

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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| LAURA A. LOVE, |) | |
| |) | |
| <i>Plaintiff</i> |) | |
| |) | |
| v. |) | No. 2:12-cv-87-JAW |
| |) | |
| CAROLYN W. COLVIN, |) | |
| <i>Acting Commissioner of Social Security,</i> |) | |
| |) | |
| <i>Defendant</i> |) | |

REPORT AND RECOMMENDED DECISION¹

The plaintiff in this Social Security Disability (“SSD”) appeal contends that the administrative law judge committed reversible error by wrongly evaluating the disability rating assigned to her by the Veterans Administration, wrongly evaluating her credibility, and failing to find that her personality disorder met the criteria of an impairment listed in Appendix 1 to 20 C.F.R. Part 404, Subpart P (the “Listings”). For the reasons that follow, 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; *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

¹ This action is properly brought under 42 U.S.C. § 405(g). 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), 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, and the commissioner to file a written opposition to the itemized statement. Oral argument was held before me on December 16, 2015, pursuant to Local Rule 16.3(a)(2)(D), 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.

requirements of the Social Security Act through September 30, 2003, Finding 1, Record at 929; that, through the date last insured, she suffered from idiopathic thrombocytopenic purpura (“ITP”) and an affective disorder/mood disorder, impairments that were severe but which did not meet or medically equal the criteria of any impairment in the Listings, Findings 3-4, *id.* at 929-34; that, through the date last insured, she had the residual functional capacity (“RFC”) to perform light work, except that she could never climb ropes, ladders, or scaffolds, could frequently climb stairs and ramps, balance, stoop, kneel, crouch, or crawl, must avoid working in unprotected heights, working with sharp implements, and working with dangerous machinery, could understand and remember simple instructions, execute simple tasks, interact with coworkers and supervisors but not the general public, and could adapt to occasional routine changes in the work place, Finding 5, *id.* at 937; that, through the date last insured, she was unable to perform any past relevant work, Finding 6, *id.* at 941; that, considering her age (25 years old on the date last insured), education (at least high school), work experience, and RFC, and using Appendix 2 to 20 C.F.R. Part 404, Subpart P (the “Grid”) as a framework for decision-making, through the date last insured there were jobs existing in significant numbers in the national economy that she could perform, Findings 7-10, *id.* at 941-42; and that she, therefore, had not been disabled from the alleged date of onset of disability, May 24, 2000, through the date last insured, Finding 11, *id.* at 943. The Appeals Council declined to review the decision, *id.* at 902-04, making the decision the final determination of the commissioner, 20 C.F.R. § 404.981; *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); *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 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. § 404.1520(g); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain substantial evidence in support of the commissioner's findings regarding the plaintiff's RFC to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The itemized statement also implicates Step 3 of the sequential evaluation process, at which step a claimant bears the burden of proving that her impairment or combination of impairments meets or equals a listing. 20 C.F.R. § 404.1520(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listing, the claimant's impairment(s) must satisfy all criteria of that listing, including required objective medical findings. 20 C.F.R. § 404.1525(c)(3). To equal a listing, the claimant's impairment(s) must be "at least equal in severity and duration to the criteria of any listed impairment." 20 C.F.R. § 404.1526(a).

I. Discussion

A. VA Disability Rating

On June 7, 2006, the Veterans Administration gave the plaintiff a service-connected disability rating of 80% with "Individual Unemployability . . . from May 25, 2000." Record at 451. The plaintiff contends that the administrative law judge did not "state anywhere in his Decision specifically what weight he gave these VA disability ratings[.]" Plaintiff's Statement of Errors ("Itemized Statement") (ECF No. 18) at [7]. This failing, she asserts, requires remand under

Pinkham v. Barnhart, No. 03-116-B-W, 2004 WL 413306 (D. Me. Mar. 3, 2004), which she characterizes as “on all fours with this case.” *Id.* at [9].

First, the plaintiff’s assessment of the administrative law judge’s opinion is erroneous. The administrative law judge specifically discussed in the decision the weight he assigned to the VA disability rating, as follows:

For the most part, mental examinations before her date last insured were for the purpose of obtaining a VA disability rating based on mental impairments. She has been assessed by VA with a 20 percent disability for a mood disorder.

* * *

As for the opinion evidence, the undersigned has considered the medical findings of the various military and VA physicians who have examined her for treatment and for disability ratings decisions. The actual ratings decisions by the VA have also been considered, but such decisions are not medical opinions (See Ex. 1F, 7F, and 26F). They are given weight as administrative decisions of another public agency based on that agency’s rules, policy, and regulations (SSR 06-3p).

