

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN M. FILES,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 96-356-P-H
)	
JOHN J. CALLAHAN,)	
<i>Acting Commissioner of Social Security,¹</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal requires the court to decide two issues: (1) whether the Commissioner erred in not determining that the plaintiff had certain severe impairments beyond those found in the decision to deny benefits, and (2) whether the Commissioner followed the Social Security Administration’s procedure for properly evaluating mental impairments. I recommend that the court vacate the decision of the Commissioner and remand for further proceedings.

In accordance with the Commissioner’s sequential evaluation process, 20 C.F.R.

¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security John J. Callahan is substituted as the defendant in this matter.

² This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner 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 16.3(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he 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 June 23, 1997 pursuant to Local Rule 16.3(2)(C) 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.

§§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found that the plaintiff had not engaged in substantial gainful activity since August 27, 1993, Finding 2, Record p. 21; that he suffered from back pain and borderline intellectual functioning, impairments that were severe but nonetheless did not meet or equal any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 3, Record p. 22; that his residual functional capacity to perform the full range of light work was reduced by an inability to bend repetitively and perform tasks requiring normal intelligence, Finding 5, Record p. 22; that he was unable to return to his past relevant work as a lumber yard worker and shoe-shop molder, Finding 6, Record p. 6; but that, despite his impairments, he was capable of making an adjustment to work that exists in significant numbers in the national economy and was, therefore, not disabled, Finding 11, Record p. 22. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the Commissioner, 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 Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *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).

I. Severe Impairments at Step 2

At step 2 of the sequential evaluation process, the plaintiff had the burden of demonstrating that he had a severe impairment or combination of impairments that significantly limited his ability to do basic work activities. 20 C.F.R. §§ 404.1520(c) and 416.920(c); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). The burden at step 2 is *de minimis*, “designed to do no more than screen out groundless claims.” *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). Therefore, when a claimant produces evidence of an impairment or combination of impairments, the Commissioner may make a determination of non-disability at step 2 when the medical evidence “establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work even if the individual’s age, education, or work experience were specifically considered.” *Id.* (quoting Social Security Ruling 85-28). Significantly, the focus at step 2 is entirely on the medical evidence, and the burden is on the claimant to provide medical evidence of sufficient completeness and detail to allow the Commissioner to ascertain the nature and limiting effects of the impairment. Social Security Ruling 85-28, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (1992) at 393; 20 C.F.R. §§ 404.1513(d)(1), 416.913(d)(1). Here, the plaintiff contends the Administrative Law Judge erred by failing to determine at step 2 that he suffered from the impairments of post-traumatic neuritis syndrome, dysthymia and arthritis.

Concerning the neuritis,³ the plaintiff relies on the March 1994 report of treating physician John Belden, M.D., a neurologist. Belden opined that the plaintiff “certainly has a post traumatic

³ Neuritis is the inflammation of a nerve or nerves. *Taber’s Cyclopedic Medical Dictionary* (6th ed., 1983) at 949.

neuritis syndrome in his thigh, probably the lateral femoral cutaneous nerve.” Record p. 148. Although Belden reported at that time that a “[c]omplete neurological examination” yielded normal results, he diagnosed neuritis because the plaintiff had reported “some numbness in the left anterior thigh” and “some neuropathic burning,” both resulting from “a stab wound many years ago.” *Id.* Belden’s report contains no suggestion that this condition imposes any functional limitations. It is precisely the sort of slight abnormality that the Administrative Law Judge could eliminate at step 2 because of its non-impact on the plaintiff’s capacity for work.

Likewise, there is substantial evidentiary support for the Administrative Law Judge’s determination that the plaintiff’s dysthymia was not a severe enough impairment to merit scrutiny beyond step 2. Dysthymia is “a mood disorder characterized by a depressed feeling and loss of interest or pleasure in one’s usual activities that persists for more than two years but is not severe enough to meet the criteria for major depression.” *Kisling v. Chater*, 105 F.3d 1255, 1256 n.2 (8th Cir. 1997) (citing Richard Sloane, *The Sloane-Dorland Annotated Medical-Legal Dictionary* (1992 Supp.) at 204). In support of his position concerning the dysthymia, the plaintiff directs the court to the report of Elliot Gruen, D.O., a psychiatrist who evaluated the plaintiff in October 1994. Record pp. 196-97. Gruen noted it was “unclear” why the plaintiff was seeking a psychiatric evaluation, that the plaintiff “did not describe neurovegetative symptoms of major depression” but that, “[a]t the very least, this patient describes general unhappiness.” *Id.* It was in this context that Gruen diagnosed dysthymia. General unhappiness, even when described in medical terms as dysthymia, may properly be considered the kind of minor abnormality that can be screened out at step 2 when the record is devoid of any medical evidence concerning the functional impact of the dysthymia.

