

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RUTH BUNN,)	
)	
Plaintiff)	
)	
v.)	Civil No. 92-213-B
)	
DONNA E. SHALALA,)	
Secretary of Health)	
and Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION ¹

This Social Security Supplemental Security Income appeal raises the question whether substantial evidence supports the Secretary's determination that the plaintiff is able to perform her past relevant work. The plaintiff contends that the Administrative Law Judge, influenced by her testimony that she engaged in the home schooling of her children, disregarded uncontroverted medical evidence and failed to make a specific finding as to how her residual functional capacity would permit her to return to her past work.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity

¹ This action is properly brought under 42 U.S.C. 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. This case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 1, 1993 pursuant to Local Rule 12(b) requiring the parties to set forth their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

since May 1990, Finding 1, Record p. 19; that she has "severe morbid obesity, dysfunctional uterine bleeding secondary to endometriosis, pelvic adhesions, and borderline hypertension," but does not have any impairment or combination of impairments that meets or equals any impairment listed in Appendix 1 to Subpart P of Social Security Regulations No. 4 (the "Listings"), Finding 2, Record p. 19; that her testimony about persistent pain symptoms is "not consistent with the medical records or description of daily activities, which include home schooling of her children," Finding 3, Record p. 19; that she has "the residual functional capacity to perform work-related activities except for work involving prolonged standing and walking and lifting and carrying more than ten pounds," Finding 4, Record p. 19; that her past relevant work as a telemarketer did not involve these activities and, therefore, she was not prevented from doing her past relevant work, Findings 5-6, Record p. 20; and that, consequently, she was not disabled at any time through the date of the decision, Finding 7, Report p. 20. The Appeals Council declined to review the decision,² Record pp. 3-4, making it the final determination of the Secretary. 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 Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions 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).

As the Administrative Law Judge determined that the plaintiff could return to her past

² The Appeals Council considered the contentions raised in the plaintiff's brief of April 13, 1992, but stated that the hearing decision reflected that the Administrative Law Judge had considered the plaintiff's testimony about the effects of her impairments in light of the total evidence on the record including clinical findings, testimony of a medical expert and a vocational expert and the plaintiff's treatment history and daily activities. The Appeals Council found the hearing decision supported by the evidence of record.

relevant work, this is a Step Four case. At this stage of the evaluative process the burden is on the plaintiff to show that she cannot perform her past relevant work. 20 C.F.R. 416.920(e); *Goodermote*, 690 F.2d at 7. In determining this issue, the Secretary must make specific findings of fact as to the plaintiff's residual functional capacity, the physical and mental demands of the past job or occupation and whether the plaintiff's residual functional capacity would permit performance of that work. Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service*, at 813 (1983).

The claimant's initial burden is to make some reasonable threshold showing of an inability to return to her past work because of an alleged disability. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). This simply involves "describ[ing] those impairments or limitations which she says she has" and how these limitations "preclude[] the performance of the particular prior job." *Id.* (emphasis in original). "Once

this threshold is crossed, the [administrative law judge] has the obligation to measure the requirements of former work against the claimant's capabilities; and, to make that measurement, an expert's [residual functional capacity] evaluation is ordinarily essential unless the extent of functional loss, and its effect on job performance, would be apparent even to a lay person." *Id.* at 7.

Social Security Ruling 82-62 confers a shared burden upon the parties. *May v. Bowen*, 663 F. Supp. 388, 394 (D. Me. 1987). "[O]nce alerted by the record to the presence of the issue the [administrative law judge] may not rest upon the failure of the claimant to *demonstrate* that the physical and mental demands of her past relevant work were such that she is unable to perform that type of work." *Id.* (emphasis in original). The claimant has the obligation to provide sufficient information from which the administrative law judge may begin a more focused inquiry through further development of the record, followed by explicit findings as to the physical and mental demands of the claimant's past relevant work. Thus the plaintiff has the initial burden "of bringing all relevant evidence before the agency, either in her application, supplemental information, or oral testimony." *Id.* at 393.

The plaintiff has met her burden of production. She contends, however, that, in finding her capable of performing her past relevant work, the Administrative Law Judge improperly relied upon her testimony concerning her home schooling activities while disregarding uncontroverted medical evidence provided by the medical expert's testimony. Although an administrative law judge is entitled to resolve contradictory medical evidence, he may not arbitrarily reject or ignore uncontroverted medical evidence. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986).

At oral argument the plaintiff asserted that the Administrative Law Judge had not so much ignored the evidence provided by the medical expert, Dr. Robert Kellogg, as he had mischaracterized it in concluding that she had the residual functional capacity to perform her past relevant work. The question, simply stated, is whether substantial evidence in the record as a whole

supports the decision.

