

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

<b>MICHAEL A. FOSTER,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 93-33-P-C</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 Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff was not under a disability prior to the expiration of his insured status in June 1989 because at that time he could perform a full or wide range of light and sedentary work existing in significant numbers in the national economy. Specifically, the plaintiff asserts that the Administrative Law Judge failed to consider a myriad of evidence indicating that he was disabled prior to his last insured date, erred in concluding that the record was unclear as to whether he had engaged in gainful activity, failed to consider the combined effects of his impairments and failed to order a consultative psychological examination. Additionally, he claims that the Appeals Council erred in failing to consider new evidence submitted on a request for

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<sup>1</sup> This action is properly brought under 42 U.S.C. 405(g). The Secretary 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 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he 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 October 22, 1993 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

review.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the record is insufficient to permit a determination whether the plaintiff had engaged in substantial gainful activity since April 15, 1989, the alleged onset of his disability, Finding 1, Record p. 16; that he met the disability insured status requirements as of that date, but he continued to meet those requirements only through June 1989, Finding 2, Record p. 17; that prior to the close of June he suffered from "a history of bilateral carpal tunnel syndrome, with right surgical carpal tunnel release in March, 1985, and with complete resolution of his symptoms in 1985; minimal degenerative arthritis of the toes bilaterally; and mild spasming of the thoracic spine, which resolved after brief treatment in April, 1989," Finding 3, Record p. 17; that during the relevant time period he did not have an impairment or combination of impairments that meets or equals any listed in Appendix 1 to Subpart P, 20 C.F.R. 404 (the "Listings"), Finding 4, Record p. 17; that during the relevant time period his impairments precluded him from performing his past relevant work, Finding 10, Record p. 18; that between the alleged onset date and the expiration of his insured status the plaintiff possessed the residual functional capacity to perform a full or wide range of light and sedentary work, Finding 6, Record p. 17; that, based on an exertional capacity for light and sedentary work, his age (38), education (high school) and vocational background (unskilled), application of Rule 202.20 of Appendix 2, Subpart P, 20 C.F.R. 404 (the "Grid"), directs a conclusion that he was not disabled at any time between April 15, 1989 and the end of June 1989, Findings 5-6, 8-9, 11-12, Record pp. 17-18. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Secretary.<sup>2</sup> 20 C.F.R. 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

<sup>2</sup> The Appeals Council, in denying review, noted that it had considered the additional medical evidence submitted by the plaintiff but found it not to be new or material inasmuch as it does not pertain to the period between April 15, 1989 and the end of June 1989. Record p. 4.

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g); *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).

There is no dispute that the plaintiff presently suffers from numerous impairments, including degenerative arthritis of the thoracic spine and major depression. Record p. 14. The controversy in this case, however, centers around a narrow time frame in which the plaintiff must prove he became disabled to receive disability benefits. *Id.* The plaintiff maintains that his disability did not begin until April 15, 1989. *Id.* at 59. His wage earning records indicate that he met the disability insured status requirements of the Social Security Act only through the end of June 1989. *Id.* at 78. Thus, the plaintiff must prove that he became disabled between April 15 and June 30, 1989 to be entitled to disability benefits.

Focusing on this narrow window of time, the plaintiff asserts a plethora of arguments why the Administrative Law Judge erred in this case. Although a number of these claims are specious, I will address each one of them in turn, as well as a number of salient issues not thoroughly addressed by the plaintiff.<sup>3</sup>

### **Failure to Consider Evidence**

The plaintiff claims that the Administrative Law Judge failed to consider medical evidence

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<sup>3</sup> I must note that the plaintiff has not aided this court in its task of reviewing the Secretary's decision. In an eighteen page brief, while asserting eight distinct claims, the plaintiff only mentions one case from the United States Court of Appeals for the First Circuit, notably miscited. More importantly, though attacking the Administrative Law Judge's consideration of the subjective complaints of pain, the plaintiff does not even mention *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986), the seminal case setting forth the analysis this court must follow.

of his back injury, his testimony of pain, the testimony of his wife and the opinion of his treating physician. The Administrative Law Judge concluded that the medical evidence demonstrated that the plaintiff was suffering only from minimal degenerative arthritis of the toes at the expiration of his insured status. Finding 3, Record p. 17; Record p. 15. He found that the plaintiff had suffered from a history of bilateral carpal tunnel syndrome and mild spasming of the thoracic spine prior to the expiration of his insured status, but concluded both had resolved by April 1989. Finding 3, Record p. 17; Record p. 15 ("While he did have some transient symptoms in his hands, back, and feet prior to the date he last met the disability insured status requirements, the record discloses that these were acute symptoms only, and that they resolved with treatment.")

