

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

THELMA M. KEITH,)	
)	
Plaintiff)	
)	
v.)	Docket No. 04-46-P-H
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises the question whether the commissioner properly found that the plaintiff, who alleges that she has been disabled since June 30, 1995 by an affective disorder and fibromyalgia, has not shown that she was afflicted by those impairments as of June 30, 1995, her date last insured. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

In accordance with 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 law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage to remain

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.

insured only through June 30, 1995, Finding 2, Record at 25; that as of her date last insured she suffered only from asthma and hypothyroidism and did not suffer from any other impairment the existence of which was established by the requisite objective medical evidence, Finding 3, *id.*; and that she therefore was not under a disability at any time through her date last insured, Finding 4, *id.* The Appeals Council declined to review the decision, *id.* at 6-8, 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 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* at 1124 (quoting Social Security Ruling 85-28).

The plaintiff complains that the administrative law judge erred in (i) failing to find that she suffered

from two severe impairments, an affective disorder and fibromyalgia, as of her date last insured, and (ii) neglecting to follow the required technique for the evaluation of mental impairments, set forth at 20 C.F.R. § 404.1520a. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff (“Statement of Errors”) (Docket No. 5). I agree that, on these bases, remand is required.

I. Discussion

As the administrative law judge correctly noted, *see* Record at 22, a claimant bears the initial burden of adducing evidence that during the relevant time period he or she suffered from a medically determinable impairment, *see, e.g.*, 20 C.F.R. § 404.1512(c) (“You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled.”). A claimed condition for which no such evidence is produced rightfully is ignored. *See, e.g.*, Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service, Rulings 1983-1991* (Supp. 2004) (“SSR 96-7p”), at 133 (“No symptom or combination of symptoms can be the basis for a finding of disability, no matter how genuine the individual’s complaints may appear to be, unless there are medical signs and laboratory findings demonstrating the existence of a medically determinable physical or mental impairment(s) that could reasonably be expected to product the symptoms.”).

The administrative law judge relied heavily on reports of Disability Determination Services (“DDS”) non-examining consultants, both of whom concluded that there was insufficient evidence to establish the existence of a medically determinable physical or mental impairment prior to June 30, 1995. *See* Record at 24, 231-44 (Psychiatric Review Technique Form (“PRTF”) completed by S. Hoch, Ph.D., on June 27, 2002); 245-58 (PRTF completed by Dr. Hoch on September 25, 2002); 259-66 (Physical Residual Functional Capacity Assessment completed by Richard Chamberlin, M.D., on September 25, 2002).

At the plaintiff's hearing on May 22, 2003, her counsel underscored to the administrative law judge that he had freshly transmitted a number of contemporaneous medical records (marked as Exhibits 12F through 15F) that were not obtained by or otherwise considered by the DDS reviewers. *See* Record at 33 ("I want it known that Exhibits 12 through 15F, which we discuss in our letter of May 21, . . . was faxed down yesterday. DDS didn't bother to get those. So, insofar as they've made any determinations, they did it on the [then-extant] record, which really began after the DLI [date last insured].").

Inasmuch as appears from the Record, no DDS consultant reviewed these later submitted exhibits, and no medical expert testified at the plaintiff's hearing. Evidently based solely upon her own review of those materials, the administrative law judge concluded that they did not alter the premise that the plaintiff had failed to adduce objective medical evidence that she suffered from an affective disorder or fibromyalgia prior to her date last insured, stating:

She does now suffer from a bipolar disorder (Exhibit 7F), although it was diagnosed subsequent to the alleged date of onset of her disability (Exhibit 1E). She was variously diagnosed as suffering from unipolar depression, depression, and mixed anxiety and depression between 1992 and 1993 (Exhibits 14F and 13F). However immediately prior to the date she last met the disability insured status requirements, she described herself as being somewhat depressed (Exhibit 14F).

Although she describes symptoms of fibromyalgia syndrome (Exhibits 1E and 2E), of ten years duration (Exhibit 7F), this condition was not diagnosed until 1996 (Exhibit 15F).

Id. at 24.

The administrative law judge correctly observed that the newly submitted medical records (Exhibits 13F and 14F) showed that the plaintiff was diagnosed at least as far back as 1992 as suffering from an affective disorder. *See, e.g., id.* at 281 (office note of treating physician James B. Donahue, D.O., dated November 16, 1992 assessing plaintiff with unipolar depression and noting, "began to become

overwhelmed by things in her life”). Nonetheless, she went on to find that the plaintiff had failed to adduce objective medical evidence of the existence of any such disorder prior to date last insured (apparently on the basis that the plaintiff had described herself as being only “somewhat depressed” in a record dated just prior to her date last insured). *See id.* at 24; Finding 3, *id.* at 25; *id.* at 292 (report of Daniel M. Merson, D.O., dated May 24, 1995, stating: “Thelma returns for evaluation of her multinodular goiter. At this point she’s still feeling somewhat depressed, but otherwise feels okay.”).

