

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICHARD OSTROWSKI,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 96-360-P-C
)	
JOHN J. CALLAHAN,)	
<i>Acting Commissioner of Social Security,¹</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner’s determination concerning the plaintiff’s disability onset date. Concluding that there is not, 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. § 404.1520; *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

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). 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.

since March 31, 1991, Finding 2, Record p. 31; that he suffers from a back impairment, an affective disorder, a somatoform disorder, a personality disorder and a substance addiction disorder, all of which are severe within the meaning of the applicable regulations, Finding 3, Record p. 31; that his mental impairments meet four of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 — specifically, Listings 12.04 (affective disorders), 12.07 (somatoform disorders), 12.08 (personality disorders) and 12.09 (substance addiction disorders), Finding 4, Record p. 31; and that the plaintiff has been under a disability within the meaning of the Social Security Act since March 31, 1991, Finding 5, Record p. 31. Thereafter, the Administrative Law Judge refused the plaintiff's request to reopen and revise the determination to establish a disability onset date of March 31, 1990. Record p. 12. The Appeals Council declined to review the decision, Record pp. 8-9, 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).

I. Disability Onset as Determined by the Administrative Law Judge

The plaintiff contends that substantial evidence is lacking to support the Commissioner's determination of March 31, 1991 as the disability onset date. Specifically, the plaintiff alleges that

the Administrative Law Judge chose that date arbitrarily, rather than with reference to the evidence presented at the hearing, and that the Appeals Council compounded the error by failing to consider a medical opinion — rendered after the Administrative Law Judge’s determination — that the plaintiff’s mental impairments reached disabling severity in 1988.

At oral argument, the Commissioner took the position that the issue is waived because there was an agreement between the Administrative Law Judge and counsel for the plaintiff, reached at the hearing, to fix the disability onset date at March 31, 1991. Indeed, there is some support in the record for such an inference. At the end of the hearing, the Administrative Law Judge rebuffed an offer by the plaintiff’s counsel to provide additional evidence concerning disability onset, advising counsel that “[w]e have an understanding here,” followed moments later by the statement, “I’ve given you everything you want.” Record p. 69. The plaintiff’s attorney, who appeared both at the administrative level and before the court, forthrightly conceded at oral argument that he very nearly waived the issue, and that the Administrative Law Judge had been under the impression that such an agreement existed. Assuming that the plaintiff, through his attorney, had communicated to the Administrative Law Judge his assent to fixing March 31, 1991 as the onset date, the record yields no conclusion other than that, by the end of the hearing, the plaintiff was no longer willing to make such a concession. The record was still open at that point. The regulations explicitly provide that the issues at the hearing include any that have not been previously resolved in a manner fully favorable to the claimant. 20 C.F.R. § 404.946(a). Therefore, the plaintiff was still entitled to contest the issue of disability onset as of the end of the hearing notwithstanding any previous suggestions of agreement.

Concerning the “critical” determination of disability onset date, the Social Security

Administration has issued the following policy statement:

The onset date of disability is the first day an individual is disabled as defined in the Act and the regulations. Factors relevant to the determination of disability onset include the individual's allegation, the work history, and the medical evidence. These factors are often evaluated together to arrive at the onset date. However, the individual's allegation or the date of work stoppage is significant in determining onset only if it is consistent with the severity of the condition(s) shown by the medical evidence.

Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* (1992) at 49-50.³

Thus, the applicant's allegation of disability onset is the "starting point," the date the impairment caused the applicant to stop work is "frequently of great significance," and medical evidence is "basic to the determination" and serves as the "primary element." *Id.* at 50. However, there are cases when

the alleged onset and the date last worked are far in the past and adequate medical records are not available. In such cases, it will be necessary to infer the onset date from the medical and other evidence that describe the history and symptomatology of the disease process.

Id. at 51.

Ruling 83-20 instructs Administrative Law Judges to call on the services of a medical advisor "when onset must be inferred." *Id.* Two medical advisors have been involved in this case.

The first, Ronald Blank, M.D., responded to interrogatories posed in 1994 when the plaintiff did not appear for a scheduled hearing before an Administrative Law Judge different from the one whose decision is presently at issue.⁴ Record pp. 27, 506-22. Blank opined that the plaintiff's

³ Social Security Rulings "are binding on all components of the Administration. These rulings represent precedent final opinions and orders and statements of policy and interpretations that have been adopted by the Administration." 20 C.F.R. § 422.406(b)(1).