Regardless of the seriousness of his present condition, the plaintiff is not entitled to disability benefits unless he can adequately demonstrate that his disability existed prior to the expiration of his insured status.<sup>4</sup> *Cruz Rivera v. Secretary of Health & Human Servs.*, 818 F.2d 96, 97 (1st Cir. 1986), *cert. denied*, 479 U.S. 1042 (1987); *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 79 (1st Cir. 1982). Evidence of an impairment that reached a disabling level of severity after the last insured date, or that was exacerbated after this date, cannot be the basis for a disability determination, even though the impairment may have had its roots prior to the date on which insured status expired. *Deblois*, 686 F.2d at 79; *Manzo v. Sullivan*, 784 F. Supp. 1152, 1156 (D.N.J. 1991); *Flint v. Sullivan*, 743 F. Supp. 777, 783 (D. Kan. 1990), *aff'd*, 951 F.2d 264 (10th Cir. 1991). Moreover, the existence of a disability prior to the expiration of insured status must be established by adequate medical evidence. *Manzo*, 784 F. Supp. at 1156-57; *Flint*, 743 F. Supp. at 782; *see also* Social Security Ruling 85-28, reprinted in *West's Social Security Reporting Service*, at

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<sup>4</sup> Despite the narrow time frame involved in this case, the burden-shifting framework of the sequential evaluation process still applies. That is, the plaintiff has the burden of showing that he suffered from a severe impairment during the crucial 1989 period that either meets or equals any in the Listings or prevented him from performing his past relevant work. If he makes it through Step Four, the plaintiff has satisfied his overall burden of proving that he was disabled during the relevant 1989 period unless the Secretary can provide positive evidence of work existing in significant numbers that the plaintiff could have performed at that time.

393 (1992). "Plaintiff cannot sustain [his] burden of proof merely by means of conclusory, self-serving testimony that [he] was disabled at the crucial time." *Manzo*, 784 F. Supp. at 1157.

The plaintiff claims that the Administrative Law Judge disregarded medical evidence indicating that his present back condition existed during his insured status. This is incorrect. The Administrative Law Judge considered this evidence, but concluded that the muscle spasming that had occurred in 1989 had resolved prior to the expiration of the plaintiff's insured status. Record p. 15; Finding 3, Record p. 17. The medical evidence adequately supports the Administrative Law Judge's determination that the plaintiff's back condition did not reach disabling severity until long after the expiration of his insured status. First, the medical notes from a follow-up visit on April 17, 1989 indicate that his back muscle spasms had "resolved." Record p. 204. In addition, x-rays taken of the plaintiff's thoracic spine in March 1989 were negative, Record p. 210; there was a fifteen month interval between his last treatment during insured status and his next treatment for back pain, *see* Plaintiff's Statement of Specific Errors at 3; and in July 1991 he described his lower back pain as a "new condition," Record p. 121. Finally, the plaintiff did not start receiving treatment for chronic thoracic spine pain until February 1992. *Id.* at 169. I conclude that the medical records provide substantial evidence to support the Administrative Law Judge's conclusion that the plaintiff's current back condition is unrelated to that which existed prior to the expiration of his insured status. *See Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991).

The plaintiff next contends that the Administrative Law Judge erred in failing to consider his testimony as to the pain he has experienced over the years when determining when his disability commenced. Although the Administrative Law Judge did err in his consideration of pain by failing to conduct an *Avery* analysis, to be discussed later, he did not err for the reasons set forth by the plaintiff. The existence of a disability prior to the expiration of insured status must be established by adequate medical evidence. The plaintiff's allegations of pain, without adequate medical

evidence, cannot be the basis for establishing that he was disabled at the crucial time. *See Manzo*, 784 F. Supp. at 1156-57; *Flint*, 743 F. Supp. at 782; 20 C.F.R. 404.1529(b). Moreover, contrary to the plaintiff's assertions, the Administrative Law Judge's opinion indicates that he did consider the plaintiff's allegations of pain. Record p. 15. As he noted, however, the plaintiff's testimony related to his presently experienced pain, and not to his functional limitations prior to the end of his insured status. *Id.* at 15-16.<sup>5</sup> Thus, the plaintiff's hearing testimony was virtually irrelevant to the determination the Administrative Law Judge was required to make.<sup>6</sup>

The plaintiff also contends that the Administrative Law Judge erred in failing to consider his wife's testimony when determining when his disability commenced. Again, the wife's testimony as to the plaintiff's pain and personality changes does not constitute medical evidence upon which a determination of disability prior to the expiration of insured status could be based. Moreover, I note that the wife's testimony was little more than a page in length and merely corroborated the plaintiff's testimony. *Id.* at 51-52.

