

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DONALD STEEVES,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 04-152-B-W

REPORT AND RECOMMENDED DECISION¹

The plaintiff in this Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal contends that the decision of the administrative law judge was not supported by substantial evidence. Statement of Specific Errors (“Statement”) (Docket No. 6) at 1. I recommend that the court affirm the commissioner’s decision.

After a hearing held on February 10, 2003 an administrative law judge issued a decision denying the plaintiff’s application for benefits. Record at 44, 51. The plaintiff requested review of this decision by the Appeals Council, *id.* at 81, and the Appeals Council remanded the case for further action, *id.* at 86-88, which was taken different administrative law judge. The remand order directed the second administrative

¹ This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). 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 March 11, 2005, 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 (*continued on next page*)

law judge to indicate what weight should be given to the report of Anthony Podraza, Ph.D.; to reconcile Dr. Podraza's opinion with a finding that the claimant's mental impairments were not severe; to expressly consider the factors set out in Social Security Ruling 96-7p in evaluating the claimant's credibility; to evaluate the claimant's mental impairments in accordance with 20 C.F.R. §§ 404.1520a(c) and 416.920a(c); and, if warranted, to obtain supplemental evidence from a vocational expert and to determine whether drug addiction and alcoholism were contributing factors material to any finding of disability. *Id.* at 87-88.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the second administrative law judge found, in relevant part, that the medical evidence established that the plaintiff suffered from dysthymic disorder, cannabis and alcohol abuse, a conversion disorder, and right shoulder and hand pain, impairments that were severe but did not, either alone or in combination, meet or equal the criteria of any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), Findings 3-4, Record at 31; that the plaintiff's assertions concerning his impairments and their impact on his ability to work were not fully credible, Finding 5, *id.*; that he retained the residual functional capacity to perform light work, as he was capable of lifting and carrying ten pounds frequently and twenty pounds occasionally, unable to perform frequent overhead reaching or constant handling with the right upper extremity, capable of handling low stress work requiring only occasional decision making and only occasional changes in work setting, able to interact occasionally with the general public, coworkers and supervisors, and able to use judgment on the job, Finding 6, *id.*; that the plaintiff was unable to perform his

page references to the administrative record.

past relevant work, Finding 7, *id.*; that given his age (39), education (high school), lack of transferable skills and residual functional capacity, use of Rule 202.20 in Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the “Grid”) as a framework for decision making resulted in a finding that the plaintiff was capable of making a successful vocational adjustment to work that existed in significant numbers in the national economy, Findings 8-12, *id.* at 31-32; and that he had not been disabled, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 13, *id.* at 32. The Appeals Council declined to review this decision, *id.* at 8-10, making it the final decision 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 made 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 5 of the sequential review process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner’s findings regarding the plaintiff’s residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff contends that the evidence supports a conclusion that his mental impairments met the listing for a somatoform disorder. Statement at 4-5. The Listings are considered at Step 3 of the sequential evaluation process, at which stage a claimant bears the burden of proving that his impairment or combination of impairments meets or equals a listing. 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, 415.925(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).

A claimant meets Listing 12.07 if, *inter alia*, he meets the criteria of both subparts A and B of the listing. The plaintiff relies on the reports of Dr. Podraza, John F. Adams, Jr., M.D., and Charles W. Sullivan, D.O. as evidence that he met the requirements of part A of the listing, and his own testimony and these reports as evidence that he met the requirements of part B. Statement at 4-5.

The administrative law judge's only explicit reference to the Listings is a statement that "the medical evidence of record, considered in conjunction with the testimony at hearing, supports a finding that the claimant does not have an impairment which meets or equals the criteria of any of the listed impairments." Record at 27. However, he also discussed the evidence of a psychiatric disorder at some length. *Id.* at 25-27. He specifically stated that he found the report of Diane Tennes, Ph.D, to be "well supported and consistent with the record as a whole," *id.* at 26, and noted that Dr. Podraza stated that his clinical interview and test results "suggested that the claimant was presenting an exaggerated picture of his present situation

and problems due to possible lack of cooperation with the testing, confusion, or malingering by an attempt to present a false claim of mental illness,” *id.* None of the reports cited by the plaintiff uses the term “somatoform” disorder, and none states a conclusion that the plaintiff meets Listing 12.07 or any other listing. Dr. Adams, an orthopedic surgeon, merely states that “I think this is not a true physical problem. I don’t know how it started, but it certainly has become habitual at this point in time, probably a psychosomatic situation.” Record at 235. Dr. Sullivan refers to “a rather puzzling impairment of his ability to walk due to losing function and what appears to be sudden weakness in the extensors of the left knee” which “appears to be a phenomena [sic] of as yet unexplained origin.” *Id.* at 206. Dr. Podraza, a neuropsychologist, stated: “Although there is a possibility that he may be malingering, I am inclined to believe that he may meet criteria for conversion disorder with motor symptom or deficit.” *Id.* at 289.

