

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DEBORAH J. COLLINS,
o/b/o F.R.F.,

Plaintiff

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant

Docket No 04-28-P-H

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income (“SSI”) appeal involves an application for disability benefits submitted by the plaintiff on behalf of her minor daughter. The commissioner denied benefits. The plaintiff contends that her daughter’s impairments of attention deficit hyperactivity disorder (“ADHD”), depression, oppositional defiance disorder and borderline personality traits, in combination, functionally equal the elements of an unidentified impairment included in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”) and that the administrative law judge’s decision to the contrary is not supported by substantial evidence. I recommend that the court affirm the decision of the commissioner.

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 November 19, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth an oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

The sequential evaluation process generally followed by the commissioner in making disability determinations, *see* 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), is somewhat modified when the claimant is a child, 20 C.F.R. § 416.924. In accordance with that section, the administrative law judge determined that the claimant, who was sixteen years old at the time of the decision, had ADHD, oppositional defiant disorder, a learning disability, a depressive disorder and cannabis abuse, impairments that were severe but which did not meet or equal the criteria of any impairment included in the Listings, Findings 1-3, Record at 18; that none of the impairments was functionally equivalent to any included in the Listings, Finding 4, *id.*; and that she accordingly had not been under a disability at any time through the date of the decision, Finding 5, *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).

When a claim for benefits is made on behalf of a child, the commissioner must first determine whether the alleged impairment is severe. 20 C.F.R. § 426.924(a), (c). If the impairment is found to be severe, as was the case here, the question becomes whether the impairment is one that is listed in Appendix 1, or that "medically equals, or functionally equals the listings." 20 C.F.R. § 416.924(a). If the impairment, or combination of impairments, does not meet or equal this standard, the child is not disabled. 20 C.F.R. §

416.924(d)(2). An impairment or combination of impairments is medically equal in severity to a listed impairment when the medical findings are at least equal in severity and duration to the listed findings; medical equivalence must be based on medical findings. 20 C.F.R. § 416.926(a) & (b). Medical evidence includes symptoms, signs and laboratory findings, including psychological or developmental test findings. Appendix 1, § 112.00(B). An impairment or combination of impairments is functionally equivalent to a listed impairment when it results in marked limitations in two domains of functioning or an extreme limitation in one domain, based on all of the evidence in the record. 20 C.F.R. § 416.926a(a) & (b). A “marked” limitation occurs when an impairment or combination of impairments interferes seriously with the claimant’s ability independently to initiate, sustain or complete activities. 20 C.F.R. § 416.926a(e)(2). An “extreme” limitation exists when an impairment or combination of impairments interferes very seriously with the claimant’s ability independently to initiate, sustain or complete activities. 20 C.F.R. § 416.926a(e)(3). No single piece of information taken in isolation can establish whether a particular limitation is marked or severe. 20 C.F.R. § 416.926(a)(d)(4).

In this case, the plaintiff contends only that the claimant’s impairments were functionally equivalent to a listed impairment. Plaintiff’s Itemized Statement of Specific Errors (“Itemized Statement”) (Docket No. 7) at 2-3. She asserts that the claimant has marked limitations in three of the six domains: acquiring and using information, attending to and completing tasks, and interacting with and relating to others.² *Id.* at 4. The administrative law judge found that the claimant did not have marked limitations in at least two of the six domains. Record at 17. Marked limitation in two domains is required for functional equivalence of a listing. 20 C.F.R. § 416.926a(a).

² The other domains are moving about and manipulating objects, health and physical well-being and caring for oneself. 20 (continued on next page)

With respect to acquiring and using information, the administrative law judge noted that the claimant “has average reading comprehension skills, and is able to write coherent well developed paragraphs,” that she “asks teachers for help, does her class work, and is capable of making good choices under pressure,” “plays video games . . . does crafts, operates a four wheeler, and is in the process of getting her driver’s permit” and is capable of helping her mother with the cooking, shopping and laundry. Record at 17. The plaintiff, citing 20 C.F.R. § 416.926a(g), contends, without further citation to authority, that the claimant’s ADHD, oppositional defiant disorder and learning disability “are classic causes of marked limitations in this domain.” Itemized Statement at 4-5. She notes the statements of Dr. James Whelan, a clinical psychologist who evaluated the claimant at the request of the state disability determination agency, that the claimant “presents with serious psychological limitation in terms of her ability to be a student,” Record at 198, 203, and William Ferreira, a school psychologist, who evaluated the claimant in 1987, that the claimant’s “most notable area of weakness in her problem solving . . . took place on visual integrative and organizational problem solving,” Record at 113, 115.³ She otherwise discusses only the diagnoses reported by Dr. Whelan and others. The diagnoses, standing alone, whatever they may “classic[ally] cause,” are insufficient to establish that the claimant was markedly limited in using what she had learned in daily living without assistance, comprehending and expressing both simple and complex ideas, or learning to apply these skills in practical ways. 20 C.F.R. § 416.926a(g)(2)(v). The state-agency consulting psychologists who evaluated the claimant’s records produced their reports after that of Ferreira and before that of Dr. Whelan. They both found “less than marked” limitations in this domain. Record at 188, 194. Dr. Whelan’s statement that

