines confidence in the supportability of the administrative law judge’s Step 4 finding.³ *See, 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.”).⁴

On the basis of these fundamental errors in transmission of restrictions to the vocational expert, remand and reversal is warranted in this case.

II. Conclusion

³ When asked by plaintiff’s counsel whether “significant problems with concentration, memory lapses” would eliminate the job, Gerrish testified that they would. *See* Record at 304. One cannot reasonably infer from this testimony that occasional problems with concentration would permit performance of the job – they might or might not. The bottom line is that the Record is silent on the point, and silence is not tantamount to substantial evidence.

⁴ The plaintiff also argued that the administrative law judge erred in omitting to include in his findings, or transmit to Gerrish, a restriction he seemingly found on her social functioning. *See* Statement of Errors at 3. In the body of his decision, in the course of making what are known as Psychiatric Review Technique Form (“PRTF”) findings (used, *inter alia*, to rate the severity of a mental impairment), the administrative law judge assessed the plaintiff as having mild to moderate difficulty in social functioning. *See* Record at 15; 20 C.F.R. § 404.1520a (describing steps in evaluation of mental impairments). Yet, in moving on to assess the impact of the plaintiff’s mental impairments in function-by-function detail (a so-called mental residual functional capacity (“MRFC”) assessment), the administrative law judge found no restrictions on social functioning. One would expect a finding of mild to moderate difficulty in social functioning at the PRTF stage to manifest itself in parallel findings at the MRFC assessment stage. Indeed, the Disability Determination Services (“DDS”) consultant who rated the plaintiff, at the PRTF stage, as suffering from mild to moderate difficulty in maintaining social functioning found her, in his MRFC evaluation, markedly limited in ability to interact appropriately with the general public. *See* Record at 131, 136 (PRTF, MRFC assessment by Thomas A. Knox, Ph.D.). This unexplained discrepancy is troubling and, in other circumstances, could alone constitute reversible error. However, because in this case there is otherwise Record support for the notion that the plaintiff’s mental impairments had no more than a mild impact on her social functioning, *see id.* at 149, 152 (PRTF assessment by Lewis F. Lester, Ph.D.), I consider the error harmless.

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further proceedings not inconsistent herewith.

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

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