

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

SANDRA REILLY, on behalf of M.R.C.,)

Plaintiff)

v.)

Docket No. 04-142-P-H

JO ANNE B. BARNHART,)

Commissioner of Social Security,)

Defendant)

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, opposition defiant disorder and post traumatic stress disorder, 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. She also contends that remand is required because the Appeals Council failed to consider

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 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 page references to the administrative record.

additional evidence that was submitted with her appeal to that body. I recommend that the court affirm the commissioner's decision.

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 ten years old at the time of the decision, had ADHD, opposition defiant disorder, depression and post traumatic stress disorder, impairments that were severe but which did not meet or equal the criteria of any impairment included in the Listings, Findings 1-2 & 4-5, Record at 21; that none of the impairments was functionally equivalent to any included in the Listings, Finding 5, *id.*; and that she accordingly had not been under a disability at any time through the date of the decision, Finding 6, *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).

Discussion

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 Errors (“Itemized Statement”) (Docket No. 7) at 2-7. She asserts that the claimant has marked limitations in two of the six domains: attending and completing tasks, as found by the administrative law judge, Record at 20, and interacting with and relating to others, where the administrative law judge found her limitations to be less than marked, *id.* Marked limitation in two domains is required for functional equivalence of a listing. 20 C.F.R. § 416.926a(a).

The plaintiff's argument relies on 20 C.F.R. § 416.926a(e)(2), Itemized Statement at 3, which generally defines "marked" limitations as occurring when

your impairment(s) interferes seriously with your ability to independently initiate, sustain, or complete activities. . . . "Marked" limitation also means a limitation that is "more than moderate" but "less than extreme." It is the equivalent of the functioning we would expect to find on standardized testing with scores that are at least two, but less than three, standard deviations below the mean.

20 C.F.R. § 416.926a(e)(2). Of course, standardized testing is not available for evaluating interacting with and relating to others. More helpful for the purposes of this appeal are the definitions and examples set forth at 20 C.F.R. § 416.926a(i), which are specific to the domain of interacting and relating with others.

In this domain, we consider how well you initiate and sustain emotional connections with others, develop and use the language of your community, cooperate with others, comply with rules, respond to criticism, and respect and take care of the possessions of others.

20 C.F.R. § 416.926a(i). Further details are provided for children in the claimant's age group (6-12).

When you enter school, you should be able to develop more lasting friendships with children who are your age. You should begin to understand how to work in groups to create projects and solve problems. You should have an increasing ability to understand another's point of view and to tolerate differences. You should be well able to talk to people of all ages, to share ideas, tell stories, and to speak in a manner that both familiar and unfamiliar listeners readily understand.

20 C.F.R. § 416.926a(i)(2)(iv).

The administrative law judge in this case noted that the claimant's "social interaction may be moderately deficient," Record at 18, but that "she is able to independently initiate, sustain, and complete most activities," that "[s]he is generally able to control her aggressive behavior," and that "[s]he does have friends at school and is able to relate with her classmates, as noted in the school records, even to the extent that she went camping with them last summer," *id.* at 20. The plaintiff contends that this rationale is insufficient and suggests that the body of evidence is opposed to this view. Itemized Statement at 4. She

cites entries in the records concerning problems the claimant had in various social activities, and the fact that her teacher in 2002 implemented a behavior plan. *Id.* at 4-5. She also cites a psychological assessment performed in 1999, when the claimant was six years old. *Id.* at 5. All but one of the pages of the record cited by the plaintiff in this section of her itemized statement are dated before two state-agency psychologists reviewed the claimant's records and found that her limitations in the domain of interacting and relating with others was less than marked. Record at 283, 317. One of the reviewers stated that the claimant "works well in a small group; self control better with medication," *id.* at 283; the other stated "minor social scrapes, generally OK," *id.* at 317. The one cited record that postdates these evaluations is found at page 334 of the record, Itemized Statement at 6; the licensed clinical social worker who was providing therapy to the claimant recorded the following:

[The claimant] reported upon being questioned that she had a fight at school. She described the circumstances that indicated she acted impulsively after provocation by the other child. She described the feelings and admitted that her anger had made her loose [sic] control.

Record at 334 (5/8/03). A single instance of fighting when provoked cannot overcome the conclusions of two psychologists who reviewed multiple school and medical records.

