

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SABINA A. WALSH,)	
)	
Plaintiff)	
)	
v.)	Civil No. 93-79-P-H
)	
DONNA E. SHALALA,)	
Secretary of Health)	
and Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION ¹

This Social Security Supplemental Security Income and Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff is capable of performing a wide range of sedentary work available in the national economy. The plaintiff claims that the Secretary erred in determining that she is not disabled in light of the uncontroverted testimony of the vocational expert that there are "few if any" jobs that she can perform given her hearing and speech impairments.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520, 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

¹ This action is properly brought under 42 U.S.C. 405(g) and 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 26, 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 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.

gainful activity since October 1, 1990 and met disability insured status requirements as of that date, Findings 1-2, Record p. 18; that she has a hearing impairment and articulation disorder but that she does not have an impairment or combination of impairments which meets or equals any listed in Appendix 1 to Subpart P, 20 C.F.R. 404 (the "Listings"), Finding 3, Record p. 18; that her "assertions concerning her impairments and their impact on her ability to work are not entirely credible in light of the degree of treatment needed, discrepancies between the claimant's assertions and information contained in the written reports, and the claimant's own description of her activities," Finding 4, Record 18; that she is unable to perform her past relevant work, Finding 6, Record p. 18; that her residual functional capacity for performing the full range of sedentary work is reduced by "her inability to work in environments in which there is a great deal of background noise or in situations in which she is required to communicate a great deal with other individuals," Finding 7, Record p. 18; that, based on an exertional capacity for sedentary work, her age (34), education (high school and three years of college) and vocational background (semi-skilled), application of Rules 201.27, 201.28 and 201.29 of Appendix 2, Subpart P, 20 C.F.R. 404 (the "Grid"), would direct a finding that she is not disabled, Findings 8-11, Record p. 18-19; that, although her non-exertional limitations do not allow her to perform the full range of sedentary work, there are a significant number of jobs in the national economy which she could perform, Finding 12, Record p. 19; and that she is therefore not disabled, Finding 13, Record p. 19. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the Secretary. 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 Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g), 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).

Because the Secretary determined that the plaintiff is not capable of performing her past relevant 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), 416.920(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 her ability to perform other work. *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).

The plaintiff, a thirty-four year old college student, has suffered from a severe hearing impairment since she was a young child. Record pp. 15, 182. She also developed an articulation and voice disorder secondary to the hearing impairment. *Id.* at 220. In recent years, she has held a number of summer, part-time and work-study jobs but nothing of extended duration. *Id.* at 50, 134, 140. Her last full-time job terminated in June 1985. *Id.* at 134.

The plaintiff relies on hearing aids for both ears to help correct her impairment. *Id.* at 33, 48. Despite use of the hearing aids, she still has significant trouble hearing conversations and must lip-read to fully understand what is being said. Record p. 46. The plaintiff's lip-reading skills are "very good." *Id.* at 183. Because of her need to supplement her hearing with lip-reading, however, the plaintiff cannot fully understand what is being said to her if she cannot see the face of the person speaking. *Id.* at 45-46. If there is a significant amount of background noise, she is also unable to hear a particular speaker. *Id.* at 33-34, 45-46. While employed as a day care worker, she could not hear a smoke alarm go off because she is unable to discern high-pitched noises. *Id.* at 51-52.

At school, the plaintiff requires a note taker for her classes and also uses an auditory trainer. *Id.* at 40, 48-49. An auditory trainer is a microphone that is attached directly to the plaintiff's

hearing aids. *Id.* at 49. The individual speaks into the microphone, helping the plaintiff to hear better. *Id.* The plaintiff tried to use this device at work once, but it did not work well because there were too many people speaking and other people did not want to try it. *Id.*

In addition to her hearing impairment, the plaintiff's speech disorder further hampers her ability to communicate with others. *See Id.* at 33. Beginning in January 1988, the plaintiff enrolled in a speech therapy program. *Id.* at 182. At that time, she was noted as having significant weaknesses in her articulation abilities. *Id.* at 182-85. Over the course of the therapy, she made slow but steady progress towards improved articulation. *Id.* at 165. She was discharged from speech therapy on September 6, 1991 after having made moderate gains in the development of her articulation and voice skills but having reached a plateau in her progress. *Id.* at 221-22.

Despite the speech therapy, it is apparently difficult for others to understand the plaintiff, as evidenced by the frequent notations in the hearing transcript where the court reporter could not understand what the plaintiff was saying. *See, e.g.,* Record pp. 34, 38. Indeed, both reviewers at the Social Security Administration who interviewed the plaintiff when she filed her Disability Report and Reconsideration Disability Report specifically noted that her speech was difficult to understand. *Id.* at 133, 148. The plaintiff's speech therapist estimated that the average listener would need repetition and/or clarification about five to ten times in a one hour conversation. *Id.* at 168. One of the reviewers at the Social Security Administration noted that the plaintiff was "understandable if I made an effort to listen to her." *Id.* at 148. The plaintiff testified that she experienced difficulty in work environments due to her problems with communicating with others. *Id.* at 33, 45. To enhance her ability to communicate with others, she utilizes some functional sign language with finger spelling. *Id.* at 168.