The ratings decision of June 6, 2003 granted the claimant a 70 percent disability based on the low platelet counts caused by ITP. She was granted a 20 percent disability for her depressive disorder. Further, the rating specialist granted the claimant a finding of individual employability effective with her date of discharge of May 25, 2000. In this regard, the rater relied on her statements that she had one unsuccessful episode of work after her date of discharge and no further attempts at employment (Ex. 26F/21-24).

Such a decision is clearly based on regulatory standards far different from those of the Social Security Administration.

* * *

Little weight is given the VA ratings decisions. They are based on standards not relevant to the Social Security Administration’s disability program. However, the undersigned has found both ITP and mood disorder to be significant impairments as did the VA. The VA rating of individual unemployability is not based on any medical finding or opinion that would lead to a similar conclusion under SSA regulations, and it is given no weight.

Record at 939-40, 941. The statement of the weight given to the VA ratings by the administrative law judge is clearly included in his opinion.

Second, *Pinkham* is distinguishable. In that case, the entire reference to the VA rating in the administrative law judge's decision was the following: "The VA found him non-service connected disabled and he receives a pension." 2004 WL 413306, at *4. "[T]here was no indication of what weight was given to the Veterans' Administration's disability determination, or even that it was considered at all." *Id.* In the instant case, as set forth above, the administrative law judge said much more about the VA ratings and the weight given to them.

In this respect, this case is more like this court's more recent decisions in *Wilson v. Colvin*, No. 2:13-cv-197-JDL, 2014 WL 4715406 (D. Me. Sept. 22, 2014), and *Smith v. Colvin*, No. 2:13-cv-00066-JAW, 2014 WL 220721 (D. Me. Jan. 21, 2014). In *Wilson*, this court found the following discussion of the weight assigned to a VA disability rating to be sufficient:

The administrative law judge stated that he had considered the VA decision pursuant to Social Security Ruling 06-03p ("SSR 06-03p") but accorded it little weight, reasoning that it was based on the rules of the VA, not the Social Security Act, and thus was nonbinding, and that it did not fully describe the evidence considered, provide the examiner's analysis of the pertinent issues, or set forth an assessment of the plaintiff's RFC.

2014 WL 4715406 at *4. In *Smith*, the following discussion was found sufficient:

The undersigned has considered the Department of Veterans Affairs' Rating Decisions dated December 16, 2004, and April 25, 2009. However, the undersigned attributes limited weight to these decisions, as they are based upon a different disability standard. Moreover, these decisions do not discuss the claimant's functional limitations, assess his residual functional capacity, or cite to specific objective medical findings supporting these decisions. Finally, the undersigned notes that the April 25, 2009, decision is beyond the claimant's date last insured.

2014 WL 220721 at *3. The discussion in the decision in this case is more detailed than either of these acceptable treatments, and thus cannot provide a basis for remand. In addition, the discussion comports with the requirements of Social Security Ruling 06-03p, reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2015) at 327-34, which governs this issue and provides

that, while a disability decision by another agency must be considered, the ultimate determination of disability rests with the commissioner.

B. Credibility

The plaintiff next faults the administrative law judge's assessment of her credibility, asserting that he "failed to consider the 'entire case record' in making his credibility determination with respect to the Plaintiff's past trauma history[.]" thereby violating Social Security Ruling 96-7p. Itemized Statement at [10]. She strongly contests his statement that

[t]he claimant testified in a very detailed manner about her trauma history, which she avers is a cause of her mental symptoms. Yet, she testified that she had not been so open about this trauma history to any of her providers. During her mental status ratings examinations and treatment prior to the date last insured, she had many opportunities to do so, and it would seem such revelations might have positively enhanced her VA disability rating. It detracts from her credibility that she would have been so open and revealing about such matters in a Social Security disability hearing many years after such traumatic events, before a male Administrative Law Judge, and yet had not reported the history fully to appropriate mental health professionals.

Record at 939.

Earlier, the administrative law judge addressed the plaintiff's credibility directly:

After careful consideration of the evidence, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to cause some symptoms; however, the claimant's statements concerning the nature, intensity, persistence, and limiting effects of her symptoms are not entirely credible for the reasons explained in this decision.

