

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BARBARA M. COX,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Civil No. 96-42-P-C</i>
)	
SHIRLEY S. CHATER,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises the issue of whether the Commissioner properly determined that the plaintiff was not suffering from a severe impairment or combination of impairments as of her date last insured. The Administrative Law Judge made this determination notwithstanding a diagnosis, made several years after that date, of recurrent major depression and personality disorder. I recommend that the court affirm the decision of the Commissioner.

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 had not engaged in substantial gainful activity since March 30, 1989, Finding 2, Record p. 16; but that, as of March 31, 1989, the

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 26, 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. Oral argument was held before me on December 9, 1996 pursuant to Local Rule 26(b) 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.

date she last enjoyed insured status under the SSD program, she suffered from no serious impairment, Findings 3 and 5, Record p. 17, and therefore, the plaintiff was not under a disability at any time prior to the date her insured status expired, Finding 6, Record p. 17. The Appeals Council declined to review the decision, Record pp. 4-5, making it 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 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).

The Administrative Law Judge heard testimony from the plaintiff that she first began suffering from symptoms of depression in 1986. Record, pp. 407-08. However, the first medical evidence concerning the plaintiff's mental health is the report of George K. Dreher, M.D., who conducted a psychiatric evaluation of the plaintiff in June 1991. *Id.* at 86-90. He diagnosed a "[p]ossible major depressive episode" without comment as to its date of onset, although he noted the plaintiff "does not seem to have a consistent picture of depression." *Id.* at 90. Nearly four years later, in March 1995, clinical psychologist Frank Luongo evaluated the plaintiff and diagnosed recurrent major depression and personality disorder. *Id.* at 328. Luongo's report also does not attempt to pinpoint the onset date of the mental disorders.

The plaintiff was treated at Maine Medical Center in July 1989 for gynecological problems.

Id. at 300-03. The treating physician noted the plaintiff's denial of a variety of symptoms, including "psychologic" ones. *Id.* at 303.

Three other pieces of evidence considered by the Administrative Law Judge speak to the issue of onset date. One is a letter from psychologist Melvyn Attfield, who treated Cox's husband. *Id.* at 361. Attfield noted that the plaintiff accompanied her husband to at least two therapy sessions prior to March 31, 1989. *Id.* Attfield stated that he had "no detailed information about [the plaintiff's] demeanor on those occasions," but that every time he has seen the plaintiff (i.e., both before and after her date last insured) "[h]er demeanor has always been dysphoric, her conversation clipped and her affect flat and frequently nihilistic." *Id.* He referred to a "nihilistic outlook" as an "overt sign[] of depression." *Id.* Luongo, after reviewing Attfield's letter and conducting a further interview with the plaintiff, submitted an addendum to his evaluation in July 1995 and opined that "her ability to engage in any gainful activity essentially ceased at the end of 1988" when she left her most recent job, at a department store. *Id.* at 362. Finally, the plaintiff's husband submitted an affidavit stating that the plaintiff has appeared to be depressed since at least early 1988, but that because of the couple's financial situation she resisted his entreaties to seek treatment until she began to talk of suicide in 1991. *Id.* at 369-71.

Regardless of the seriousness of the plaintiff's condition at the time of the Administrative Law Judge's decision, the plaintiff is not entitled to disability benefits unless her disability existed prior to the expiration of her insured status. *Cruz Rivera v. Secretary of Health & Human Servs.*, 818 F.2d 96, 97 (1st Cir. 1986), *cert. denied*, 479 U.S. 1042 (1987). Evidence of an impairment that reached a disabling level of severity after the date last insured, 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 v. Secretary of Health & Human Servs.*, 686 F.2d 76, 79 (1st Cir. 1982).

There are, however, cases in which medical evidence generated after the date last insured permits the Commissioner to infer that the onset of the disability occurred before the critical date. Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* (1992) at 49, 51. The plaintiff relies on the principles set out in Ruling 83-20 to contend that the court should vacate the denial of benefits to her. Specifically, she takes the position that the Administrative Law Judge was obliged to accept her testimony as to the onset of her mental impairments in light of the medical evidence which she contends corroborates her assertion. Ruling 83-20 does indeed advise that, in determining the onset date of a disability with non-traumatic origins, “the date alleged by the individual should be used if it is consistent with all the evidence available.” *Id.* at 51. “However, the established onset date must be fixed based on the facts and can never be inconsistent with the medical evidence of record.” *Id.*

In cases where the Administrative Law Judge must infer the date of onset, it is necessary to call upon the services of a medical expert. *Id.* The Administrative Law Judge did so here, continuing the hearing for several weeks so that he could secure the advice and testimony of Carlyle Voss, M.D., a psychiatrist. After questioning the plaintiff himself, Voss testified that she “has long-standing problems with a lot of anxiety around others,” that she “probably fits the diagnostic criteria of having a social phobia,” that he would “readily accept that she’s had the difficulties” to which she testified, but that he could not “say with certainty” that such impairments existed in March 1989 at

a level that meets or equals any of the Listings.² Record pp. 428-29. The reference to the Listings notwithstanding, it is apparent from the context that Voss was making this point: Even assuming that the plaintiff's impairments were disabling as of the date of the hearing, and that their onset antedated the end of her insured status, her condition had not reached a disabling level of severity as of her date last insured. Given that the judgment as to the disability onset date "must have a legitimate medical basis," Ruling 83-20 at 51, the Administrative Law Judge correctly determined, based on the medical evidence of record (as interpreted by the medical advisor), that the onset date of the plaintiff's mental impairments could not be traced back to her date last insured in 1989.

