

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JEFFREY D. RICHARDS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 04-59-P-C</i>
)	
JO ANNE B. BARNHART,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal concerns the commissioner’s conclusion that the plaintiff was not disabled prior to his date last insured (“DLI”). I recommend that the commissioner’s decision be affirmed.

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 was insured for purposes of SSD through December 31, 2000, Finding 1, Record at 13; that he had the medically determinable impairment of affective mood disorder, Finding 2, *id.*; that his impairment did not significantly limit his ability to perform basic work-

¹ This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his 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 he 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 November 19, 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 (*continued on next page*)

related activities and therefore was not severe, Finding 3, *id.*; and that he was not under a disability as that term is defined in the Social Security Act at any time prior to December 31, 2000, Finding 4, *id.* & *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 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).

Discussion

the administrative record.

This case involves a Step 2 finding in the context of an allegation that the plaintiff's disability existed before the date last insured. The plaintiff contends that the administrative law judge erred by failing to apply Social Security Ruling 83-20 in determining the date of onset of his mental disability and that he presented evidence that met his evidentiary burden at Step 2. Itemized Statement of Errors Pursuant to Local Rule 16.3, etc. ("Itemized Statement") (Docket No. 7) at 2-7.² The plaintiff relies on the commissioner's decision to award him Supplemental Security Income ("SSI") benefits based on a disability with an onset date of May 1, 2001 in support of his position. *Id.* at 2-3. However, contrary to the plaintiff's characterization, that decision, made at the administrative level without the involvement of an administrative law judge, did not find that the plaintiff's "condition met Listing 12.04," nor did it find "significant impairments based on both Affective Disorder and Antisocial Personality Disorder." *Id.* at 3.³ Rather, the determination found that the plaintiff was "disabled because of depression" and noted that "we are unable to establish the onset before May 1, 2001." Record at 38-39.

The administrative law judge did not find that the plaintiff had any impairment other than affective mood disorder. *Id.* at 13. The plaintiff contends that the administrative law judge was required to find the

² The plaintiff also contends that the administrative law judge should have used an alleged date of onset of December 31, 1998 instead of December 31, 2000, the date stated on his application for benefits. Itemized Statement at 2 note*. Counsel for the plaintiff conceded at oral argument that the exact date of onset alleged has no bearing on the outcome of this appeal, in which the question whether the alleged impairment was severe on December 31, 2000 — the date last insured — is determinative. Whether that impairment began one day or two years before the DLI makes no difference for purposes of this appeal.

³ The pages cited by the plaintiff in support of his assertion that these are the commissioner's "findings" are part of a Psychiatric Review Technique Form completed by David R. Houston, Ph.D., a state-agency reviewer. Record at 140, 150, 152. This document is not expressly adopted in the commissioner's decision to award SSI benefits, *id.* at 38-39, and counsel for the plaintiff was unable to cite any authority for the proposition that the conclusions of such a reviewer become those of the commissioner merely by the act of awarding benefits. I am aware of no such authority and, indeed, such a conclusion would conflict with the long-established regulations and case law that permit, and on occasion require, the commissioner to reject the conclusions of non-examining state-agency reviewers. *See, e.g.*, 20 C.F.R. § 404.1527(f); *Rose v. Shalala* 34 F.3d 13, 18-19 (1st Cir. 1994).

existence of depression, based on the commissioner's finding that the plaintiff was disabled by depression as of May 1, 2001 and entries in his medical records before his DLI. Itemized Statement at 6-7.

Social Security Ruling 83-20 instructs that

[i]n disabilities of nontraumatic origin, the determination of onset involves consideration of the applicant's allegations, work history, if any, and the medical and other evidence concerning impairment severity. The weight to be given any of the relevant evidence depends on the individual case.

Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 50. The date alleged by the claimant should be used "if it is consistent with all the evidence available." *Id.* at 51. "[T]he established onset date must be fixed based on the facts and can never be inconsistent with the medical evidence of record." *Id.* According to SSR 83-20, "it may be possible," but only "[i]n some cases," for the administrative law judge to use the medical evidence of record "to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination." *Id.* Such a determination "must have a legitimate medical basis;" it is necessary to call on the services of a medical advisor in such circumstances. *Id.*

SSR 83-20 also contemplates the possibility that the available medical evidence will not yield a reasonable inference about the progression of a claimant's impairment. *Id.* In such a case, "it may be necessary to explore other sources of documentation" such as information from family members, friends and former employers of the claimant. *Id.* The impact of lay evidence on the decision regarding the date of onset "will be limited to the degree it is not contrary to the medical evidence of record." *Id.* at 52.

