

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>TEENIA M. COLBY,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 92-215-B</b>
	)	
<b>DONNA E. SHALALA,</b>	)	
<b>Secretary of Health</b>	)	
<b>and Human Services,</b>	)	
	)	
<b>Defendant</b>	)	

**REPORT AND RECOMMENDED DECISION <sup>1</sup>**

This Social Security Supplementary Security Income appeal raises the question whether substantial evidence supports the Secretary's decision that, despite her back pain, the plaintiff is able to perform her past relevant work. The plaintiff asserts that the Administrative Law Judge failed to adequately consider her testimony as to her complaints of pain.

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 had not engaged in substantial gainful activity since she left work voluntarily in October 1990, Finding 1, Record p. 14; that since filing for Supplementary Security Income on May 13, 1991 she has had a severe back impairment that does not meet or equal the severity of any listed in Appendix 1, Subpart B, 20 C.F.R. 404 (the

---

<sup>1</sup> 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. The 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 at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references.

``Listings"), Finding 2, Record p. 14; that since that date she has retained the residual functional capacity to perform her past relevant work as a receptionist, as that job is ordinarily performed in the national economy, Finding 3, Record p. 14; and that, therefore, she is not disabled for the purpose of entitlement to Supplemental Security Income, Finding 4, Record p. 14. The Appeals Council declined to review the decision, Record pp. 7-8, making it the final decision 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).

At Step Four of the evaluative process, the plaintiff has the burden of showing that her impairment prevents her from performing her past relevant work. *Goodermote*, 690 F.2d at 7; 20 C.F.R. 416.920(e). An administrative law judge is allowed to rely on the claimant's own description of the duties involved in her former job as well as her own statements of her functional limitation. *Santiago v. Secretary of Health and Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). He must ascertain the demands of the usual former work and then compare these demands with present mental and physical abilities. *Id.* The administrative law judge may not simply rely on the claimant's failure to demonstrate that the physical and mental demands of past relevant work can no longer be met, but, ``once alerted by the record to the presence of an issue,' must develop the record further." *Id.* at 5-6 (emphasis in original) (citation omitted).

The plaintiff complains of lower back pain that radiates down her left leg. A report from Dr. Rozario, a surgeon, indicates that he performed surgery (a microsurgical discectomy at L5-S1) on her lumbar spine in December 1988. Record p. 129. She was able to return to work as a cashier

in December 1989 but left work voluntarily on October 30, 1990, not because of a disability, but because she had no babysitter. *Id.* p. 89. She stated that her pain began "around the end of November [1990]," *id.*, after shovelling snow, *id.* p. 34, and that she sought treatment in January 1991, *id.* p. 89. The radiology reports of March 1991 indicate that her MRI showed what "may represent scar tissue or recurrent disc herniation," *id.* p. 150, and that the CT scan showed "[a]bnormal disc appearance . . . consistent with recurrent or residual disc herniation and/or previous surgery at that site . . . .," *id.* p. 151. By April 1991 the pain had "substantially improved." *Id.* p. 167. She reported a 50% pain reduction with Lidocaine therapy. *Id.* p. 157. Dr. Rozario stated that "[s]he has asked about pain medication and I have explained to her that I would not be giving her pain medication on a long term basis" but that she should see Dr. Hayes, her treating physician, on this issue. *Id.* p. 166. Dr. Rozario did recommend nonsteroidal anti-inflammatory medication. *Id.*

Dr. Hayes's notes are largely indecipherable. However, he referred the plaintiff to Dr. John Duckworth, a neurosurgeon, for evaluation. Dr. Duckworth's notes state that:

She would like at this time to gain SSI. She would like to proceed with evaluation about her back and lower extremity pain, actually she states at this time to have very little in the way of back or lower extremity pain. . . . She is unhappy [about] having to make thirteen long distance phone calls to get Darvocet from Dr. Rozario's office.

*Id.* p. 164. Dr. Duckworth reported that the repeat myelogram/CT scan showed "substantial improvement in the resected disc of L5-S1 to the left." *Id.* He further stated:

I counseled Mrs. Colby quite strongly that she does not need a repeat operation. She has a neuropathy because of intraneural scarring. She does not need further neurological care. She needs to resolve the neuropathy by judicious use of return to activity as much as possible. I, too, would try to limit narcotic medications like the Darvocet as much as possible. Physical therapy may be beneficial. . . . I think she needs no further testing. I would initiate no other treatment.

*Id.* p. 165.

Residual functional capacity assessments were done by nonexamining, nontestifying physicians Drs. Yindra and Brinkman, who reached a similar conclusion that the plaintiff was able to sit for six out of eight hours in a workday, stand or walk for about six hours and frequently lift to a maximum of ten pounds. *Id.* pp. 112, 120. Dr. Brinkman noted that the "exam shows very little in [the] way of [positive] findings." *Id.* p. 126.

Dr. Kellogg, a testifying medical expert, offered a more restricted residual functional capacity assessment, concluding that "based largely on the testimony today, and supported to some extent by the record, she is able to sit . . . for a half-hour, stand 20 minutes, gains relief of discomfort by frequent changes of position" and could lift up to ten pounds on a frequent basis but should avoid high places requiring awkward positions and avoid extreme temperatures. *Id.* pp. 50-51. In reference to her residual functional capacity, he stated that "at a [pain] level of 7 [out of 10] I don't believe that one is incapacitated. . . ." *Id.* p. 53.

