

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

COREY MOORE,

Plaintiff,

v.

MICHAEL J. ASTRUE,

Defendant

)
)
)
)
)
)
)
)
)
)
)

No. 2:09-cv-297-GZS

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises a single issue: whether the administrative law judge erred in finding that the plaintiff had no severe impairments. I recommend that the court vacate 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 met the insured status requirements of the Social Security Act only through June 30, 2010, Finding 1, Record at 16; that he suffered from attention deficit hyperactivity disorder (“ADHD”), by history, but that impairment had not significantly limited his ability to perform basic work-related activities for 12 consecutive months and, therefore, was not severe, Findings 4-5, *id.* at 18; and that he had,

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 16.2(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 December 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.

therefore, not been under a disability as that term is defined in the Social Security Act from the alleged date of onset of disability, October 14, 2004, through the date of the decision, October 26, 2010. Finding 6, *id.* at 21. The Appeals Council declined to review the decision, *id.* at 1-2, 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 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

The plaintiff contends that he suffers from an unspecified gastrointestinal impairment and mental impairments of ADHD and stress, all of which should have been found to be severe at Step 2 of the sequential evaluation process.

A. Physical Impairment

The plaintiff asserts that “the medical record clearly establishes that claimant has a medically determinable gastrointestinal impairment[,]” albeit one as to which “various physicians have not reached agreement on the specific diagnosis.” Plaintiff’s Itemized Statement of Errors (“Itemized Statement”) (ECF No. 16) at 4. He admits that the administrative law judge’s conclusion that any such impairment was not severe is supported by the physical residual functional capacity (“RFC”) assessments of the state-agency reviewing physicians, Dr. Richard Chamberlin and Dr. Lawrence P. Johnson, but contends that “those opinions suffer from two severe defects.” *Id.* at 5.

Specifically, according to the plaintiff, those two defects are a failure to present to a vocational expert² the plaintiff’s claim that he suffered from bouts of diarrhea on the average of twice a week and the fact that these reviewing physicians did not see records from the plaintiff’s treating medical professionals for the period from August 2008 to March 2010. *Id.* at 5-6.

The administrative law judge did not present any questions to a vocational expert because he found that the plaintiff suffered from no severe impairment at Step 2 of the sequential evaluation process. A vocational expert’s testimony does not become relevant before Step 4 of that sequential evaluation process. *See, e.g., Carriger v. Astrue*, No. EDCV 08-1606-

² This appears to be an alleged failure of the administrative law judge, not a reason to discount the reviewing physicians’ opinions. I note also that a vocational expert was present at the hearing, Record at 34; Itemized Statement at 8, yet the plaintiff’s attorney, who continues to represent him here, made no attempt to question the vocational expert. He asserts that the administrative law judge decided “not to allow the vocational expert (VE) to testify at the first hearing[,]” Itemized Statement at 8, but gives no supporting citation to the transcript of that hearing, and I see no such denial in that transcript.

JEM, 2010 WL 761293, at * 6 (C.D. Cal. Mar. 3, 2010). Thus, failure to present a question to a vocational expert is not a ground upon which the plaintiff can seek remand in this case.

With respect to his second argument on this point, the plaintiff cites only pages 1024-36 of the record as the “recent treating medical records from August, 2008 to March, 2010,” that the state-agency physician reviewers did not see. Itemized Statement at 5. It is true that the existence of medical records which state-agency reviewers did not see may provide grounds for remand, *see, e.g., Garland v. Barnhart*, No. 03-132-P-S, 2004 WL 413302, at *3 (D. Me. Mar. 3, 2004), but the question here is more nuanced.

The records cited by the plaintiff consist of a consultation report dated June 28, 2010, from James H. Morse, Record at 1024-26; a one-page Medications Report from Swift River Family Medicine dated April 28, 2010,³ for sulfasalazine 500 mg and folic acid tabs (no dosage given), *id.* at 1027; and Emergency Department records from Southern Maine Medical Center for admissions on March 8, 2010, and September 24, 2009, *id.* at 1028-36. No records dated before September 24, 2009, are included in the cited pages. The diagnosis from the 2010 emergency department visit was “Vomiting/Diarrhea,” *id.* at 1030, and the diagnosis from the 2009 visit was “Pharyngitis,” *id.* at 1035. Pharyngitis is an inflammation of the mucous membrane and underlying parts of the pharynx. *Stedman’s Medical Dictionary* (27th ed. 2000) at 1361. In neither of the hospital visits was the plaintiff admitted to the hospital.

Neither the post-hearing medication record nor records of the emergency room records provide medical evidence that would require the state-agency physicians to find that the plaintiff suffered from a severe medical impairment, likely to last at least 12 months or to result in death, as the Social Security regulations require.

