

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MICHELLE L. McLAUGHLIN,)
)
 Plaintiff)
)
 v.)
)
 MICHAEL J. ASTRUE,)
 Commissioner of Social Security,)
)
 Defendant)

No. 1:10-cv-263-JAW

REPORT AND RECOMMENDED DECISION¹

The plaintiff in this Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal contends that the administrative law judge erred in finding that her anxiety was not a severe impairment and gave insufficient weight to the opinions of her treating medical professionals. I recommend that the court affirm the commissioner’s decision.

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 administrative law judge found, in relevant part, that the plaintiff suffered from a major depressive disorder and fibromyalgia, impairments that were severe but which, considered separately or in combination, did not meet or equal the criteria of any impairment listed in Appendix 1 to 20 C.F.R. Part 404, Subpart P (the “Listings”), Findings 3-6, Record at 38; that

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 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 September 12, 2012, 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.

she retained the residual functional capacity (“RFC”) to lift and carry up to 20 pounds occasionally and 10 pounds frequently, sit with normal breaks for about six hours in an eight-hour workday, stand and walk with normal breaks for about six hours in an eight-hour workday, push and pull with her upper extremities frequently, occasionally climb ramps, stairs, ropes, ladders, and scaffolds, balance frequently, occasionally stoop, crouch, kneel, and crawl, frequently reach vertically and horizontally, use her upper extremities frequently for fine and gross manipulation, sustain work-related concentration, persistence, and pace continuously for at least two to three hour increments over an eight-hour workday for 40 hours a week, understand and carry out complicated instructions, perform complex tasks, and occasionally interact with the public, Finding 7, *id.* at 38-39; that her allegations of functional limitations in excess of these findings were not fully credible, Finding 8, *id.* at 39; that she could return to her past relevant work as a medical transcriptionist, a sedentary, skilled job, Finding 9, *id.*; and that, as a result, she had not been disabled, as that term is defined in the Social Security Act, at any time through the date of the decision, November 20, 2007, Finding 10, *id.* The Appeals Council declined to review the decision, *id.* at 1-3, 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 reached Step 4 of the sequential evaluation process, at which stage the claimant bears the burden of proving inability to return to past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step, the 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(f), 416.920(f); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service Rulings 1975-1982* ("SSR 82-62"), at 813.

The plaintiff's statement of errors also implicates Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at Step 2, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or [a] combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* (quoting Social Security Ruling 85-28).

I. Discussion

A. Step 2 Issue

The plaintiff contends that the administrative law judge should have found that her anxiety was a severe impairment at Step 2 of the evaluative process. Plaintiff's Itemized Statement of Errors ("Itemized Statement") (ECF No. 41) at 3-6. She lists a number of entries in the record that she believes support her position, *id.*, but, of course, the test that must be applied in this case is not whether evidence in the record would support a conclusion other than

that drawn by the administrative law judge, but rather whether the administrative law judge's conclusion is supported by substantial evidence in the record. In addition, "an error at Step 2 is uniformly considered harmless, and thus not to require remand, unless the plaintiff can demonstrate how the error would necessarily change the outcome of the plaintiff's claim." *Bolduc v. Astrue*, Civil No. 09-220-B-W, 2010 WL 276280, at *4 n.3 (D. Me. Jan. 19, 2010).

The administrative law judge reviewed the plaintiff's alleged mental impairments, including anxiety, in 13 single-spaced pages of text. Record at 14-26. After an extensive review of the records of the plaintiff's treatment for mental impairments, the administrative law judge reached the following conclusions about her alleged anxiety:

While the claimant does suffer from a major depressive disorder, no anxiety disorder has been established by the requisite objective medical evidence. The claimant was reportedly moderately to severely anxious in February, 2004 (Exhibit 5F), but she was also reportedly relaxed. In May, 2004 (Exhibit 5F) she was also reportedly anxious, but likewise relaxed (Exhibit 5F). In June, 2004 (Exhibits 5F, 2F and 1F) no anxiety was reported (Exhibits 2F and 5F), but she was again reportedly "relaxed", not hypervigilant and "not tense" (Exhibit 5F). In July, 2004 she was reportedly anxious, but once again was apparently also relaxed (Exhibit 5F). In August, 2004 she was reportedly relaxed and "not tense" (Exhibit 5F). In spite of her complaints, there is no significant objective evidence in the record that she suffered from any anxiety between July, 2004 and October, 2005. In October, 2005 she was reportedly highly anxious (Exhibit 10F), and in November, 2005 she was reportedly anxious (Exhibit 11F). No objective reports of anxiety appear in the record in 2007 until September, 2007. Although various practitioners have described the claimant as suffering from anxiety disorders, the objective medical evidence fails to establish that she has suffered from sustained anxiety, versus acute episodes of anxiety. The diagnoses appear to have been based in large measure upon her subjective complaints.

* * *

Even if it could be said that the claimant has intermittently suffered from an anxiety disorder, the existence of which has been demonstrated by the requisite objective medical evidence, such evidence fails to establish that she suffered from any anxiety disorder meeting the continuity or durational criteria [of 20 C.F.R. §§ 404.1509, 404.1521, and 404.1520a].

Id. at 20-22 (footnote omitted).

The plaintiff's proffered diagnoses, which she characterizes as "not a complete list," but are all that she identifies in support of her position, are not uniformly supportive of her argument. All of the proffered diagnoses are listed on page 4 of the plaintiff's itemized statement.

- "Treating provider June Topacio, MD" at page 319 of the record: This is a chart progress note made by Heather O'Keefe, whose medical title or credentials are not stated. Under the heading "Assessment & Plan," generalized anxiety disorder is listed on Axis I, along with major depressive affective disorder. Record at 319. On the following page, under the heading "Assessment and Chosen Plan of Action," O'Keefe records that the plaintiff "continues to identify high levels of depression, anhedonia,² pain and anxiety however a complete exploration of issues and symptoms has been deferred at this time[.]" *Id.* at 320. Later on the same page, O'Keefe notes "[t]he patient[']s psychiatric condition and presentation today required a complete past psychiatric, medical and social history, a review of systems and comprehensive mental status exam. . . . The patient requires continual consideration of the accuracy of the diagnosis and the benefits and risks of ongoing treatment." *Id.* at 320. Dr. Topacio co-signed this record one day after it was created. *Id.* at 321.
- "DDS psychologist Scott Hoch, PhD, who diagnosed anxiety N[ot] O[therwise] S[pecified]" at page 235 of the record: Dr. Hoch did identify the presence of "anxiety NOS" when he filled out a Psychiatric Review Technique Form

² "Absence of pleasure from the performance of acts that would ordinarily be pleasurable." *Stedman's Medical Dictionary* (27th ed. 2000) at 88.

(“PRTF”) after reviewing the plaintiff’s medical records. *Id.* at 235. He also found “Depression, chronic.” *Id.* at 233.

- “DDS psychologist Peter Allen, PhD, who diagnosed anxiety with episodic panic on May 6, 2005” at page 300 of the record: Dr. Allen also completed a PRTF, on which he found “anx[iety with] episodic panic.” *Id.* at 300. He also found a “mood [disorder rule out] dysthymia.”³ *Id.* at 298.
- “Consultative examiner Kenneth Kindya, PhD., who diagnosed panic disorder with agoraphobia on June 4, 2004” at page 216 of the record: Dr. Kindya did make this diagnosis, but he also wrote the following: “In terms of understanding, the patient appeared to understand well. I saw no problem in this area. . . . Sustained concentration appeared adequate. Her persistence was adequate. Her social interaction appears to be limited by agoraphobic avoidance. Her adaptation appears to be limited as well by a combination of panic and depression.” *Id.* at 216.
- “Consultative examiner David Axelman, MD, who . . . wrote in June 2004 that “[t]he main problem is psychological in nature with depression, panic attacks, and agoraphobia becoming fairly severe especially after the death of her mother”” at page 220 of the record: Dr. Axelman examined the plaintiff medically, not mentally, as the plaintiff notes, Itemized Statement at 4; thus, this “assessment” is of limited value and cannot reasonably be considered a diagnosis.