As counsel for the commissioner conceded at oral argument, Dr. Hoch’s earlier PRTF findings cannot stand as substantial evidence that the plaintiff did not suffer from depression as of her date last insured inasmuch as he never had the benefit of review of the later-submitted contemporaneous records. *See, e.g., Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) (“[T]he amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert. In some cases, written reports submitted by non-testifying, non-examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule.”) (citations and internal quotation marks omitted).

Nonetheless, based on his own meticulous parsing of that later-submitted evidence, counsel for the commissioner posited that even had the DDS reviewers seen those materials, the outcome would have been the same. He contended that (i) the diagnoses of Drs. Donahue and Merson properly are ignored inasmuch as neither is a psychologist or psychiatrist and both relied on the plaintiff’s statements rather than on objective indicia of depression and, (ii) in any event, the record as a whole, including the new materials, does not demonstrate that any such disorder was severe as of the plaintiff’s date last insured for purposes of Step 2 analysis. Counsel makes a thoughtful, but ultimately unpersuasive, argument. I reject it for several

reasons:

1. The later submitted contemporaneous evidence (notably, Dr. Donahue's records) uniformly indicates that the plaintiff was diagnosed with, and treated with Trazadone and/or Zoloft for, an affective disorder beginning as early as 1992 and continuing through and beyond her date last insured. *See, e.g.*, Record at 269-82; *see also id.* at 44-45 (plaintiff's hearing testimony). I do not think it clear to a layperson that Dr. Donahue's records fail to establish that the plaintiff suffered from a "medically determinable" affective disorder prior to her date last insured. *See* 20 C.F.R. § 404.1529(b) ("Your symptoms, such as pain, fatigue, shortness of breath, weakness, or nervousness, will not be found to affect your ability to do basic work activities unless medical signs or laboratory findings show that a medically determinable impairment(s) is present.").

Dr. Donahue's handwritten progress notes – those of a busy family practitioner – are laconic. *See* Record at 269-88. Nonetheless, it is a reasonable inference that his diagnoses were based not only on the plaintiff's subjective statements but also on his observations and longitudinal knowledge of this patient, whom the Record indicates he saw frequently for a period of at least twelve years (from 1984 to 1996). *See id.* These are the types of "signs" that can establish a medically determinable impairment. *See* 20 C.F.R. § 404.1528(a) & (b) (distinguishing "symptoms," which are a claimant's "own description of [his or her] physical or mental impairment" and do not suffice to establish the existence of such an impairment, from "signs," which are "anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms)").

2. In any event, Dr. Donahue unarguably was a "treating source" as that term is defined in the relevant regulation, *see id.* § 404.1502, and his diagnosis of depression constituted a "medical opinion," *see*

id. § 404.1527(a)(2). The administrative law judge was obliged either to accord that opinion controlling weight or, if not, to assess its weight pursuant to a multi-factored test (taking into account, for example, the length of the treatment relationship and frequency of examination, supportability, consistency with the record as a whole and specialization). *See id.* § 404.1527(d). She then was required to “give good reasons in [her] notice of determination or decision for the weight [she gave to the plaintiff’s] treating source’s opinion.” *See id.* § 404.1527(d)(2). Inasmuch as appears, she did none of these things. *See* Record at 19-25. While courts overlook an “arguable deficiency in opinion-writing technique” if not outcome-determinative, *see Bryant ex rel. Bryant v. Apfel*, 141 F.3d 1249, 1252 (8th Cir. 1998), the instant flaw goes beyond such a deficiency: It is instead a wholesale failure to adjudicate a basic point. The commissioner’s attempt to create the missing analysis from wholecloth at oral argument comes too late when, as here, the claimant was entitled to be presented with a reasoned explanation in the underlying decision. *See* 20 C.F.R. § 404.1527(d)(2).

3. Assuming *arguendo* that the administrative law judge did find that the plaintiff suffered from an affective disorder prior to her date last insured but that it was then non-severe, *see* Record at 24, that finding of non-severity is unsupported by substantial evidence. At oral argument, counsel for the commissioner posited that inasmuch as no treating physician made any finding that depression affected the plaintiff’s ability to work, the administrative law judge had nothing to go on to make such a finding (and hence supportably implicitly rated the condition non-severe). This is a chicken-and-egg argument: No such evidence exists at least in part because the administrative law judge never forwarded the contemporaneous medical evidence to Dr. Hoch or another expert for analysis.

Perhaps anticipating this objection, counsel for the commissioner further contended that had the

DDS reviewers seen the contemporaneous evidence, they would have reached the same conclusion. I am not so certain. Inasmuch as appears, Dr. Hoch believed that he had insufficient evidence to rate the severity of the plaintiff's mental condition as of the relevant time because there was "no info[rmation] prior to DLI [date last insured]." *Id.* at 243. The later-submitted evidence, including the records of Drs. Donahue and Merson, would have filled that gap.

