

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTINA MARDEN on behalf of)
GREGORY HAVENS,)
)
Plaintiff)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security,)
)
Defendant)

Docket No. 99-145-B

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income (“SSI”) appeal involves an application for disability benefits submitted by the plaintiff on behalf of her minor son. The commissioner denied benefits. The plaintiff contends that the administrative law judge’s failure to obtain a consultative examination of her son, who she claims is disabled by attention deficit hyperactivity disorder, requires a remand. I recommend that the court affirm the decision of the commissioner.

The sequential evaluation process generally followed by the commissioner in making

¹ This action is properly brought under 42 U.S.C. § 1383(c)(3). 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 16.3(a)(2)(A), 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 November 17, 1999, pursuant to Local Rule 16.3(a)(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.

disability determinations, *see* 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5,6 (1st Cir. 1982), is somewhat modified when the claimant is a child, 20 C.F.R. § 416.924. In accordance with that section, the administrative law judge determined that the claimant had attention deficit hyperactivity disorder (“ADHD”), a severe impairment, but did not have an impairment or combination of impairments that met or medically or functionally equaled the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (“the Listings”), Findings 2 & 3, Record p. 14; and that he accordingly had not been disabled at any time through the date of the decision, Finding 4, Record p. 14. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the commissioner, 20 C.F.R. § 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 § 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 conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Richardson v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The claimant contends that the administrative law judge was required to obtain a consultative examination of the child in this case because, while he found that the child’s ADHD was severe, the expert psychological advisor who testified at the hearing stated that the record evidence did not support a diagnosis of ADHD, but rather suggested the possibility of “an emerging oppositional/defiant disorder,” Record at 25, for which the child had not previously been evaluated. Statement of Errors (Docket No. 8) at 3. Although the claimant does not specify any basis in the

Social Security regulations for her argument, she appears to be invoking 20 C.F.R. § 416.919a(b)(4), which provides that a consultative examination will normally be required when “[a] conflict, inconsistency, ambiguity or insufficiency in the evidence must be resolved” and the administrative law judge is unable to do so by recontacting the claimant’s medical care provider. In this case, however, there is no conflict or ambiguity that requires resolution. The expert advisor and the state agency reviewers agreed that, if the child suffered from ADHD, it was not severe. Record at 174-75, 178, 181. The records of the treating physician who diagnosed ADHD indicate that it is not severe. *Id.* at 171-73. The administrative law judge did not base his decision on the possible presence of a different disorder. He found that the evidence presented by the claimant did not meet the listing for ADHD, found at Appendix 1 to Subpart P, 20 C.F.R. § 404, § 112.11. Record at 13. The claimant did not, and does not, base her application on a claim that her son has an oppositional/defiant disorder that meets the Listings.

When a claim for benefits is made on behalf of a child, the commissioner must first determine whether the alleged disability is severe. 20 C.F.R. § 416.924(a), (c). If the disability is found to be severe, as was the case here, the question becomes whether the disability is one that is listed in Appendix 1, or “is medically [or] functionally equal in severity to a listed impairment.” 20 C.F.R. § 416.924(d). If the impairment does not meet this standard, the child is not disabled. 20 C.F.R. § 416.924(d)(2). Here, the administrative law judge appropriately evaluated the record evidence in light of the listing for ADHD, as well as the listing for organic mental disorders, found at section 112.02 of the listings, as required by 20 C.F.R. §§ 416.926a, 416.927, 416.928 and sections 112.00(A) - (F) of the listings. Record at 11-14. There is substantial evidence in the record to support his conclusion.

To the extent that the claimant argues that the mention of a possible alternate diagnosis by an expert advisor at the hearing compels the administrative law judge to initiate an investigation of that new and different disability by means of a consultative examination, that is not the purpose of the consultative examination, which is provided only when “the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision on your claim.” 20 C.F.R. § 416.919a(b). Here, the evidence was sufficient to support a denial of the claim made by the plaintiff. If she wishes to make a claim based upon a different alleged disability, she may do so by initiating such a claim and meeting her burden of proof. That burden does not shift to the commissioner upon the mention by an expert advisor of a possible alternate diagnosis for the claimant’s condition. None of the case law cited by the plaintiff supports such an expansion of the commissioner’s responsibilities. As the Tenth Circuit notes in *Hawkins v. Chater*, 113 F.3d 1162 (10th Cir. 1997), a case cited by the plaintiff,

the claimant has the burden to make sure there is, in the record, evidence sufficient to suggest a reasonable possibility that a severe impairment exists. When the claimant has satisfied his or her burden in that regard, it then, and only then, becomes the responsibility of the ALJ to order a consultative examination if such an examination is necessary or helpful to resolve the issue of impairment.

Id. at 1167. The plaintiff in this case presented no evidence of an impairment other than ADHD. Even if the expert advisor’s suggestion in response to questions from the administrative law judge that a different diagnosis was more appropriate could be construed to be evidence presented by the plaintiff, the advisor’s testimony suggests only that such an impairment is not severe. Record at 26-29.

For the foregoing reasons, 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 22nd of November, 1999.

*David M. Cohen
United States Magistrate Judge*