³ The plaintiff’s first hearing before an administrative law judge was held on April 27, 2010. Record at 34.

The report of Dr. Morse, also dated soon after the plaintiff's first hearing, about his examination of the plaintiff at the request of the plaintiff's attorney, Record at 1024, includes the following relevant observations: there is "little evidence for the diagnosis of colitis[;]" and the plaintiff could have been suffering from irritable bowel syndrome or a form of dietary intolerance or, less likely but possible, an intestinal motility disorder or a gastric emptying syndrome. *Id.* at 1025-26. Dr. Morse conducted no laboratory tests, but recommended several. *Id.* at 1026. Dr. Morse observed that the plaintiff had had no medical treatment since 2008 before coming to him for a consultation. *Id.* at 1024. He suggested that the March 2010 emergency room visit was not related to the plaintiff's digestive symptoms. *Id.* at 1025. He also noted a colon biopsy in 2000 was found not to be consistent with inflammatory bowel disease even though there was a "nonspecific increase in acute inflammatory cells within the colon." *Id.* at 1024. Biopsies in 2008 and other tests "did not show evidence of any intestinal disease." *Id.*⁴

These facts make Dr. Morse's report, based only upon a review of the plaintiff's medical records and what the plaintiff reported to him, rather than any of the tests he recommended, a slim reed upon which to rely in invoking the case law dealing with medical diagnoses reached after the state-agency physicians have rendered their reports based upon existing medical records. The fact that Dr. Peter Webber, the medical expert who testified at the plaintiff's first hearing, concluded that the existing medical records were insufficient to allow him to reach any diagnosis, *id.* at 58-59, emphasizes this point.

The plaintiff relies on the final sentence in Dr. Morse's report to tip the balance in favor of remand: "[Without further intervention, diagnosis and treatment,] I expect these symptoms will continue to interfere with his ability to maintain steady employment and result in a pattern of

⁴ These conclusions, from the plaintiff's own chosen consultant, render unhelpful the "evidence of [his] gastrointestinal impairment" from 2000 and 2008 that he cites. Itemized Statement at 4.

continued absences from work.” *Id.* at 1026. This is less than a clear statement that the plaintiff had suffered from some medical impairment that could be expected to last more than 12 months or to end in death. If he gets appropriate treatment, according to Dr. Morse, the plaintiff should be able to maintain steady employment in the future.

Nevertheless, in this case, it is not necessary to decide whether the plaintiff has met his Step 2 burden on the asserted basis that subsequent records unavailable to the state-agency physician reviewers are included in the administrative record. Dr. Morse’s statement about the future implies that an impairment that would prevent the plaintiff from maintaining steady employment, and thus having more than a minimal effect on the plaintiff’s ability to perform one or more work-related activities, was present in the past. In addition, Dr. Webber testified at the hearing that “[i]t sounds like he has very serious symptoms that are affecting him functionally, on a long term basis, but I’ve got very little to support that[.]” Record at 59. He added that “we don’t have a name for [the plaintiff’s impairment], that I, that I can substantiate.” *Id.*

In response to questions from the plaintiff’s attorney, Dr. Webber testified that, if the plaintiff’s testimony about his diarrhea and weight loss were accurate, the plaintiff had “a significant gastroenterological problem[.]” *id.* at 60, and that “he may have a treatable disorder, which can be significantly resolved, on the other hand he may not.” *Id.* at 61. The question raised by this information is whether a specific impairment must be identified by a claimant.

At oral argument, I asked counsel to submit post-argument briefs on the question of whether a claimant must, at Step 2, establish the existence of a particular medical impairment rather than an impairment that has not been diagnosed but has been found to impose relevant limitations. The commissioner’s memorandum of law (ECF No. 21) does not address this

question directly; instead, it emphasizes what the commissioner finds to be evidence supporting his denial of the plaintiff's application for benefits.⁵

The plaintiff's brief (ECF No. 22) cites case law to support his contention that no specific diagnosis is necessary. *See, e.g., Bergquist v. Astrue*, 818 F.Supp.2d 1125, 1131 (S.D. Iowa 2011) (“[A] specific diagnosis is not necessary to prove a disability claim.”); *Hight v. Shalala*, 986 F.2d 1242, 1244 (8th Cir. 1993) (reversing denial of benefits to claimant who had “some ailment affecting his lungs, his breathing, and his overall health”) (emphasis in original). Given this legal landscape, it appears to me that the plaintiff has met his minimal Step 2 burden. Proper consideration of the plaintiff's gastrointestinal problem could change the outcome of this claim, and remand is indicated on this issue.⁶