At the administrative hearing, E. Charles Kunkle, M.D., a medical advisor (neurologist), testified that the plaintiff's problem with background noise is consistent with the objective medical evidence and represents a limitation in her residual functional capacity. *Id.* at 68. Dr. Kunkle

opined that due to her hearing impairments the plaintiff would require a quiet work environment with little background noise. *Id.* at 68-69. Further, because of her speech disorder, the plaintiff would need co-workers and supervisors who would be willing ``to put out the effort to speak to her both clearly and . . . to listen closely to what she has to say" *Id.* at 69.

A vocational expert, Diane Herrle, testified that given the plaintiff's hearing and communication limitations there are ``few if any" jobs that the plaintiff could perform. Record p. 73.

Q [ALJ] Now consider this hypothetical, this nature, where you have an individual that's 33 years of age who has completed three years of college. She is restricted to sedentary type activities. Further there are environmental concerns which require that the person be employed in a situation in which there is limited -- very extremely limited background noise in, in the environment and which her ability to both communicate and receive communications is limited. Are there any -- first of all let me ask you, could she return to any of the previous jobs that she held given those limitations?

A [VE] Well, perhaps the first one that, that comes to mind is, is the library aide job -- position. If she would be working away from dealing with people on an ongoing basis which would require communication. If she could find a job such as the typist or data entry.

Q [ALJ] Okay. The typist and data entry. Now supposing she -- give me the hypothet [sic], what type of jobs would be, would be available to a person given the precise factors that I enumerated above, the age, the education, restrictions, particularly as to the environmental conditions as to the quiet background environment, limited ability and necessity of communicating and being communicated with. What types of jobs would be available to a person of that --

A [VE] In preparation I looked at the, at the Dictionary of Occupational Titles and to the census code. Looked at -- if, if a person with limited ability to communicate, that would mean that they would be limited in their dealings with people. And I factored that in and I found that the base of sedentary jobs would be reduced by 20 percent by that factor alone, the inability to, to communicate with others. Then the next factor that I communicated in was

working around hazardous situations. If you have inability to hear in a noisy situation --

Q [ALJ] Dangerous machinery, etc.

A [VE] -- dangerous machinery, etc., then that reduced the, the base by -- the two combined by 51 percent. And then if you factor in noisy backgrounds that would further reduce the base of sedentary jobs to -- I don't have an exact figure but there would be in my, in my opinion there would be few if any jobs that this person could do.

Q [ALJ] Nothing -- in your opinion there would be nothing available regionally or, or nationally of the type of work that she could do?

A [VE] For sedentary work away from people, away from background noise, and with an inability to communicate, there might be some, but they would be very few.

Id. 71-73.

Despite the testimony of the vocational expert, the Administrative Law Judge nevertheless concluded that the plaintiff "is capable of making a successful adjustment to other work which exists in significant numbers in the national economy." *Id.* at 13. Specifically, the Administrative Law Judge ruled as follows:

Ms. Walsh cannot work in environments in which there is a great deal of background noise or in which she is required to communicate constantly with other individuals. Ms. Herrle, the vocational expert, testified that Ms. Walsh's reduced ability to communicate narrows the range of available jobs by approximately 51 percent. However, she pointed out that the claimant is able to work in positions such as library aide, typist, and data entry clerk. As such jobs exist in significant numbers in the national economy, a finding will be reached within the framework of the [Grid] that Ms. Walsh is capable of making a successful adjustment to work which exists in significant numbers in [the] national economy.

Id. at 15-16.

It appears that the Administrative Law Judge misunderstood the vocational expert's testimony. The vocational expert specifically testified that given the plaintiff's vocational

limitations with respect to noisy situations and a limited ability to communicate there were very few jobs she could perform. Record p. 73. The Administrative Law Judge reports that "the vocational expert[] testified that Ms. Walsh's *reduced ability to communicate* narrows the range of available jobs by approximately 51 percent." *Id.* at 16 (emphasis added). This simply is incorrect. Rather, the vocational expert testified that a limited ability to communicate with others reduced the number of available sedentary jobs by only twenty percent. *Id.* at 72. Combined with the avoidance of hazardous working situations, arising from her need to avoid noisy situations, the number of available jobs was then reduced to fifty-one percent, as reported by the Administrative Law Judge. *Id.* Finally, factoring in the plaintiff's need to avoid "noisy backgrounds," again arising from her need to avoid noisy situations, the number of available jobs was "few if any." *Id.* at 72-73. Summarizing her testimony, the vocational expert stated that "[f]or sedentary work away from people, away from background noise, and with an inability to communicate, there might be some [jobs], but they would be very few." *Id.* at 73.