It is necessary that the evidence establish both that an impairment existed before the DLI and that the impairment was severe. See *Flint v. Sullivan*, 951 F.2d 264, 267 (10th Cir. 1991) (retrospective diagnosis of post-traumatic stress disorder without evidence of actual disability is insufficient). In this case,

the plaintiff cites five references to depression in the record. Itemized Statement at 6. In the first, the plaintiff reported on March 1, 1999 to a mental health services worker while he was a prisoner that he had had “mood swings of hypomania to depression for the past 2 years” and “cried daily for the past 6 months.” Record at 115. The worker observed that he “presents calm & cooperative & mood is depressed.” *Id.* The second reference is an entry in prison medical records dated January 16, 2001: “? Anxiety causing s/s vs viral gastro.” *Id.* at 104. The third reference is to two entries in the prison medical record prescribing Celexa on March 3, 1999 and May 26, 1999, *id.* at 107, which the plaintiff asserts is an antidepressant, Itemized Statement at 6. The fourth reference is an entry in the prison medical record, also dated March 3, 1999: “R[ule]/O[ut] depression.” Record at 109. The final reference is to a prison medical record dated January 13, 1993: “Pt reports being depressed lately.” *Id.* at 169.

The first and last references are only to reports by the plaintiff himself, which do not constitute medical evidence. *See* SSR 83-20 at 50 (“medical evidence serves as the primary element in the onset determination”). The second and fourth references cannot reasonably be read to present medical evidence of the existence of depression. With respect to the fourth reference, there is no indication in subsequent entries in the plaintiff’s medical records that depression was diagnosed. The drug prescribed in the third reference, Celexa, is used for the treatment of depression. *Physicians’ Desk Reference* (57th ed. 2003) at 1344. However, in this case there is no evidence of treatment for depression beyond a period of seven months, at most; the remaining six entries in that portion of the plaintiff’s medical records, beginning on October 28, 1999, include no prescriptions for antidepressants. Record at 106-07. At most, this evidence indicates an episode of depression that resolved well before the DLI. The medical expert who testified at the hearing stated, with respect to the evidence of depression in the prison medical records, “I don’t think he would fall in a regular basis,” “If it’s the major depressive disorder, I’m not sure I have enough evidence

to . . .,” and “I don’t know if I can go back and say that, the major depressive disorder . . .” *Id.* at 27, 30-31. This testimony does not support the plaintiff’s position. The evidence on which the plaintiff relies is not sufficient to meet even the *de minimis* burden at Step 2 with respect to the existence of depression as a severe impairment that had not resolved before the DLI.

The plaintiff also contends that the evidence with respect to antisocial personality disorder, another impairment not found by the administrative law judge, met the Step 2 standard. Itemized Statement at 4-6. The plaintiff relies on the report of Kevin L. Polk, Ph.D., generated after a consulting evaluation performed on October 17, 2001. *Id.* at 5. Contrary to the plaintiff’s characterization, *id.*, Dr. Polk’s discussion of the social history provided to him by the plaintiff, Record at 139, does not constitute a conclusion or observation about the “onset of personality disorder.” Dr. Polk does opine that the plaintiff’s “reports indicate that he could easily have been diagnosed with conduct disorder prior to age 15.” *Id.* The “conduct disorder” to which Dr. Polk refers is apparently antisocial personality disorder. *Id.* Dr. Polk’s report in all other respects can only be reasonably characterized as discussing the plaintiff’s condition as of the date on which Dr. Polk saw him, rather than an opinion regarding the date of onset of the mental impairments that he diagnoses.

The administrative law judge appears to have relied on the opinions of two state-agency reviewers, Dr. Houston and Peter G. Allen, Ph.D., to the effect that “there is insufficient evidence to find the claimant disabled prior to his date last insured.” *Id.* at 12. Both of these opinions were rendered after the date of Dr. Polk’s report (*id.* at 137, 140, 154) and at least Dr. Houston had seen Dr. Polk’s report, *id.* at 152. The administrative law judge was entitled to rely on Dr. Houston’s conclusion that the evidence concerning antisocial personality disorder was insufficient prior to the DLI. *Id.* While antisocial personality disorder generally begins in childhood or early adolescence, as noted by the plaintiff, Itemized Statement at 5, *see*

American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 645 (4th ed., text rev. 2000), that fact says nothing about the severity of the plaintiff's impairment at the relevant time. Some evidence of severity is required, even where the evidentiary burden is *de minimis*.

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 23rd day of November, 2004.

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

Plaintiff

JEFFREY D RICHARDS

represented by **DANIEL W. EMERY**
36 YARMOUTH CROSSING DR
P.O. BOX 670
YARMOUTH, ME 04096
(207) 846-0989
Email: danemery@maine.rr.com

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **THOMAS D. RAMSEY**
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
617/565-4277
Email: thomas.ramsey@ssa.gov