Finally, the plaintiff claims that the Administrative Law Judge erred by ignoring conclusions reached by his treating physician when deciding that his current back problems did not reach disabling severity prior to his last insured date. First, the Administrative Law Judge did not "ignore" the physician's conclusion, as suggested by the plaintiff, but rather determined that those conclusions were insufficient to support a finding that the plaintiff's back constituted a disability prior to the date he last met insured status. *See* Record p. 15. The medical findings cited by the plaintiff were made in late February and March of 1992. *See* Plaintiff's Statement of Specific Errors at 10. They do not provide adequate medical evidence for establishing that he was disabled at

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<sup>5</sup> The plaintiff asserts that the entire hearing testimony relates to the crucial time period because it was sandwiched between two questions referring to 1989. *See* Plaintiff's Statement of Errors at 6-7. This is a mischaracterization of the testimony. A review of the hearing transcript reveals that the plaintiff's testimony relates primarily to his present condition. The two questions referred to by the plaintiff were isolated questions specifically relating to the 1989 period. *See* Record pp. 27, 52.

<sup>6</sup> This fact creates another problem that will be addressed later.

the crucial time in 1989. The only medical reference to an earlier time period in these 1992 reports is the physician's notation to "very old dysfunctioning" in the plaintiff's back. Record p. 169. This statement is extremely vague and does not provide adequate medical evidence to establish that the plaintiff's back reached disabling severity during the crucial two-and-a-half month period in 1989.

### **Substantial Gainful Activity**

The plaintiff alleges that the Administrative Law Judge misstated the evidence when concluding that the record is unclear whether he engaged in gainful activity subsequent to the alleged date his disability began. This point is moot. Though concluding that the evidence was insufficient to determine whether the plaintiff was engaging in gainful activity after April 15, 1989, a Step One inquiry, the Administrative Law Judge nevertheless proceeded all the way to Step Five in the sequential evaluation process. Record p. 16. Thus, despite his specific finding as to gainful activity, the Administrative Law Judge, "[g]iving [the plaintiff] the benefit of virtually every doubt," implicitly determined that he had not engaged in substantial gainful activity after the alleged onset of his disability when at Step Four he found that the plaintiff was incapable of performing his past relevant work. *Id.*

### **Combined Effects of Impairments**

The plaintiff contends that the Administrative Law Judge erred in failing to consider the combined effects of the plaintiff's impairments. This allegation is without merit. The Administrative Law Judge concluded that the only impairment or combination of impairments existing prior to the date the plaintiff last met insured status was minimal degenerative arthritis of the toes. Record p. 15; Finding 3, Record p. 17. The Administrative Law Judge noted that prior to the date the plaintiff last met insured status, he did have some "transient symptoms" in his hands,

feet and back, but these were "acute symptoms only" that had resolved with treatment. Record p. 15. The medical record supports the conclusion that the other symptoms the plaintiff had experienced during the relevant 1989 period, either separately or combined, did not constitute an impairment at that time. *See* 42 U.S.C. 423(d)(2)(b).

For instance, the medical record indicates that the plaintiff's carpal tunnel syndrome had resolved in 1985 with surgical intervention. Record p. 112. There is no medical evidence that the plaintiff suffered from any impairment stemming from carpal tunnel syndrome during the relevant 1989 period. Additionally, although the plaintiff complained of left ankle pain during the relevant 1989 period arising from the residuals of a 1970 ankle fracture, there is no medical evidence indicating that he experienced any disabling effects from his ankle during this period. *Id.* at 198, 200, 206. Indeed, x-rays taken in May 1988 indicated that the left ankle was normal. *Id.* 221. Finally, as discussed previously, the medical records support the conclusion that the back spasms that had developed during the 1989 period had resolved prior to the expiration of insured status. Based on this medical evidence, the Administrative Law Judge was permitted to draw the conclusion that the plaintiff was not suffering from an impairment or combination of impairments during the brief 1989 period in question except for degenerative arthritis in his toes. *See Irlanda Ortiz*, 955 F.2d at 769.