The first psychiatric review technique form (“PRTF”) completed by a state-agency reviewer had the benefit of Dr. Sullivan’s report. *Compare id.* at 221 *with id.* at 205. This reviewer, a psychologist, found only a non-severe mental impairment other than a meeting of the Listing for substance addiction disorders. *Id.* at 221. The second PRTF had the benefit of the reports of Dr. Sullivan and Dr. Adams. *Compare id.* at 261 *with id.* at 205 & 235. This psychologist-reviewer reached the same conclusions as the first. *Id.* at 261. The administrative law judge accordingly would have been entitled to rely on these reports as evidence that a somatoform disorder, one of the options specifically listed on the PRTF, did not exist at the listing level. The findings of non-examining, non-testifying experts such as these psychologists can constitute substantial evidence, particularly where 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). I therefore will consider only Dr. Podraza’s report, which is dated approximately six months after the later of the two state-agency PRTFs. *Compare* Record at 261 *with id.* at 284.

There is no listing for “conversion disorder,” Dr. Podraza’s tentative diagnosis. *Id.* at 289. Courts have treated conversion disorder as equivalent to or a type of somatoform disorder, *e.g.*, *Easter v. Bowen*, 867 F.2d 1128, 1129 (8th Cir. 1989); *Matos v. Barnhart*, 2004 WL 1846136 (D. Kan. June 3, 2004), at *5; *Carraher v. Sullivan*, 796 F. Supp. 1207, 1212 (S.D. Iowa 1992), and as something different, *e.g.*, *Whitney v. Secretary of Health & Human Servs.*, 993 F.2d 1548 (table) (6th Cir. 1993), 1993 WL 150005 at ** 1; *Parsons v. Heckler*, 739 F.2d 1334, 1337 & nn.8, 10 (8th Cir. 1984); *Carter v. Chater*, 1996 WL 189326 (N.D. Ill. Apr. 15, 1996), at *4 n.7. Assuming *arguendo* that the two are the same, the medical evidence cited by the plaintiff does not meet the criteria of part B of Listing 12.07, which provides:

- [Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms] [r]esulting in at least two of the following:
1. Marked restriction of activities of daily living; or
 2. Marked difficulties in maintaining social functioning; or
 3. Marked difficulties in maintaining concentration, persistence, or pace; or
 4. Repeated episodes of decompensation, each of extended duration.

Appendix 1, Subpart P, 20 C.F.R. Part 404, § 12.07 (B).

The plaintiff contends that the evidence establishes subsections 1 and 2 of part B, “as demonstrated by the claimant’s testimony . . . and, again, by the reports of Dr. Podraza, supplemented with the reports of Dr. Adams and Dr. Sullivan.” Statement at 5. First, the part B criteria must be established by medical evidence, a term which excludes the plaintiff’s own testimony. Dr. Podraza’s report repeats the plaintiff’s

own statements that might be characterized as demonstrating restriction in the activities of daily living, although not necessarily to the degree regarded in the Social Security arena as “marked,” Record at 284-85, but there are no findings resulting from testing that support these claims. Test findings in the area of “neurocognitive profile” are generally described as “mild,” *id.* at 287-88; findings in the area of personality demonstrate some difficulty in maintaining social functioning, *id.* at 288-89, but, again, not necessarily in the marked range. In the context of Social Security, the degree of limitation imposed by mental impairments in the first three of the four areas listed in part B of Listing 12.07 is evaluated on a five-point scale: none, mild, moderate, marked, and extreme. 20 C.F.R. §§ 404.1520a(c)(4), 416.920a(c)(4). The report of Diane Tennes, Ph.D., on which the administrative law judge explicitly relied, Record at 26, records the plaintiff’s reports of significant difficulty in activities of daily living and social functioning, *id.* at 210, but Dr. Tennes characterizes these as “moderate” and “mild,” respectively, *id.* at 211. The administrative law judge was entitled to rely on the opinion of Dr. Tennes.

Dr. Sullivan’s report cannot reasonably be read to provide medical evidence of either subsections 1 or 2. *Id.* at 206-07. The same is true of Dr. Adams’s report. *Id.* at 235-36.²

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

² When asked at oral argument to identify the specific evidence in the reports of Drs. Sullivan, Adams and Podraza supporting a finding of marked restriction of activities of daily living or marked difficulties in social functioning, counsel for the plaintiff acknowledged that neither Dr. Sullivan nor Dr. Adams spoke to these two domains and cited Dr. Podraza’s report only with respect to social functioning.

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 14th day of March, 2005.

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

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