C.F.R. § 416.926a(b)(1).

³ The plaintiff asserts that the claimant’s “math and reading skills are so poor that she is not even taking high school math or English. She has been given vocational courses instead.” Itemized Statement at 5. The cited page of the transcript of the claimant’s testimony at the hearing before the administrative law judge does not support this assertion. Record at 27-
(continued on next page)

the claimant had “serious psychological limitation in terms of her ability to be a student,” *id.* at 203, is not necessarily inconsistent with the conclusion that the claimant was not markedly limited in the domain of acquiring and using information. Even if it were conflicting evidence, the administrative law judge may rely on the reports of the state-agency psychologists under these circumstances. *See Berrios Lopez v. Secretary of Health & Human Servs.*, 951 F.2d 427, 431 (1st Cir. 1991).⁴

At oral argument, counsel for the plaintiff contended that the administrative law judge was not entitled to rely on the reports of the state-agency psychologists because those reports were not themselves supported by substantial evidence. Counsel first contended that the report of Peter G. Allen, Ph.D., Record at 193-97, must be disregarded entirely because Dr. Allen states, under the heading “Explanation of Findings,” that “[w]hile impairment may be severe, does not meet/equal a listing,” *id.* at 197. However, as discussed above, the first question for an expert evaluating a child’s claim for benefits after a finding that the impairment at issue is severe is whether the impairment meets a listing. Thus, the statement by a state-agency reviewer that the severe impairment of the child at issue did not meet a listing is appropriate and certainly does not present a reason to disregard that reviewer’s other findings. Dr. Allen also performed the analysis that is required after a finding that the impairment does not meet a listing by considering the evidence with respect to each of the six domains. *Id.* at 194-95.

Counsel for the plaintiff next contended that the findings of both state-agency psychologists with respect to the domains were inconsistent with test results reported at pages 116-18 of the record , the testimony of the claimant child and her mother, the report of the claimant’s special education teacher and a

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⁴ The special education teacher on whose report the plaintiff relies with respect to the domain of attending to and completing tasks noted that the claimant’s ability to learn and use knowledge was “appropriate in class room situations.” Record at 128.

physician's report of a 20-minute medication management session. The results of the WIAT testing in June 2000 showed, *inter alia*, reading comprehension in the average range, basic reading skills in the below average range, mathematics skills in the below average range and writing skills in the below average range. *Id.* at 116-17. The special education teacher reported difficulty in completing out-of-class assignments, following school rules and emotional "dysregulation," along with appropriate ability to learn and use knowledge in a classroom setting and average communication skills and interaction with others. *Id.* at 128-30. The physician merely recorded the reports of the child and her mother that the child was suspended from school twice, for pushing and slapping another girl and for "mouthing off" to the vice-principal, and "was having difficulty with her school suspensions." *Id.* at 146.

The child testified that she "had problems with the teacher" in a math class and was taken out of it, that she did not finish an English class because she was transferred to a different school, that she has trouble reading words more than seven or eight letters long, that she has trouble spelling and cannot read a newspaper. *Id.* at 27-29. She also testified that she was "doing better this year" because her mother was at home rather than working. *Id.* at 33, 34. In response to a question from the administrative law judge, she clarified that she did not read the newspaper because she would give up after starting to read an article when she encountered a word that she could not sound out or pronounce. *Id.* at 36-37. Her mother agreed with her testimony about her reading difficulties, that the child "wouldn't make it" in school without special education and that the child has "real bad motivation." *Id.* at 42-45.

