

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ROSE HASKELL,)	
)	
PLAINTIFF)	
)	
v.)	CIVIL No. 01-24-P-H
)	
LARRY G. MASSANARI, ACTING)	
COMMISSIONER OF SOCIAL SECURITY,)	
)	
DEFENDANT)	

ORDER AFFIRMING RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge filed with the court on August 13, 2001, with copies to the parties, his Report and Recommended Decision. The defendant filed its objection to the Magistrate Judge’s Recommended Decision on August 29, 2001. I have reviewed and considered the Recommended Decision, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Recommended Decision; and I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision with the following modification, and determine that no further proceedings are necessary.

As Magistrate Judge Cohen recognized in Field v. Chater, 920 F. Supp. 240, 243 (D. Me. 1995), the First Circuit “has not expressed itself on the question of when the court should exercise its authority to remand for an award of benefits, rather than for further factfinding, if the Commissioner has failed to meet her

burden at Step 5.” That question may now be before the First Circuit in two pending cases. Freeman v. Apfel, No. 00-120-B (D. Me. Dec. 4, 2000), appeal docketed, No. 01-1293 (1st Cir. Feb. 27, 2001); Seavey v. Apfel, No. 00-23-B (D. Me. Oct. 6, 2000), appeal docketed, No. 01-1202 (1st Cir. Feb. 7, 2001). In the meantime, I conclude that remand is the appropriate remedy here. The Commissioner’s error was the Administrative Law Judge’s reliance on opinions by nonexamining, nontestifying physicians in the face of a later discogram, the results of which were presented at the hearing. No medical testimony evaluated the significance of the new finding for residual functional capacity or its impact on the earlier medical opinions. This is not a case, therefore, where the record otherwise demonstrates or at least suggests that the plaintiff is disabled under the statutory standards, see, e.g., Allen v. Bowen, 881 F.2d 37 (3d Cir. 1989) (once the residual functional capacity is corrected and the vocational expert testimony is appropriately set aside, the Grid yields a conclusion of disabled); Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993) (when plaintiff is person of “advanced age,” regulations recognize that “age significantly affects a person’s ability to do substantial gainful activity,” and Commissioner has even a “higher burden” to prove person’s ability to perform work), or where the Commissioner has been dilatory or the plaintiff has been proceeding through the system for years. See, e.g., Curry v. Apfel, 209 F.3d 117 (2d Cir. 2000) (case had been pending more than six years and a remand could result in substantial additional delay).

It is therefore **ORDERED** that the Recommended Decision of the Magistrate Judge is hereby **ADOPTED**. The Commissioner's decision is **VACATED** and the cause **REMANDED** for further proceedings consistent with this opinion.

SO ORDERED.

DATED: SEPTEMBER 24, 2001.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 01-CV-24

ROSE HASKELL
plaintiff

FRANCIS JACKSON, ESQ.
JACKSON & MACNICHOL
P.O. BOX 17713
PORTLAND, ME 04112-8713
(207) 772-9000

v.

SOCIAL SECURITY ADMINISTRATION
COMMISSIONER
defendant

JAMES M. MOORE, ESQ.
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
(207) 945-0344

WAYNE G. LEWIS, ESQ.
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
(617) 565-4277