Id. at 938. Significantly, the plaintiff's testimony about her history of trauma is not the only reason given by the administrative law judge for discounting her credibility. *See, e.g., Little v. Colvin*, No. 2:13-cv-365-GZS, 2014 WL 5782457, at *8 (D. Me. Nov. 6, 2014); *Abdi v. Astrue*, No. 2:10-cv-89-GZS, 2010 WL 5452125, at *2-*3 (D. Me. Dec. 28, 2010).

The administrative law judge also noted that, when the claimant was evaluated at a VA hospital in November 2002, she “complained about panic attacks but was not clear about when she had them. She was unable to quantify the amount of her alcohol use[,]” Record at 931; that she alleged carpal tunnel syndrome as an impairment but it had not been diagnosed and no pathology or abnormalities were found, *id.* at 933; that her complaints of right hip pain were not linked to a medically determinable impairment, *id.*; that her alleged low back pain was not diagnosed or treated prior to the date last insured, *id.*; that she testified that she had multiple sclerosis, but that impairment was ruled out by neurologists in 2007 and 2010 and was not discussed in the medical records before the date last insured, *id.* at 934; and that, “[e]ven based on her own subjective statements to physicians, the condition of fibromyalgia was not a medically determinable impairment prior to the date last insured[,]” *id.* These observations, independent of the question of the plaintiff’s memory concerning past trauma, are more than sufficient to support the administrative law judge’s conclusion that the plaintiff’s “statements concerning the nature, intensity, persistence, and limiting effects of her symptoms are not entirely credible[.]” *Id.* at 938.

Given that the plaintiff challenges only one aspect of the credibility finding, *see Little, supra*, 2014 WL 5782457 at *8 (fact that claimant does not challenge all relevant credibility findings weighs against remand), and the deference that this court must give to the credibility findings of administrative law judges, *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987), the plaintiff is not entitled to remand on this basis.²

² At oral argument, the plaintiff’s attorney contended that the administrative law judge was required to make separate findings as to the plaintiff’s credibility with respect to her physical impairments and with respect to her mental impairments, and that his failure to make separate credibility findings as to her testimony about her mental impairments requires remand. He cited no authority in support of this argument, which was not included in the plaintiff’s itemized statement. If the argument has not been waived, the court should reject it. My own research located no authority to support it.

C. Listing 12.08

The plaintiff's final argument is a one-paragraph presentation of her claim that the administrative law judge should have evaluated her personality disorder under Listing 12.08 and that both his failure to do so and his failure to consult a medical expert in this regard require remand. Itemized Statement at [12]. She cites no authority in support of her position.

The plaintiff does not identify any evidence that would require the administrative law judge to find that Listing 12.08 was met or, for that matter, to consider the issue at all. That omission alone dooms her argument. *E.g., Parker v. Colvin*, Civil No. 2:13-cv-286-DBH, 2014 WL 3533323, at *2 (D. Me. July 15, 2014); *Sawyer v. Colvin*, No. 1:12-cv-231-JAW, 2013 WL 1760534, at *4 (D. Me. Mar. 30, 2013).

The plaintiff also asserts that she is entitled to remand because “the ALJ deprived [her] of the opportunity to demonstrate that [she] equaled Listing 12.08 by failing to have a medical expert at the hearing.” Itemized Statement at [12]. She cites no authority in support of this assertion, which her attorney repeated at oral argument. If this were a statutory or regulatory requirement, a medical expert would have to be present at every hearing, because an administrative law judge could not know before the hearing whether the issue of medical equivalence of a listing would arise.³ An administrative law judge must call a medical expert to testify at hearing as to medical equivalence of a listing only “where the administrative record is inconclusive as to whether a claimant’s impairments are equivalent to an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1.” *Diehl v. Barnhart*, 357 F.Supp.2d 804, 815 (E.D. Pa. 2005). The plaintiff has made no attempt to show that the record in this case is inconclusive on this point.

³ A state-agency reviewing psychiatrist found that the plaintiff did not meet or equal a listing. Record at 487. That evidence satisfies the requirement for expert testimony on the question of medical equivalence, when that requirement arises. *Castaneda v. Astrue*, 344 Fed.Appx. 396, 398 (9th Cir. 2009) (citing Social Security Ruling 96-6p).

In addition, as the commissioner's attorney pointed out at oral argument and in her written opposition, the administrative law judge in this case specifically found that the evidence did not establish the B criteria for Listing 12.04, Record at 935-36, and the B criteria are the same for Listings 12.04 and 12.08. *Compare* 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.04(B) with § 12.08(B). On the merits, therefore, any error with respect to Listing 12.08 was harmless, as the administrative law judge would have found the necessary evidence lacking.

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 31st day of December, 2015.

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