Contrary to counsel's contention, none of this evidence is necessarily inconsistent with the state agency psychologists' findings, *id.* at 188, 194, of a less than marked limitation in the domain of acquiring and using information, as that domain is described in 20 C.F.R. § 416.926a(g)(2)(v). In addition, as counsel for the commissioner pointed out at oral argument, other evidence in the record is clearly consistent

with these findings. *See, e.g., id.* at 124, 128. The administrative law judge was entitled to rely on the conclusions of the state-agency psychologists, who must be considered as experts in the evaluation of the psychological issues in disability claims, *see Reeves v. Barnhart*, 263 F.Supp.2d 154, 161 (D. Mass. 2003), under these circumstances.

With respect to the domain of attending to and completing tasks, the applicable regulation provides that an adolescent claimant should be able to maintain concentration while reading textbooks, independently plan and complete long-range academic projects, organize her materials and time to complete school tasks and assignments and not be unduly distracted or distracting in a school or work setting. 20 C.F.R. § 416.926a(h)(2)(v). The plaintiff relies on the testimony of the claimant and the report of her special education teacher that the claimant had difficulty completing out-of-class assignments and that her functioning is affected by moodiness, poor anger management and impulse control and inability to follow directions from authority. Itemized Statement at 6. The claimant testified that she could complete her homework if she did it before she left school. Record at 31. The administrative law judge noted that “the medical evidence demonstrates that she is able to concentrate” and that she “does her class work.” *Id.* at 16-17. The teacher’s report presents a closer question for this domain than was presented by the evidence cited by the plaintiff with respect to the domain of acquiring and using information, and the administrative law judge’s analysis is less than extensive. However, the two state-agency consultants, whose reports were dated after that of the special education teacher, found less than marked limitations in this domain as well. Record at 188, 194. Those reports constitute substantial evidence in support of the administrative law judge’s finding concerning the domain of attending to and completing tasks. Counsel for the plaintiff offered no basis for disregarding those reports beyond those discussed above, and for the reasons already discussed, the administrative law judge did not commit any error by relying on those reports.

The final domain discussed by the plaintiff, interacting with and relating to others, again received a rating of less than marked limitation from both state-agency reviewers. *Id.*⁵ The plaintiff relies on a pupil evaluation team report requiring the claimant to be accompanied by a special education teacher throughout the school day because she had “been having a difficult time with a peer,” *id.* at 132; suspension from school for pushing and slapping another girl and “mouthing off” to the vice-principal, *id.* at 146; and the claimant’s report of “a period of marked conflict” with her mother and her therapist’s opinion that anger dyscontrol continued to be a problem for the claimant, *id.* at 165. The administrative law judge found that “the evidence demonstrates that [the claimant] is capable of interacting with peers, and has adequate social interaction skills. The evidence also shows that she has normal communication . . . skills.” Record at 17 (citations deleted). The incidents of conflict with a single peer and with her mother and the vice-principal do not compel the conclusion that the claimant had marked limitations in the areas set forth in 20 C.F.R. § 416.926a(i)(2)(v): ability to initiate and develop friendships with others of similar age, express feelings and ask for assistance in getting needs met, seek information, describe events and tell stories in all kinds of environments and with all types of people, recognize that there are different social rules for adolescents and adults and begin to be able to solve conflicts between oneself and others. The administrative law judge was entitled to rely on the opinions of the state-agency consultants with respect to this domain as well. At oral argument, counsel for the plaintiff suggested that the state-agency reports must be discounted based on the observation of James F. Whelan, Jr., Psy.D., in his report of his post-hearing evaluation of the child, that “when the environment is not perfectly attuned to the individual, then the individual is not well able to function.” *Id.* at 204. However, Dr. Whelan also stated that “[s]ocial interaction appears to be adequate”

⁵ In particular, one reviewer noted in this portion of his evaluation report that the claimant’s pupil evaluation team (continued on next page)

for the child. *Id.* The child’s special education teacher, when given the opportunity to remark on the child’s ability to cooperate with others and follow rules noted only “difficulty following school rules.” *Id.* at 128. Her pupil evaluation team noted that she did a “[n]ice job interacting with peers.” *Id.* at 125. This is sufficient evidentiary support for the findings of the state-agency psychologists.

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 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 23rd day of November, 2004.

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

Plaintiff

DEBORAH J COLLINS, *On behalf of her minor FRF*

represented by **LESLIE S. SILVERSTEIN**
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reported that she “likes to help others [and] has positive peer-interactions.” Record at 188.

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V.

Defendant

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