⁴ Blank stated that he found no medical reason "for the claimant failing to appreciate the
(continued...)

mental impairments met Listing 12.08, but did not comment about disability onset. *Id.* at 508. Indeed, he referred to the “difficulty in reviewing this claimant’s Medical History” because he had not “been in treatment with a single provider for long enough to verify diagnostic impressions.” *Id.* Blank urged consideration of “the possibility of malingering,” but added that he did “not believe that further testing or evaluation will fully clear up the various inconsistencies in the claimants [sic] performance” or that “any single evaluation process will further clarify past psychiatric diagnoses.” *Id.* at 509.

At the hearing that immediately preceded the decision currently under review, the Administrative Law Judge called upon the services of medical advisor G. Adair Heath, M.D., a psychiatrist. Heath testified that he was unable to pinpoint disability onset. *Id.* at 68. It was at this point that counsel for the plaintiff offered to provide additional evidence on this issue, in the form of data about the plaintiff’s work history, but the Administrative Law Judge told counsel not to do so. *Id.* at 69.

Although the record includes data concerning medical treatment sought by the plaintiff during the relevant period, *see, e.g., id.* at 195-205 (1991 progress notes), 238 (reference in March 1990 to “multiple psychosomatic complaints”), 243 (reference to “period of angry outbursts, depression and generalized inability to cope”), an Administrative Law Judge is a lay person and, thus, generally not qualified to interpret raw data in a medical record. *Manzo-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 17 (1st Cir. 1996) (citation omitted). This is presumably the

⁴(...continued)
requirement to be present at his schedule hearing.” Record p. 508. The previous Administrative Law Judge dismissed the proceeding based on the plaintiff’s failure to appear. *Id.* at 528. The matter was subsequently reopened, and the case came before a second Administrative Law Judge because the plaintiff moved from Massachusetts to Maine. *Id.* at 554, 593.

reason the Social Security Administration has told its administrative law judges that they “should” consult medical advisors when drawing inferences about disability onset. Ruling 83-20, *supra* at 51. Because neither medical advisor gave the Administrative Law Judge any assistance in applying the medical evidence to the issue of disability onset, it cannot be said that these aspects of the record provide the requisite evidentiary support for the determination made.

However, Ruling 83-20 contemplates the possibility that the medical evidence alone will not yield a supportable inference as to disability onset. *Id.* In such a situation, the appropriate recourse is to “other sources of documentation” such as testimony from relatives, friends and former employers of the claimant. *Id.* No such exploration occurred here. In any event, and in all cases that require an inference as to onset date, “[c]onvincing rationale must be given for the date selected.” *Id.* at 52. The Administrative Law Judge’s decision lacks any rationale for the date chosen; indeed, the decision erroneously states that the plaintiff amended his application “to reflect an alleged onset of disability on March 31, 1991.” Record p. 27. Accordingly, I am unable to conclude that the decision of the Administrative Law Judge is supported by substantial evidence in the record.

II. Evidence Submitted to the Appeals Council

I must also agree with the plaintiff that the Appeals Council compounded the error by failing to consider certain additional evidence submitted to it by the plaintiff. The Appeals Council is required to consider “new and material” evidence when “it relates to the period on or before the date of the administrative law judge hearing decision.”⁵ 20 C.F.R. § 404.970(b). The new evidence in

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); (continued...)

question is the opinion of treating psychiatrist David B. Lobo, M.D., given in connection with a March 1996 examination, that the plaintiff's disability dated from 1988.⁶ Record p. 631. In these circumstances, "[t]he timing of the examination is not dispositive" of whether the Appeals Council should have considered it. *Williams v. Sullivan*, 905 F.2d 214, 216 (8th Cir. 1990). A thorough review of the record suggests that Lobo's opinion is the only medical evidence that speaks directly to the issue of disability onset.

The situation confronted by the Eighth Circuit in *Williams* was one in which the Social Security Administration chose a disability onset date based entirely on the assumption that a medical report submitted to the Appeals Council, post-dating the Administrative Law Judge's decision but expressing the view that the plaintiff had suffered from chronic mental illness since childhood, was not new and material evidence within the meaning of section 404.970(b). *Id.* The Eighth Circuit determined that the Appeals Council erred in not considering the report and remanded the case on that basis alone. *Id.* at 216-17. For like reasons, although the plaintiff here would be entitled to remand even in the absence of new and material evidence submitted to the Appeals Council, the Appeals Council's error is itself a separate ground for remand.

III. Conclusion

For the foregoing reasons, I recommend that the decision of the Commissioner be **VACATED** and the cause **REMANDED** for a redetermination of the date on which the plaintiff

⁵(...continued)

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).

⁶ The plaintiff also sent the Appeals Council an evaluation done by Lobo in March 1995 which did not refer to the onset of disability. *Id.* at 629.

became disabled.

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 15th day of July, 1997.

*David M. Cohen
United States Magistrate Judge*