

administrative law judge found, in relevant part, that the plaintiff suffered from asthma, depression, polysubstance abuse and obesity, 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 3-4, Record at 22; that she was a credible witness, Finding 5, *id.*; that she retained the residual functional capacity (“RFC”) to perform light, low-stress work not requiring more than occasional (i) decision-making, (ii) changes in the work setting, (iii) exposure to respiratory irritants or (iv) exposure to extremes in temperature, Finding 6, *id.*; that her past relevant work as a chambermaid did not require performance of work-related activities precluded by her RFC, Finding 7, *id.*; and that she therefore was not under a disability at any time through the date of decision, Finding 9, *id.*² The Appeals Council declined to review the decision, *id.* at 7-9, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 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. §§ 405(g), 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 in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the

² Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through the (*continued on next page*)

commissioner must make findings of the plaintiff's RFC and the physical and mental demands of past work and determine whether the plaintiff's RFC would permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service Rulings 1975-1982* ("SSR 82-62"), at 813.

However, the plaintiff's statement of errors implicates Step 3, at which stage a claimant bears the burden of proving that her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. §§ 404.1520(d), 416.920(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment, the claimant's medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the listing for that impairment. 20 C.F.R. §§ 404.1525(d), 404.1528, 416.925(d), 416.928. To equal a listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. §§ 404.1526(a), 416.926(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §§ 404.1526(b), 416.926(b).

The plaintiff complains that the administrative law judge erred in failing to find that her condition met Listing 12.04 (affective disorders) or Listing 12.06 (anxiety-related disorders). *See generally* Statement of Errors and Fact Sheet ("Statement of Errors") (Docket No. 7). I find no reversible error.

I. Discussion

A claimant meets Listing 12.04 or 12.06 if, *inter alia*, she meets the criteria of both subparts A and B of the listing. *See* Listings 12.04, 12.06. The plaintiff posits that she clearly met the criteria of subparts A and B of both of those listings. *See* Statement of Errors at [3]-[4]. In support of this argument, she

date of decision, *see* Finding 1, Record at 21, there was no need to undertake a separate SSD analysis.

primarily relies on (i) a report of Disability Determination Services (“DDS”) examining consultant Joseph Wojcik, Ph.D., dated July 11, 2002, (ii) her documented history of holding jobs only for a brief duration, and (iii) the finding of the administrative law judge that she was a credible witness, coupled with her testimony attributing her failure to hold jobs for more than six or eight weeks to anxiety and depression. *See id.* at [2]-[4].

She also cites “Exhibits 7 and 9” of the Record, *see id.* at [3], which are Psychiatric Review Technique Form (“PRTF”) assessments completed by non-examining DDS psychologists S. Hoch, Ph.D., and Lewis F. Lester, Ph.D., *see* Record at 257-70 (PRTF completed by Dr. Hoch on July 24, 2002), 283-97 (PRTF completed by Dr. Lester on January 17, 2003). Nonetheless, Drs. Hoch and Lester, both of whom had access to the Wojcik report, *see id.* at 269, 295, found that the plaintiff did not meet either the A or B criteria of Listing 12.04 or Listing 12.06, *compare id.* at 260, 262, 267, 286, 288, 293 *with* Listings 12.04, 12.06. In seeming recognition of this difficulty, the plaintiff ultimately argues:

If this Court finds that there exists evidence in the record which supports a finding that [she] did meet the above-referenced listings (without reference to the opinions by medical experts who just reviewed records), then this Court should remand this case for further proceedings and require the ALJ to have a medical expert present at the hearing to give his expert opinion on the extent to which the Plaintiff’s functioning is impaired.

Statement of Errors at [4].

Although Drs. Hoch and Lester “just reviewed records,” an administrative law judge generally may (indeed, as a layperson, must) rely on the assistance of such medical experts in assessing the impact of a claimant’s impairments on ability to function at work. *See, e.g., Roberts v. Barnhart*, 67 Fed. Appx. 621, 623 (1st Cir. 2003) (“An ALJ may determine RFC only if the evidence suggests a relatively mild impairment posing, to the layperson’s eye, no significant restrictions.”); *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”).

The findings of non-examining, non-testifying medical experts such as Drs. Hoch and Lester can constitute substantial evidence, particularly where, as here, those medical experts had access to the material evidence. *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). Drs. Hoch and Lester had access to the report of the examining physician, Dr. Wojcik, who noted, *inter alia*, the plaintiff’s self-report that:

[W]hen she has worked in the past and even at her last job, she finds that tension begins to build up and she cannot work for more than eight weeks. She said that she finds herself having difficulty dealing with people and becoming increasingly stressed out and spending more and more time in her room. She said that after she quits a job, it takes her about two months to come out of her room.

Record at 348.³ Therefore, I discern no reason why the Hoch and Lester PRTF evaluations cannot constitute substantial evidence that the plaintiff’s condition did not meet a listing.⁴

³ In her Statement of Errors, the plaintiff contended that she met subpart B of Listings 12.04 and 12.06 in that she suffered from marked difficulties in maintaining social functioning and repeated episodes of decompensation, each of extended duration. *See* Statement of Errors at [4]. As counsel for the commissioner posited at oral argument, even the plaintiff’s own testimony, taken at face value, does not establish that she met those criteria. Per relevant regulations, “[t]he term *repeated episodes of decompensation, each of extended duration* . . . means three episodes within 1 year, or an average of once every 4 months, each lasting for at least 2 weeks.” Listing 12.00(C)(4) (emphasis in original). Yet the plaintiff reported performing sixteen jobs in fifteen years, *see* Record at 42, averaging about one asserted “decompensation” per year. With respect to social functioning, relevant regulations provide: “You may demonstrate impaired social functioning by, for example, a history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, or social isolation. You may exhibit strength in social functioning by such things as your ability to initiate social contacts with others, communicate clearly with others, or interact and actively participate in group activities.” *Id.* § 12.00(C)(2). (continued on next page)

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner 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 13th day of December, 2004.

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

Plaintiff

TINA NOBERT

represented by **PAUL ARANSON**
PAUL ARANSON LAW OFFICE
1038 MAIN STREET
PO BOX 929
SANFORD, ME 04073
207-324-4198
Email: housolaw@aol.com

“We do not define ‘marked’ by a specific number of different behaviors in which social functioning is impaired, but by the nature and overall degree of interference with function. For example, if you are highly antagonistic, uncooperative, or hostile but are tolerated by local storekeepers, we may nevertheless find that you have a marked limitation in social functioning because that behavior is not acceptable in other social contexts.” *Id.* While the plaintiff testified that crowds of people cause her anxiety and she prefers to be alone, *see* Record at 30-31, she stated that she does go out shopping occasionally, speaks to people on the phone, can work in proximity to co-workers as long as there is not a crowd, and visits with relatives or friends for an hour a week, *see id.* at 31-33, 53-54, 155.

⁴ Apart from this, I note that the plaintiff testified at hearing that she could perform past relevant work as a chambermaid (which did not involve contact with the general public) on a full-time basis, and that she had left that particular job not for psychological reasons but because she moved to another town. *See* Record at 53-55.

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **KAREN BURZYCKI**
ASSISTANT REGIONAL COUNSEL
Room 625 J.F.K. FEDERAL
BUILDING
BOSTON, MA 02203
617/565-4277
Email: karen.burzycki@ssa.gov
ATTORNEY TO BE NOTICED