In arguing to the contrary, the plaintiff relies on two recent circuit court cases, *Bailey v. Chater*, 68 F.3d 75 (4th Cir. 1995), and *Jones v. Chater*, 65 F.3d 102 (8th Cir. 1995). *Bailey* simply stands for the proposition that, when evidence regarding the onset date is "ambiguous," Ruling 83-20 requires the Administrative Law Judge to consult a medical advisor. *Bailey*, 68 F.3d at 79. The issue in *Jones* was "whether retrospective medical diagnoses uncorroborated by contemporaneous medical reports but corroborated by lay evidence relating back to the claimed period of disability can support a finding of past impairment." *Jones*, 65 F.3d at 103. The Eighth Circuit answered that question in the affirmative, and therefore determined that an Administrative Law Judge erred by failing to consider both "provocative medical diagnoses suggesting an impairment during the insured period" and potentially corroborating evidence proffered by members of the claimant's family. *Id.* at 104.

Jones is distinguishable. At issue there was whether the claimant suffered from Post-

² The Listings appear as Appendix 1 to Subpart P, 20 C.F.R. § 404, and apply only after there is a determination that the claimant has a severe impairment or combination of impairments. 20 C.F.R. § 404.1520(c) and (d).

Traumatic Stress Disorder (“PTSD”) as of his date last insured in 1975. *Id.* at 103. The court noted that PTSD did not even gain recognition as a legitimate mental impairment until approximately four years after that date. *Id.* Three mental health professionals examined the claimant after he sought treatment in 1991, and all three suggested that the claimant’s PTSD was triggered by military service that ended in 1968 and, therefore, that the impairment was present prior to the end of his SSD coverage. *Id.* Thus, there was no medical evidence in the record suggesting that the plaintiff in *Jones* did *not* suffer from PTSD when last insured.

In the instant case, the most plaintiff-favorable gloss that can be placed on the medical evidence of record is that it is conflicting on the issue of onset date. The Dreher evaluation -- closest in time to the expiration of the plaintiff’s coverage -- explicitly declines to diagnose a consistent depressive state that ranged beyond the episode of suicidal ideation in 1991. Assuming that the psychologist who treated the plaintiff’s husband can properly render a medical opinion based on the impressions he gained thereby about the plaintiff, Attfield’s comments are imprecise as to whether his observations antedated the end of the plaintiff’s insured status. And Luongo -- who only expressed a retrospective opinion when asked to do so in connection with this proceeding -- did not explicitly diagnose depression as of the expiration date, but observed only that “her period of disability became settled and fixed” and “her ability to engaged in any gainful activity essentially ceased” as of December 1988. Record p. 362. The resolution of conflicts in the medical evidence is within the province of the Administrative Law Judge. 20 C.F.R. § 404.1527(c)(2); *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987). And, concerning Luongo’s expressed views about the ultimate issues in the case, it suffices to say that the Commissioner is not bound by a medical source’s statement that a claimant is “disabled” and will

accord no “special significance” to such a source’s views on a claimant’s residual functional capacity for work. 20 C.F.R. § 404.1527(e). Thus, where the retrospective diagnosis in *Jones* stood uncontroverted, in circumstances suggesting that the only possible diagnosis would be a retrospective one, and the Administrative Law Judge improperly ignored both these diagnoses and corroborating lay evidence, here the Administrative Law Judge was within his authority (having availed himself, as required, of a medical advisor) in resolving conflicting medical evidence against the claimant. Since Ruling 83-20 requires inferences of disability onset dates to be grounded in the medical evidence, the Administrative Law Judge did not err in failing to evaluate the affidavit of the claimant’s husband.

The plaintiff makes much of the Administrative Law Judge’s references, in his colloquy with the medical advisor, to a lack of “hard evidence” concerning the existence of mental impairment as of the plaintiff’s date last insured. Record p. 428. The Administrative Law Judge asked the medical advisor, “Is there any way that you can suggest I can get hard evidence that would either tell us one way or the other on what her condition was in ‘89?,” a question that was answered in the negative. *Id.* The plaintiff correctly notes that “hard evidence” is not the applicable standard. But the court is empowered to review only final decisions of the Commissioner. 42 U.S.C. § 405(g). Whatever the Administrative Law Judge said at the hearing, his written decision applies the correct standard for determining the plaintiff’s disability onset date. Moreover, as counsel for the Commissioner pointed out at oral argument, the references to “hard evidence” can be understood as allusions to the statutory requirement of “medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques” that corroborate any assertions by a claimant as to her disabling symptoms. 42 U.S.C. § 423(d)(5)(A).

Finally, I reject the plaintiff's contention that the Administrative Law Judge "cut off the hearing" and refused to allow the medical advisor to discuss fully the issue of disability onset once it was established that the record contains no "hard evidence." Plaintiff's Statement of Errors (Docket No. 5) at 3. It is plain from the hearing transcript that the Administrative Law Judge permitted the medical advisor to testify fully about his views concerning disability onset. Nor is there any basis for a determination that the Administrative Law Judge did not permit counsel for the plaintiff to question the medical advisor fully on this subject, notwithstanding the plaintiff's assertion to that effect at oral argument. Although the Administrative Law Judge declared at the conclusion of the medical advisor's testimony that he was "not going any further with this," and that he did not think the plaintiff was qualified for benefits, the plaintiff's counsel did not request permission to ask further questions of the expert witness. Record p. 429. Indeed, the Administrative Law Judge even invited the plaintiff to submit additional medical evidence after the hearing. *Id.* The only cutting off that occurred was when the Administrative Law Judge admonished the plaintiff's attorney that he was "not at all impressed" with argument that had no basis in the record. *Id.* at 427.

Accordingly, I recommend that the decision of the Commissioner 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 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 this 16th day of December, 1996.

David M. Cohen
United States Magistrate Judge