In her testimony, the plaintiff stated that she had been under treatment for endometriosis since 1989 and still had pain in her lower abdomen and back. Record pp. 30-31. She described the frequency of her pain as "weekly" and "not on a daily basis." *Id.* p. 32. She stated that she has "good days," "bad days" and "middle days." *Id.* There are a few days of the month when she is comfortable. *Id.* pp. 32-33. On a scale of one to ten, with "one" being "just an awareness" of pain and "ten" being "the worst you can imagine," she rated her pain as "nine to ten" on a "bad day," "seven" on a "middle day" and "four" on a "good day." *Id.* p. 32. She said she is not currently taking medication but on her "bad days" she takes Anaprox, an anti-inflammatory drug, for her pain. *Id.* pp. 32-33. She described herself as "immobilized" on her "bad days" with body movement aggravating her pain and causing her to take Advil or Tylenol along with her medication. *Id.* p. 34. This "takes the edge off the pain." *Id.* p. 46. When asked how many days a week she was "usually really bothered by pain," she replied, "two to three days." *Id.* p. 42. She stated that Dr. Harris, an obstetrician/gynecologist, has been giving her "shots" once a month for the past four months to stop her menstrual cycle,³ *id.* pp. 54-55, that there has been some improvement, *id.* p. 55, and that she is "better than [she has] been in a year," *id.* p. 47. She said she also suffers from fatigue. *Id.* She is 4 feet 11 inches tall, *id.* p. 28, and weighs about 260 pounds, *id.* p. 39. She has been encouraged to lose weight but has not been successful. *Id.* p. 50.

The Administrative Law Judge questioned the plaintiff extensively about her home schooling activities, which occupy two to three hours per day. She described the home schooling of her two children as a joint responsibility with her husband, who takes over for her when she has severe pain. *Id.* pp. 47-48. She stated that the children have been in home schooling for over a year, that she intends to keep doing home schooling, but that home schooling is not related to her

³ Dr. Harris placed her on Depo Lupron, a medication for endometriosis given by injection once a month, usually for a six month course of treatment. Record p. 182.

being unable to work. *Id.* p. 43.

Dr. Kellogg, the medical expert, testified that the record documents that the plaintiff has a variety of impairments, including severe obesity, endometriosis (minimum), pelvic adhesions and minimal hypertension. *Id.* p. 57. Her obesity, however, does not equal the Listings (specifically Rule 10.10, Appendix 1, Subpart P, 20 C.F.R. 404) because there is no medical evidence that it is accompanied by arthritis, significant hypertension or cardiovascular or respiratory involvement. *Id.* p. 58. He stated that: "What she does have is abdominal and back pain. The former possibly due to her endometriosis and the latter, low back pain, there's no clinical documentation of the cause of that other than the suspicion that it's related to her obesity . . . or she may even have intrinsic muscular skeletal pathology that hasn't been assessed by an X-ray or test." *Id.* He said that she was being treated for endometriosis, that "[i]t's there, it's been documented . . . and it can cause pain." *Id.* p. 62.

Further questioning of Dr. Kellogg by the Administrative Law Judge yielded the following colloquy:

Q . . . Do you think that the pain that she does experience, . . . she testifies that she's incapacitated for those two to three days a week. Is that testimony well found in the medical record for whatever cause?

A It's the claimant's allegation, but it's not supported by laboratory tests or clinical findings.

Q Okay. And you say that with the idea that the endometriosis can produce pain, but --

A It can produce pain, but not characteristically of the nature that this claimant alleges.

Q Okay. It's primarily around the menstrual cycle, is that correct?

A Primarily, yes.

Q Okay. Given the seven day norm of that cycle, could one fully expect her to experience pain of that severity within that seven to ten day period because of the endometriosis?

A I don't think so.

Q Okay. How many days does she have pain of that degree, *looking just at the objective medical*, what is supported there in terms of the severity of pain that she's talking about or how many days per month?

A Oh, I would say --

Q She's talking *incapacitating*?

A My opinion would be *four to five days per month*.

Q Four to five days per month?

A Yes, but what she's having is not all around the period, it's one day a week.

Q And it's more reasonable medically -- in your opinion, that those days be clustered around the actual period itself rather than throughout the month, is that correct?

A Yeah.

Id. pp. 65-66 (emphasis added).

He further stated that the plaintiff did not have the capacity to engage in a full or light range of work but that "[s]he would be able to do a sedentary work base." *Id.* pp. 66-67. However, when asked by the plaintiff's representative, "With respect to that sedentary ability, would she have that during those four to five days that she's in severe pain?" he answered, "I don't think she would." *Id.* p. 67.

The vocational expert's testimony merely characterized the nature of the plaintiff's past jobs in terms of skill and exertional requirements. There were no hypothetical questions related to the effect that four to five days a month of incapacitating pain might have on her ability to perform her

past work.