### **New Evidence Before the Appeals Council**

As his next assigned error, the plaintiff contends that the Appeals Council erred in failing to consider a Veterans Administration disability determination submitted as new evidence on a request for review. This evidence consists of medical records generated in 1992. Record pp. 227-43. Because these medical records do not relate to the crucial 1989 time period, the Appeals Council was not required to consider them. 20 C.F.R. 404.970(b).

## **Consultative Psychological Examination**

Finally, the plaintiff argues that the Administrative Law Judge erred in not ordering a consultative psychiatric or psychological examination as requested by his counsel. This argument is also without merit. As the plaintiff conceded at oral argument, there is no medical evidence that the plaintiff was suffering from a mental impairment during the relevant 1989 period. The plaintiff was first diagnosed with depression in August 1991. Record p. 173. Consequently, given the absence of any medical evidence that the plaintiff was suffering from a mental impairment at the time his insured status expired, the Administrative Law Judge did not err by refusing to order a consultative psychological examination.

## **Other Issues**

As indicated by his formal findings and the text of his opinion, the Administrative Law Judge concluded that the only impairment the plaintiff had during the relevant time period that did not resolve by the end of June 1989 was minimal degenerative arthritis of the toes bilaterally. Finding 3, Record p. 17; Record p. 15. This conclusion, as previously discussed, is supported by substantial evidence in the medical record. The Administrative Law Judge also determined that the plaintiff's toe impairments precluded him from performing his past relevant work during the crucial time period. Finding 10, Record p. 18; Record p. 16. Because the Administrative Law Judge determined that the plaintiff was not capable of performing his past work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting his ability to perform other work during the brief 1989 period in

question. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health and Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

After reviewing the evidence in the record as a whole, *Rodriguez*, 647 F.2d at 222, I conclude that the Administrative Law Judge's Step Five determination is not supported by substantial evidence. Although not thoroughly addressed by the plaintiff, I find that the Administrative Law Judge committed two errors at Step Five that undermine the basis for his decision. First, the Administrative Law Judge erroneously determined that the plaintiff retained the residual functional capacity to perform light and sedentary work during the relevant 1989 period. Finding 9, Record p. 17. Specifically, the Administrative Law Judge stated that he could find no basis in the record for concluding that the plaintiff lacked the residual functional capacity to perform light and sedentary work. Record p. 16. However, notwithstanding the lack of medical evidence to the contrary, the Secretary has the burden at Step Five to provide *positive evidence* regarding the plaintiff's ability to perform light or sedentary work. There is none in this record. The Secretary never obtained a written residual functional capacity assessment of the plaintiff. Neither a medical expert nor a vocational expert testified as to the plaintiff's residual functional capacity. Moreover, the plaintiff's testimony related solely to his present functional limitations, not his limitations during the crucial 1989 period. Consequently, in the absence of any affirmative evidence indicating the plaintiff's ability to perform light and sedentary work during the relevant 1989 period, I cannot conclude that the residual functional capacity determination is supported by substantial evidence.

Second, the Administrative Law Judge did not properly evaluate the plaintiff's allegations of pain at Step Five. The medical record indicates that the plaintiff experienced pain in his toes during the crucial time period. Record p. 200. Because the Administrative Law Judge determined that the plaintiff suffered from degenerative arthritis of the toes during the relevant 1989 period, at Step Five he was required to evaluate the effect of this pain on the plaintiff's residual functional capacity.

*Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 23 (1st Cir. 1986); Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 655 (1992). This he did not do. The Administrative Law Judge commented that the plaintiff's testimony provided very little evidence that he was subject to functional limitations from pain prior to the close of June 1989. Record p. 16. While this is true, it is because the plaintiff's testimony related primarily to his present condition. *Id.* at 15. The Administrative Law Judge, however, had a responsibility to develop the record and inquire about the pain the plaintiff experienced in his toes during the relevant time period. *Avery*, 797 F.2d at 23; Social Security Ruling 88-13 at 654-55; *see also Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991). The Administrative Law Judge could not rely on a lack of objective evidence to support a decision that the plaintiff was capable of light and sedentary work during the relevant 1989 period despite the complaints of pain in his toes. *Avery*, 797 F.2d at 22-23. Consequently, because the Administrative Law Judge failed to evaluate the plaintiff's complaints of pain stemming from the degenerative arthritis in his toes, the Step Five determination is not supported by substantial evidence.

## Conclusion

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **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 4th day of November, 1993.***

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