B. Mental Impairments

To assist the parties on remand, I address the plaintiff's further contention that the administrative law judge was required to find that his mental impairments of ADHD, reading disorder, mathematics disorder, cognitive disorder, oppositional defiant disorder, adjustment disorder, and borderline personality disorder all were severe. Itemized Statement at 7. The plaintiff discusses the evidence only with respect to his IQ scores, which he does not tie to any of the listed impairments. *Id.*

⁵ The commissioner contends that this issue was raised by the plaintiff for the first time at oral argument, Memorandum of Law (ECF No. 21) at 1, which would cause it to be deemed waived. *Bard v. Astrue*, No. 1:12-cv-22-NT, 2012 WL 5258197, at *5 (D. Me. Sept. 28, 2012). While it is not stated exactly as I posed the question, the argument is raised sufficiently in the plaintiff's itemized statement.

⁶ In reaching this conclusion, I do not credit the assertion of the plaintiff's attorney that references in the medical records to an endoscopy before June 2000 that showed “a patchy, non-specific increase in acute inflammatory cells” in the colon, and a September 2008 endoscopy that revealed “diffuse antral erythema in the stomach” are necessarily “clinical signs and laboratory findings” substantiating the existence of “a serious gastrointestinal impairment.” Itemized Statement at 4. That is a conclusion to be drawn by a physician. For an attorney, an administrative law judge, or this court to draw such a conclusion from that raw medical evidence is to engage in conduct forbidden by Social Security law and regulation. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990); *Kaylor v. Astrue*, No. 2:10-cv-33-GZS, 2010 WL 5776375, at *3-*4 (D. Me. Dec. 30, 2010).

Rather, the plaintiff complains that the administrative law judge “fail[ed] to have Dr. Claiborn, the psychological expert who appeared at the first hearing, testify.” *Id.* at 8. This “failure,” he asserts, along with the administrative law judge’s failure to call Dr. Claiborn to testify at the supplemental hearing despite having represented that he would do so, violated his right to due process of law. *Id.* He cites no authority in support of this argument.⁷

As this court has said previously,

Social Security applicants are afforded both statutory and constitutional due process rights. Such applicants have a statutory right, upon request, to reasonable notice and opportunity for a hearing. In addition, applicants for social security disability benefits are entitled to due process in the determination of their claims. At a minimum, the Constitution requires notice and some opportunity to be heard. Above that threshold, due process has no fixed content; it is flexible and calls for such procedural protections as the particular situation demands.

In circumstances in which an administrative law judge has offered what amounts to reasonable notice and opportunity to be heard, there is no underlying due process violation.

Newcomb v. Astrue, No. 2:11-cv-02-GZS, 2012 WL 47961, at *7 (D. Me. Jan. 6, 2012) (citations and internal punctuation omitted). A plaintiff relying on a due process violation as the basis for remand must also demonstrate prejudice flowing from the violation. *Levesque v. Astrue*, No. 06-162-B-W, 2007 WL 3023568, at *5 (D. Me. Oct. 12, 2007). Most significantly, he must “show that, had the ALJ done his duty, [he] could and would have adduced evidence that might have altered the result.” *Id.* (citation omitted). The plaintiff has not done so here.

The plaintiff cites statements from medical providers that he “may have difficulties with stressors” and that stress “can be an aggravating factor” for gastrointestinal impairment, Itemized

⁷ The plaintiff complains again in this section of his itemized statement that the administrative law judge “prevented [his attorney] from questioning the [vocational expert].” Itemized Statement at 8. As noted previously, testimony from a vocational expert has no bearing on a decision made by an administrative law judge at Step 2.

Statement at 9, but such evidence is equivocal and, more important, does not identify any impairment or aggravation of any impairment that is caused by the stress itself.

Similarly, the plaintiff's recitation of the limitations found by Drs. Quinn and Luongo to be attributable to his mental impairments, *id.* at 10, fails to identify those impairments and, more important, the medical evidence establishing their existence. The plaintiff takes nothing with this claim.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case remanded for further proceedings consistent with this opinion.

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 31st day of December, 2012.

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

Plaintiff

COREY MOORE

represented by **FRANCIS JACKSON**
JACKSON & MACNICHOL
238 WESTERN AVE
SOUTH PORTLAND, ME 04106
207-772-9000
Email: fmj@jackson-macnichol.com

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **DINO L. TRUBIANO**
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617-565-4277
Email: dino.trubiano@ssa.gov

KARLA J. GWINN
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
J.F.K. FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203
617-565-3428
Email: karla.gwinn@ssa.gov

SEAN D. SANTEN
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
J.F.K. FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203
617-565-4280
Email: sean.santen@ssa.gov