The other evidence of record does not specifically address the plaintiff's claim of this kind of pain. Dr. Hall, a nonexamining, nontestifying physician, noted her "morbid obesity" and commented that "[p]erhaps a female reviewer would see [her gynecological problems] differently" but stated that he did not find a severe impairment. *Id.* p. 124. Likewise, Dr. Brinkman, another nonexamining, nontestifying physician, reported that she was obese but noted "very little else of significance." *Id.* p. 132. Dr. Paolini's notes indicate some improvement with Anaprox, *id.* p. 146, but her notes reflect continuing complaints of pain, *id.* pp. 144-149.

An administrative law judge is allowed to weigh evidence and to resolve conflicts in the medical evidence of record. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991); *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 4 (1st Cir. 1987), *cert. denied sub nom. Pagan v. Bowen*, 484 U.S. 1012 (1988). However, in the instant case I see little conflict to resolve. Dr. Kellogg's testimony indicates that, on the basis of the medical evidence of record, the plaintiff has four to five days of incapacitating pain per month (even if it is not the typical presentation). The plaintiff's question to Dr. Kellogg as to whether she retained sedentary ability during the four to five days she had severe pain was based on this testimony. It was not, as the Administrative Law Judge seems to have interpreted it and reflected it in his opinion, a question *whether* she had severe pain during that time. The other evidence of record does not contradict Dr. Kellogg's testimony and shows at least some objective evidence of an underlying cause of her pain. Dr. Kellogg's own testimony suggests that while there is a documented basis for her abdominal pain, further tests or X-rays might be useful to clarify the cause of her lower back pain. Record p. 58.

Subjective symptoms must be evaluated considering credibility, motivation and medical evidence of impairment. *Gray v. Heckler*, 760 F.2d 369, 374 (1st Cir. 1985). *Avery v. Secretary of Health & Human Services*, 797 F.2d 19 (1st Cir. 1986), and Social Security Ruling 88-13 provide a

framework for evaluating pain. In *Avery*, the Court of Appeals for the First Circuit, construing the Secretary's instructions for evaluating pain, stated that they "specifically contemplate a possible finding of disability in a case where the degree of pain alleged is significantly greater than that which can be reasonably anticipated based on the objective physical findings" *Avery*, 797 F.2d at 22-23 (quoting Program Operations Manual System ("POMS") DI T00401.570). In such a case, the administrative law judge is to "obtain detailed descriptions of daily activities by directing specific inquiries about the pain and its effects to the claimant, his/her physician from whom medical evidence is being requested, and other third parties who would be likely to have such knowledge." *Id.* p. 23 (quoting POMS). "It is essential to investigate all avenues presented that relate to the subjective complaints. . . ." *Id.* (quoting POMS).

Social Security Ruling 88-13 states that "[t]he [residual functional capacity] assessment must describe the relationship between the medically determinable impairment and the conclusions of [residual functional capacity] which have been derived from the evidence, and must include a discussion of why reported daily activity restrictions are or are not reasonably consistent with the medical evidence." Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 655 (1992).

The Administrative Law Judge questioned the plaintiff extensively about her daily activities, particularly her home schooling, and concluded that her ability to do home schooling confirmed her residual functional capacity for sedentary work. Record pp. 18-19. The Administrative Law Judge stated that her pain "is exaggerated and she has been home schooling her children for a year, which also is a contributing reason why she is not working." *Id.* p. 19. However, the plaintiff's testimony indicates that her husband does the home schooling when she is incapacitated. Because her testimony with respect to her home schooling and the effect her pain has on her ability to do it is consistent with her overall testimony concerning pain and with Dr. Kellogg's testimony as well, the mere fact that she has done home schooling and plans to continue it

should not diminish her credibility concerning pain. The Administrative Law Judge did not elaborate on his comment that the home schooling was a reason she was not working, although this clearly relates to credibility.

A credibility determination by an administrative law judge who has observed the claimant, evaluated her demeanor and considered how the testimony fits with the evidence is entitled to deference, especially when supported by specific findings. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987). The Administrative Law Judge's conclusion that "[t]here is pain, especially with the menstrual periods, but it is not incapacitating and would not significantly interfere with her ability to perform sedentary work," *id.* p. 19, simply does not address the pattern of pain that the plaintiff claims is disabling, i.e. incapacitating pain four to five days out of the month and more moderate pain on other days, nor does his rationale accurately reflect Dr. Kellogg's testimony.

Furthermore, Social Security Ruling 82-62 is specific in its statement that [t]he decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision. Since this is an important and, in some instances, a controlling issue, every effort must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit.

Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service*, at 812 (1983). The Administrative Law Judge's questioning of the vocational expert was perfunctory at best. No effort was made to ascertain the effect that four to five days of incapacitating pain per month would have on the plaintiff's ability to perform her past relevant work or any other work.

For the foregoing reasons I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

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 ten (10) days after being served with a copy thereof. A responsive memorandum 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 at Portland, Maine this 17th day of March, 1993.

David M. Cohen
United States Magistrate Judge