At Step Five of the sequential evaluation process, the burden is on the Secretary to show there are jobs in the national economy that the plaintiff can perform. *Rosado*, 807 F.2d at 294. Under the regulatory scheme, work exists in the economy when there is a "significant number of jobs" having requirements which the claimant is able to meet with her physical abilities and vocational qualifications. 20 C.F.R. 404.1566(b), 416.966(b). Thus, for the Secretary to sustain her burden at Step Five the record must contain positive evidence of the existence of a significant number of jobs that the plaintiff could perform. *Rosado*, 807 F.2d at 294; *Lugo*, 794 F.2d at 16.

In light of the vocational expert's uncontroverted testimony as to the lack of available jobs for the plaintiff, the record is devoid of any evidence of a significant number of jobs that she could perform. The testimony of the vocational expert is seemingly unequivocal -- there are "few if any" jobs which this plaintiff can perform given her particular aural and speech limitations. By citing to the fifty-one percent figure in his written opinion, it seems most likely that the Administrative Law

Judge intended to adopt the vocational expert's testimony in its entirety, but failed to do so by not accurately reflecting her complete testimony.

Nevertheless, at oral argument, the Secretary asserted that the vocational expert's initial response to the hypothetical -- that the plaintiff might be able to work as a library aide, typist or data entry clerk -- supported the Administrative Law Judge's determination that she could perform such jobs. For a number of reasons, however, this reliance is misplaced. First, the vocational expert's initial statements regarding the library aide, typist and data entry positions were in response to the Administrative Law Judge's question whether the plaintiff could return to any of her previous jobs given her non-exertional limitations. In his findings, however, the Administrative Law Judge specifically held that the plaintiff was unable to perform her past relevant work, which includes library aide and typist work. *See* Record pp. 15, 134-35, 140. Accordingly, the Secretary is precluded from relying on the vocational expert's testimony about previous work to support the Administrative Law Judge's determination as to work the plaintiff can still perform.²

Second, the Administrative Law Judge apparently credited the vocational expert's statements that the plaintiff might be able to return to her previous job as a library aide "*if she would be working away from dealing with people*" as an affirmation that the plaintiff could perform such a job, as well as typist and data entry positions. Record p. 16, 72 (emphasis added). This testimony is ambiguous at best. Read in context, it appears that the vocational expert was only remarking that *if* the plaintiff could find such a library aide job she might be able to perform it. That is, the plaintiff could perform some of the types of jobs she held in the past, such as library

² The Secretary conceded at oral argument that the determination that the plaintiff could work as a library aide was precluded by the Administrative Law Judge's finding that she was unable to perform her past relevant work. However, the Secretary asserted that the plaintiff still has the functional ability to perform typist or data entry work. In support of this position, the Secretary referred the court to the definitions of typist and data entry clerk in the Department of Labor's Dictionary of Occupational Titles. These definitions do nothing to change the result reached here. Even assuming the plaintiff is capable of performing the functional requirements for these jobs, the record contains no positive evidence that such jobs exist in significant numbers in the economy, nor does the Dictionary of Occupational Titles indicate how many such jobs are available.

aide or typist, if there would be no need for her to communicate with others in those positions. Thus, the vocational expert's reference to the plaintiff's ability to work in her past positions was qualified by the expert's statement that she would have to be "working away from dealing with people" to perform such a job. However, there is no evidence that library aide, typist or data entry positions do not involve a need to communicate with others. Moreover, there is no positive evidence in the record that library aide, typist or data entry positions that would accommodate the plaintiff's limitations even exist, let alone exist in significant numbers. To the contrary, without mentioning any of these jobs, the vocational expert just moments later testified that there are virtually no jobs that would meet the plaintiff's special requirements.³

Thus, because it appears that the Administrative Law Judge's opinion was based on a misreading of the vocational expert's testimony, I cannot conclude that his determination that the plaintiff can perform a significant number of jobs in the national economy is supported by substantial, positive evidence in the record. Accordingly, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.⁴

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

³ Moreover, even if the vocational expert's comments regarding library aide, typist and data entry positions were intended as an assertion that the plaintiff could perform such jobs generally, such statements would not constitute substantial evidence to satisfy the Secretary's burden at Step Five. As noted in footnote 2, the record contains no positive evidence that such jobs exist in significant numbers in the economy, contrary to the specific finding of the Administrative Law Judge. See Finding 12, Record p. 19 ("These jobs [library aide, typist and data entry clerk] exist in significant numbers in the national economy.")

⁴ The plaintiff has asserted that this court, instead of vacating the Secretary's decision, should direct the Secretary to make benefit payments. "Where the record overwhelmingly supports a disability finding and remand would merely delay the receipt of benefits to which the plaintiff is entitled, reversal is appropriate." *Thompson v. Sullivan*, 957 F.2d 611, 614 (8th Cir. 1992). However, given the confusion surrounding the vocational expert's testimony, I cannot conclude that this record is sufficiently clear for me to find that the plaintiff is entitled to benefits. Cf. *Suarez v. Secretary of Health & Human Servs.*, 740 F.2d 1, 2 (1st Cir. 1984).

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 1st day of November, 1993.

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