In her own testimony, the plaintiff stated that she suffers pain "in the left cheek of my [buttocks] plus the left hip" and outer surface of the leg, usually down to the knee but on a "really bad day" down to the ankle. *Id.* p. 45. She has "bad days" "at least five" days out of a 30 day month "but not one after the other." *Id.* p. 21. She further stated that because of the pain she has to lie down "usually like one day a week . . . , an hour of the day." *Id.* p. 24. She described the pain level on a "really bad day" as "around seven" (out of ten) but on a "normal day" it "stays around one or two." *Id.* p. 21. She indicated that sitting for prolonged periods affects her back but that she can sit about one-half hour in a straight high-backed chair. *Id.* p. 23. It is when she moves around that the pain begins. *Id.* pp. 23-24. She can walk two miles and does the daily exercises recommended by her physical therapist. *Id.* Walking and swimming eases the pain. *Id.* She attends AA and NA meetings and said that both she and her husband had been marijuana users. *Id.* pp. 35-36.

The Administrative Law Judge directed three hypothetical questions to the vocational expert, Sharon Greenleaf. The first elicited the response that the plaintiff would be unable to return

to her past relevant work as she performed it (receptionist whose job involved lifting bundles of newspapers). *Id.* p. 61. The second hypothetical question concerned receptionist work as generally performed in the national economy. The vocational expert answered that the plaintiff had the required residual functional capacity to do the job. *Id.* p. 62. The final question assumed that for at least four to five days of the working month the plaintiff would have to lie down for an hour out of the day. The vocational expert stated that this would rule out past relevant work or any other work. *Id.*

The plaintiff contends that the Administrative Law Judge should have made a specific finding related to the credibility of the plaintiff's testimony concerning her need to lie down for one hour during the day four or five times a month. If this testimony were believed, she asserts, she would be incapable of returning to her past relevant work.

The Administrative Law Judge's opinion makes no direct reference to the plaintiff's stated need to lie down, although there are references to other aspects of her residual functional capacity. As the plaintiff points out, the Administrative Law Judge made the comment at the hearing that she had "testified very credibly," *id.* p. 63, and wrote in his opinion that her testimony regarding pain was "generally credible," *id.* p. 13.

*Avery v. Secretary of Health & Human Servs.*, 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 subjective complaints. . . ." *Id.* (quoting POMS).

Social Security Ruling 88-13 provides, in relevant part, that

[i]n evaluating a claimant's subjective complaints of pain, the adjudicator must give full consideration to all of the available evidence, medical and other, that reflects on the impairment and any attendant limitations of function.

The RFC assessment must describe the relationship between the medically determinable impairment and the conclusions of RFC 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.

In instances in which the adjudicator has observed the individual, the adjudicator is not free to accept or reject that individual's subjective complaints solely on the basis of such personal observations. Rather, in all cases in which pain is alleged, the determination or decision rationale is to contain a thorough discussion and analysis of the objective medical evidence and the nonmedical evidence, including the individual's subjective complaints and the adjudicator's personal observations. The rationale is then to provide a resolution of any inconsistencies in the evidence as a whole and set forth a logical explanation of the individual's capacity to work.

Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 655 (1992).

In the instant case, the Administrative Law Judge did not make a specific finding, nor did he even mention the need to lie down as related to the plaintiff's pain or ability to work, although admittedly he may have considered it indirectly through the questions posed to the medical and vocational experts. Nor did he comment upon the plaintiff's credibility in this particular area.

At oral argument, citing *DaRosa v. Secretary of Health & Human Servs.*, 803 F.2d 24 (1st Cir. 1986), the plaintiff asserted that there must be an individualized finding concerning pain and that the medical advisor's general statement that "at a level of seven I don't believe that one is incapacitated," Record p. 53, was not sufficient. The Secretary suggested that the Administrative Law Judge had made an implicit finding in regard to the plaintiff's pain and her need to lie down for relief and that no more specific statement was needed if the record supported the decision.

The First Circuit has expressed a preference for specific findings. An administrative law judge is free to find that a claimant's testimony regarding her pain is not credible. *DaRosa*, 803 F.2d at 26. The result, however, must be supported by substantial evidence and the administrative law judge must make specific findings as to the relevant evidence in determining that the plaintiff's testimony is not credible. *Id.* In *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192 (1st Cir. 1987), the First Circuit is less specific, but states that "[t]he credibility determination by the [Administrative Law Judge], who observed the claimant, evaluated his demeanor, and considered how the testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings." *Id.* at 195. In deciding that case, the court indicated that "[a]lthough more express findings[ ] regarding . . . pain and credibility . . . are preferable, we have examined the entire record and their adequacy is supported by substantial evidence." *Id.*

Here, there is no specific finding related to the plaintiff's credibility concerning her asserted need to lie down to ease her pain for an hour four or five days of the month. There is no evidence, other than the plaintiff's own testimony, that relates directly to this matter. It is the responsibility of the Secretary to determine issues of credibility, to draw inferences from the evidence of record and to resolve conflicts in the evidence. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). However, this does not mean that she may arbitrarily reject or ignore evidence. Even when the evidence is slight the Secretary is required at least to consider it and set forth a rationale for rejecting it so that the reviewing court will know that the claim was not ignored. *Figueroa v. Secretary of Health & Human Servs.*, 585 F.2d 551, 554 (1st Cir. 1978).

Because there is no medical evidence in the record that contradicts the plaintiff's statement that she must lie down to ease her pain, and because the Administrative Law Judge made no specific comment as to the plaintiff's credibility or to the effect that her stated need to lie down has on her ability to do her past relevant work, I conclude that the Secretary's decision is not supported by substantial evidence.

For the foregoing reasons I recommend that the Secretary's decision be **VACATED** and the

case be **REMANDED** for 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 22nd day of March, 1993.***

---

***David M. Cohen***  
***United States Magistrate Judge***