For evidence of the arthritis the plaintiff cites documents that were not before the Administrative Law Judge prior to his decision on April 26, 1995 but were submitted to the Appeals Council thereafter. Specifically, he relies on treatment notes from November and December 1994 referring to arthritis in one of his wrists, and a March 1995 report from a physical therapist noting that the grip of the plaintiff's right hand was 50 percent weaker than that of his left.⁴ *Id.* at 206, 219. Because this evidence "relates to the period on or before the date of the administrative law judge hearing decision," the Appeals Council was obligated to consider it.⁵ 20 C.F.R. §§ 404.970(b), 416.1470(b). The Commissioner correctly pointed out at oral argument that a physical therapist is not an acceptable medical source. *See* 20 C.F.R. §§ 404.1513(a), 416.913(a) (listing acceptable medical sources). However, the report of the physical therapist, deemed by the regulations to be a potentially helpful if not definitive source of information about functional limitations, *id.* at §§ 404.1513(e), 416.913(e), is nothing but corroborative of the physician's finding of arthritis. I agree with the plaintiff that the physician's diagnosis and the physical therapist's observations together comprise sufficient evidence of a severe impairment, as opposed to a mere slight abnormality, and it was therefore error not to consider the plaintiff's arthritis in the later stages of the sequential evaluation process.

II. Evaluation of Mental Impairments

⁴ At hearing, the plaintiff testified that he has pain and weakness in one of his wrists, which he attributed to tendinitis. Record pp. 41-42.

⁵ The court also considers such new and material evidence in reviewing the Commissioner's decision. *Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996); *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994); *Keeton v. Department of Health & Human Servs.*, 21 F.3d 1064, 1067 (11th Cir. 1994); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993); *but see Eads v. Secretary of Health & Human Servs.*, 983 F.2d 815, 817-18 (7th Cir. 1993) (to opposite effect).

The plaintiff next contends that the Administrative Law Judge erred by failing to follow the procedure set forth at 20 C.F.R. §§ 404.1520(a) and 416.920(a) for evaluating mental impairments. This procedure involves a specific set of evaluative steps and the completion of a standard document (the Psychiatric Review Technique (“PRT”) form) that tracks those steps. *Id.* The Commissioner has conceded that remand is appropriate on this issue given the Administrative Law Judge’s failure to complete the PRT form.⁶ I agree.

III. Other Issues

Finally, the plaintiff contends that the hypothetical given to the vocational expert, which became the basis of the Administrative Law Judge’s determination of non-disability at step 5 of the sequential evaluation process, was fatally flawed because its reference to “borderline intelligence” was too vague, and because it lacked references to the impairments discussed above in connection with the determination at step 2. The plaintiff also takes the position that even if the hypothetical was adequate, the response given by the vocational expert — that the plaintiff was capable of performing unskilled work in the shoe industry — was insufficient to sustain the Commissioner’s burden of establishing that the plaintiff could perform work available in substantial numbers in the national economy. In my view, it is unnecessary to address these issues in light of the flaws at earlier stages in the sequential evaluation process. If, following remand, the Commissioner cures the errors identified and determines at step 5 that the plaintiff is still unentitled to benefits based on the expert

⁶ Prior to oral argument, the Commissioner moved to remand solely on this basis. The plaintiff opposed the motion, taking the position that the interests of justice would be better served if the court took up all of the issues presented in his Statement of Errors and determined whether other flaws existed in the administrative determination. Agreeing with the plaintiff, I denied the motion.

testimony already of record, that would be an appropriate time for the court to address the issues raised. Prior to that juncture, any review of the issues at step 5 would be purely advisory.

III. Conclusion

For the foregoing reasons, I recommend that the decision of the Commissioner 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 this 7th day of July, 1997.

*David M. Cohen
United States Magistrate Judge*