In addition, the record indicates general improvement in the claimant's social behavior in the period of time closest to the hearing. The plaintiff testified that the claimant had friends in the special education room. *Id.* at 38. The claimant's fourth-grade teacher noted, presumably in June 2003,² that the claimant "continues to improve her work and social habits" and "ended her school year on a positive, strong academic and social note." *Id.* at 347. The same counselor whose May 8, 2003 note is quoted by the plaintiff filled out an "Individual Treatment Plan Review" dated October 23, 2003 that rated the claimant's

symptoms with respect to “losing her temper, arguing, swearing, irritating others, being easily annoyed by others, refusing to follow directions, difficulty paying attention/concentrating or listening, and acting impulsively without thinking” as “4 now on a 1-10 [scale], needs to be a 2.” *Id.* at 343. On November 13, 2003 he noted that the claimant “sounded more confident about her friendships,” *id.* at 341, and on December 3, 2003 the claimant reported that “she was doing well and that there were no significant incidents to report,” *id.* at 342. This does not suggest a limitation on the ability to interact and relate with others that is more than moderate. When this counselor was asked to report on the claimant’s mental impairment in November 2003, he stated, with respect to her social function, “Read Notes.” *Id.* at 313-14.

The state-agency reports provide sufficient support for the administrative law judge’s conclusion with respect to the domain of interacting and relating with others, and the record itself provides support for that conclusion. The plaintiff also contends that remand is required because the Appeals Council apparently did not review two documents submitted to the Appeals Council by her lawyer with a letter dated April 8, 2004. Itemized Statement at 7-8. The Appeals Council makes no reference to these documents, Record at 4, and they did not appear with the letter in the administrative record, *id.* at 359-61. Counsel for the plaintiff did not submit the documents with her itemized statement, although she did quote from them, Itemized Statement at 8. The documents have been added to the record by means of an order granting a joint motion to supplement the record. Docket Nos. 12-13.

The plaintiff asserts that the failure of the Appeals Council to consider these documents, standing alone, requires remand. She also states, without citation to authority, that “[i]f it is required that [the claimant] have an adult that will hold her accountable for her behavior, this tends to indicate a marked

² The plaintiff testified on December 16, 2003 that the claimant was in fifth grade. Record at 28, 30.

limitation in interacting and relating with others.” Itemized Statement at 8. The two documents are a one-page letter dated April 7, 2004 and an 18-page document from the Portland Public Schools dated March 15, 2004. Exh. 1 to Motion to Supplement Record (Docket No. 12). Newly-submitted evidence will be considered by the Appeals Council only when “it relates to the period on or before the date of the administrative law judge’s hearing decision.” 20 C.F.R. § 416.1470(b). The administrative law judge’s decision in this case is dated January 21, 2004. Record at 13. The letter dated April 7, 2004 begins with a statement that the claimant “has been a client” of the agency identified on the letterhead “since February 6, 2004.” This letter clearly cannot convey information related to the period on or before January 21, 2004. The fact that the Appeals Council apparently did not consider it accordingly cannot constitute reversible error.

The 18-page document is itself dated March 15, 2004. The plaintiff’s itemized statement quotes from page 17³ of this document, where the claimant’s special education teacher writes:

Overall, [the claimant] has made some wonderful gains this year. She is certainly a pleasure to work with. As she enters middle school next year, it is important that [she] have an adult at school that she considers her contact person. She does best when she has someone that she knows she can trust and has had the opportunity to build a relationship with. She does best when she knows she has someone who will hold her accountable for her work and behavior.

The same document also reports, at page 01, under the heading “summary of discussion” that the claimant “is polite, talkative and seems to have established relationships with friends.” To the extent that this document may reasonably be construed to relate to the period before January 21, 2004, the quoted statement does not compel a conclusion that the claimant’s limitations in interacting and relating with others

³ Page references are to printed numbers appearing in the upper right hand corner of the page.

was marked rather than moderate.⁴ Most fifth-graders would presumably do best when they know that an adult will hold them accountable for their work and behavior. Remand for consideration of new evidence is only appropriate where that evidence is material. 42 U.S.C. § 405(g). Evidence is material only if, were it considered, the commissioner's decision might reasonably have been different. *Evangelista*, 826 F.2d at 140. The additional records, as presented by the plaintiff, do not meet this standard.

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 14th day of March, 2005.

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

⁴ Contrary to the plaintiff's assertion, Itemized Statement at 7, the fact that these two documents did not exist at the time of the hearing is not sufficient, standing alone, to establish the good cause required by 42 U.S.C. § 405(g) before a court may order the commissioner to consider new and material evidence. *See, e.g., Evangelista v. Secretary of Health & Human Servs.*, 826 F.2d 136, 141 (1st Cir. 1987); *Lisa v. Secretary of Dep't of Health & Human Servs.*, 940 F.2d 40, 45 (2d Cir. 1991).

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