Nor is it clear to me that the administrative law judge reached a supportable conclusion, based on her own analysis of the raw medical evidence, that the plaintiff's affective disorder was non-severe as of the plaintiff's date last insured. I recognize that an administrative law judge is not precluded from rendering "common-sense" judgments (unassisted by medical experts) about the extent to which an impairment impacts a claimant's functioning. *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 or she "is not qualified to assess residual functional capacity based on a bare medical record."); *Stanwood v. Bowen*, 643 F. Supp. 990, 991 (D. Me. 1986) ("Medical factors alone may be used only to screen out applicants whose impairments are so minimal that, as a matter of common sense, they are clearly not disabled from gainful employment. . . . [A]n impairment is to be found not severe only if it has such a minimal effect on the individual's ability to do basic work activities that it would not be expected to interfere with his ability to do most work.") (citations and internal quotation marks omitted).

Nonetheless, to the extent the administrative law judge made such a finding, she based it on a notation made at one point in time in the continuum of a what appears to have been a waxing and waning condition. *See* Record at 24 (observation by administrative law judge that plaintiff "was variously diagnosed

as suffering from unipolar depression, depression, and mixed anxiety and depression between 1992 and 1993. However, immediately prior to the date she last met the disability insured status requirements, she described herself as being somewhat depressed.”) (citations omitted), 292 (Letter from Dr. Merson to Dr. Donahue dated May 24, 1995, stating: “Thelma returns for evaluation of her multinodular goiter. At this point she’s still feeling somewhat depressed, but otherwise feels okay.”); *see also id.* at 137 (psychiatric evaluation dated March 12, 1997 by David B. Lobo, M.D., diagnosing bipolar disorder and stating: “This is a 51-year-old, married woman referred by her family physician, Dr. Donahue, who has some concerns that she may be suffering from Bipolar Disorder. He has been treating her with Zoloft for about six years which has been helpful, but she continues to have extreme highs and lows.”); 221-22 (report by DDS examining consultant James F. Whelan, Jr., Psy.D., dated June 17, 2002, noting: “In some ways, it appears that Ms. Keith never recovered fully from what she described as the caving-in point.”).²

In short, the Record as a whole is murky enough that I do not believe a layperson, such as the administrative law judge, was competent to make an assessment that the plaintiff’s mental impairment was non-severe as of her date last insured without the assistance of an expert who had examined the evidence in totality (including the later-submitted evidence).

Further, as the plaintiff suggests, *see* Statement of Errors at 5, to the extent the administrative law judge made a Step 2 determination, she did so without following the requisite step-by-step technique for evaluation of mental impairments. *See* 20 C.F.R. § 404.1520a; Record at 19-25. While such an error can be harmless – for example, if the Record contains a PRTF completed by a medical expert that supports the

² The “caving-in point” was an event that occurred in 1990 (well prior to the date last insured), when the plaintiff became responsible for care of a newborn granddaughter. *See* Record at 46-47, 221-22. While counsel for commissioner characterized this portion of the Whelan evaluation as merely reporting the plaintiff’s subjective testimony, it appears (*continued on next page*)

administrative law judge's ultimate determination and otherwise corroborates a Step 2 finding of non-severity, *see, e.g., Swan v. Barnhart*, No. 03-130-B-W, 2004 WL 1529270, at *7 (D. Me. Apr. 30, 2004) (rec. dec., *aff'd* May 19, 2004), this case is distinguishable. Dr. Hoch completed his PRTF without benefit of the later submitted contemporaneous medical evidence; in addition, as noted, the administrative law judge improperly relied on her own layperson's assessment of whether the new evidence established a severe impairment as of date last insured. This error, too, accordingly should be rectified on remand.

As the plaintiff's counsel conceded at oral argument, it is less clear from the plaintiff's later submitted evidence that she can be characterized as suffering prior to June 30, 1995 from fibromyalgia, with which she was first diagnosed approximately one year later. *See* Record at 269 (office note of Dr. Donahue dated July 15, 1996 questioning whether plaintiff had fibromyalgia and noting finding of positive fibromyalgia tender points).³ Nonetheless, the DDS's Dr. Chamberlin, like Dr. Hoch, did not have the benefit of the later submitted records, which include a March 3, 2003 report of rheumatologist Charles D. Radis, D.O., observing that the plaintiff's "long-standing non-restorative sleep associated with widespread musculoskeletal pain is consistent with fibromyalgia syndrome." *Id.* at 297. Under the circumstances, Dr. Chamberlin's report cannot stand as substantial evidence that the plaintiff did not suffer from fibromyalgia as of her date last insured. Nor was the administrative law judge, as a layperson, qualified to make that assessment without benefit of medical expertise. Accordingly, reversal and remand for further proceedings is warranted on this ground, as well.

under the heading, "Medical Source Statement" and seemingly reflects Dr. Whelan's analysis.

³ Fibromyalgia is defined as "[a] syndrome of chronic pain of musculoskeletal origin but uncertain cause." *Stedman's Medical Dictionary* 671 (27th ed. 2000). "The American College of Rheumatology has established diagnostic criteria that include pain on both sides of the body, both above and below the waist, as well as in an axial distribution (cervical, thoracic, or lumbar spine or anterior chest); additionally there must be point tenderness in at least 11 of 18 specified sites." *Id.*

II. Conclusion

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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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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