³ “A chronic mood disorder manifested as depression for most of the day, more days than not, accompanied by some of the following symptoms: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration, difficulty making decisions, and feelings of hopelessness[.]” *Stedman’s Medical Dictionary* (27th ed. 2000) at 556.

- Treating counselor Amy Grenier, LCPC, who confirmed the previous diagnosis of generalized anxiety disorder on October 26, 2005,” at page 356 of the record: Grenier does record this diagnosis at the end of a document entitled “Initial Assessment,” but she does not discuss the limitations that she finds to be caused by this diagnosis or the severity of its symptoms, which is the only information from such an “unacceptable medical source” that the commissioner may consider. 20 C.F.R. §§ 404.1513(a), 416.913(a).

Even if the administrative law judge erred in failing to adopt Dr. Topacio’s approval of O’Keefe’s diagnosis, the plaintiff is not entitled to remand unless and until she shows how a finding that her anxiety constituted a severe impairment would necessarily have changed the outcome of her application for benefits.⁴ In addition, the reports of the state-agency psychologists, which are the only record documents cited by the plaintiff that include an evaluation of the effect of identified impairments on work-related activities, do not differentiate between depression and anxiety as the source of those limitations. The plaintiff has not challenged the limitations resulting from depression that were included in her RFC by the administrative law judge. There appears to be no basis in the medical evidence for a challenge to those limitations based on anxiety alone.

It is also significant that the plaintiff cites no evidence of anxiety after October 26, 2005, although the hearing before the administrative law judge was held on October 10, 2007. Record at 9. This gap strongly suggests that the administrative law judge did not err in his conclusion that the evidence of the plaintiff’s anxiety did not meet the “continuity or durational criteria” of

⁴ When asked about this at oral argument, the plaintiff’s attorney replied that, if her anxiety were found to be severe, the RFC assigned to the plaintiff would have to include a limitation on interaction with coworkers and supervisors. However, the vocational expert testified that three jobs would be available to the plaintiff with such a limitation: data clerk, shipping checker, and telephone customer service. Record at 76-77. Accordingly, any such error would be harmless.

20 C.F.R. § 404.1509. Record at 22. In this regard, it is important to note that the vocational expert, who testified in response to a hypothetical question based on the RFC that the administrative law judge ultimately adopted that the plaintiff could return to her past relevant work as a medical transcriptionist, *id.* at 76, also testified that, if the hypothetical question limited the claimant to simple work, there would also be jobs available to her in significant numbers in the national economy. *Id.* at 75-77.⁵

On the showing made, the plaintiff is not entitled to remand on the basis of an error at Step 2.⁶

B. Weight Given Treating Sources

The plaintiff also argues that she is entitled to remand because the administrative law judge did not give sufficient weight to the opinions of Tammy Pellegrino, OTR; Amy Grenier, LCPC; Dr. Catherine Mauss; and Kenneth Kindya, Ph.D. Itemized Statement at 7-9.

I first note that Dr. Kindya performed a one-time consultative psychological assessment, Record at 214, and cannot accurately be characterized as a “treating source.” I also conclude that

⁵ At oral argument, the plaintiff’s attorney asserted that another reversible error at Step 2 resulted from the fact that the limitation on concentration assigned to the plaintiff in the administrative law judge’s RFC was “unclear” as to “what happens after two to three hours.” Counsel acknowledged that this issue was not raised in the plaintiff’s itemized statement, so I will consider it waived. *Farrin v. Barnhart*, No. 05-144-P-H, 2006 WL 549376 (D. Me. Mar. 6, 2006), at *5. I doubt that the argument would succeed if it had been properly raised. *See Shorey v. Astrue*, No. 1:11-cv-414-JAW, 2012 WL 3475790 (D. Me. July 13, 2012), at *2-*4.

⁶ The plaintiff also assigns fatal error, Itemized Statement at 5-6, to footnote 11 in the administrative law judge’s opinion, in which he rejects the level of limitations found by the state-agency psychologists because “[t]hese conclusions appear to have been largely based upon an erroneous belief that the claimant’s medical records objectively established the presence of an anxiety disorder.” Record at 26-27, n.11. The plaintiff contends that the administrative law judge may not rely on such an evaluation, because he “is not qualified to determine the significance of any particular medical findings reported as part of a medical examination.” Itemized Statement at 5. The state-agency PRTFs did not result from a “medical examination,” but, in any event, the plaintiff’s premise is incorrect. A lay person may review a medical record and conclude that a particular conclusion is based only upon the patient’s subjective reports. Indeed, this court does so frequently in Social Security cases. *See, e.g., Cyr v. Astrue*, No. 1:11-cv-433-GZS, 2012 WL 3095437, at *3 (D. Me. July 10, 2012).

the RFC adopted by the administrative law judge was largely consistent with Dr. Kindya's findings.⁷

The plaintiff acknowledges that Pellegrino is not an acceptable medical source under Social Security regulations, but nonetheless argues that her opinion "is the most important" because it was based on activities that the plaintiff performed in her presence. Itemized Statement at 7. Thus, she asserts, Social Security Ruling 06-03p required the administrative law judge to give her RFC "significant weight." *Id.* This argument would read the difference between acceptable and unacceptable medical sources out of Social Security regulations. The plaintiff's failure to provide a pinpoint citation to the Ruling makes it difficult to evaluate her argument, but the Ruling merely restates the rule that information from unacceptable medical sources "cannot establish the existence of a medically determinable impairment" but "may provide insight into the severity of the impairment(s) and how it affects the individual's ability to function." Social Security Ruling 06-03p, reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2011-12) at 329. Consideration of evidence provided by unacceptable medical sources is required, but the weight to be given such opinions "will vary according to the particular facts of the case, the source of the opinion, including that source's qualifications, the issue(s) that the opinion is about, and many other factors" that are listed in the Ruling. *Id.* at 331. The plaintiff does not discuss how any of these factors apply to Pellegrino's opinions in this case.

The administrative law judge discussed Pellegrino's report in his opinion. Record at 33 & n. 14. In the absence of any information about such factors as the length of time, if any, over

⁷ With respect to the two specific findings from Dr. Kindya's report selected by the plaintiff, Itemized Statement at 8, the RFC limiting the plaintiff to occasional contact with the public addresses Dr. Kindya's first finding, "social interaction . . . limited by agoraphobic avoidance," and there would be little need for adaptation if the plaintiff were to return to her past relevant work.

which Pellegrino provided treatment to the plaintiff, the frequency of such treatment, Pellegrino's professional qualifications, and any explanation of how Pellegrino translated her observations into the specific work-related limitations that she assigned to the plaintiff, the administrative law judge's treatment of Pellegrino's report does not constitute reversible error.

The administrative law judge considered Dr. Mauss to be a treating physician. *Id.* at 32. The plaintiff relies on Dr. Mauss's conclusion that "her pain and other symptoms would be severe enough to constantly interfere with her attention and concentration." Itemized Statement at 8. The administrative law judge rejected the specific limitations listed by Dr. Mauss because her opinion "was based upon only two or three office visits between August, 2006 and June, 2007[,]” and the limitations were not consistent with the recorded findings on physical examination and the plaintiff's activities of daily living. Record at 32-33. This is an adequate statement of the reasons for rejecting Dr. Mauss's conclusions. The plaintiff's itemized statement offers no reason why it is not adequate, other than Dr. Mauss's status as a treating physician. That alone is not enough.

I have already noted that Grenier is not an acceptable medical source. The plaintiff again offers no specifics about the manner in which the administrative law judge's treatment of Grenier's opinions about the plaintiff's mental limitations, *id.* at 22-24, is fatally deficient. I note also that Grenier's stated limitations are largely inconsistent with those of Dr. Kindya, most of which the administrative law judge adopted.

The plaintiff is not entitled to remand on the basis of her second presented issue.

II. 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, within fourteen (14) days after being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) 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 27th day of September, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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