

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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| KATHRYN S. SHORT, |) | |
| |) | |
| <i>Plaintiff</i> |) | |
| |) | |
| <i>v.</i> |) | Docket No. 03-46-B-W |
| |) | |
| JO ANNE B. BARNHART, |) | |
| <i>Commissioner of Social Security,</i> |) | |
| |) | |
| <i>Defendant</i> |) | |

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income (“SSI”) appeal raises the question whether substantial evidence supports the commissioner’s determination that the plaintiff, who alleges disability stemming from fibromyalgia, depression and low-back, leg and knee pain, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further development.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

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 by telephone on January 29, 2004, 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.

law judge found, in relevant part, that the medical evidence established that the plaintiff suffered from low back pain and fibromyalgia, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 2, Record at 17; that she lacked the residual functional capacity (“RFC”) to lift and carry more than twenty pounds, sit or stand for prolonged periods, bend, stoop, twist, squat, kneel or crawl repetitively, work above shoulder level or work in exposure to extreme cold, Finding 4, *id.*; that her capacity for the full range of light work was diminished by non-exertional limitations, Finding 5, *id.*; that she was unable to return to her past relevant work as a potato sorter, Finding 8, *id.*; that, given her age as of the date she alleged she became disabled (37), education (high school), work experience and RFC, she was capable of making a successful vocational adjustment to work existing in significant numbers in the national economy, including employment as a cashier, mail clerk, file clerk, receptionist, assembler and telemarketer, Findings 6-7, 11, *id.*; and that she therefore had not been under a disability at any time through the date of decision, Finding 12, *id.* The Appeals Council declined to review the decision, *id.* at 4-5, 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); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his or her past

relevant work. 20 C.F.R. § 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 in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff's complaint also implicates Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only 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.* at 1124 (quoting Social Security Ruling 85-28).

The plaintiff complains, in five interrelated points of error, that the administrative law judge (i) failed to follow proper procedure (Social Security Ruling 96-3p) in determining that two impairments (affective depressive disorder and torn lateral meniscus of the left knee) were non-severe (Point 1), (ii) lacked substantial evidentiary support for each of those two non-severity findings as well as for his overall determination of RFC (Points 2-4), and (iii) relied on vocational-expert testimony responsive to a flawed RFC hypothetical, undermining the validity of his Step 5 determination (Point 5). *See* Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 8) at 3-12.

I agree that the administrative law judge's treatment of the plaintiff's affective disorder is sufficiently flawed to warrant remand.

I. Discussion

As the plaintiff observes, *see id.* at 3-4, per Social Security Ruling 96-3p a Step 2 (severity) determination entails assessment of (i) whether a claimant has a medically determinable impairment, (ii) if so, whether that impairment reasonably could be expected to produce the alleged symptoms, and (iii) “once the requisite relationship between the medically determinable impairment(s) and the alleged symptom(s) is established, the intensity, persistence, and limiting effects of the symptom(s) . . . along with the objective medical and other evidence[.]” Social Security Ruling 96-3p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2003) (“SSR 96-3p”), at 117.

As concerns the plaintiff’s affective disorder, the administrative law judge did none of these things. *See* Record at 12-18. Nonetheless, in the body of his decision, he did make what might fairly be characterized as implicit findings that the claimed affective disorder was medically determinable but nonetheless non-severe, stating:

The claimant is being prescribed Paxil for reactive depression characterized by a flat affect, an anxious and depressed mood, anhedonia, decreased energy, and poor sleep. However, there is no evidence that the claimant has ever sought or received any formal psychiatric treatment, and Dr. Pahilan stated in January, 2002, that the claimant’s overall mood had improved on her current medication.

Id. at 13 (citations omitted).

On close inspection, neither basis for the implicit finding of non-severity stands up. To the extent the administrative law judge inferred from the plaintiff’s lack of formal psychiatric treatment that her affective disorder was non-severe, the inference was unreasonable. The plaintiff’s primary-care physician, Abe N. Pahilan, M.D., explained that “because of the dearth of available psychiatrist/psychologist/counselors in rural northern Maine, [depression’s] diagnosis and subsequent treatment have become the responsibility of the primary care providers.” *Id.* at 264. Nothing else of record controverts his explanation. The

administrative law judge was not entitled simply to ignore it and substitute his own opinion for that of Dr. Pahilan. *See, e.g., Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999) (administrative law judge is “not at liberty to ignore medical evidence or substitute his own views for uncontroverted medical opinion”).

To the extent the administrative law judge relied on Dr. Pahilan’s January 2002 observation that the plaintiff’s overall mood had improved on medication, *see* Record at 13, that was correct as far as it went, but it did not go far enough. The administrative law judge omitted to mention that in the same January 2002 letter, Dr. Pahilan opined that the plaintiff’s “mood disorder further complicates her fibromyositis[.]” *Id.* at 264. This statement, combined with the plaintiff’s hearing testimony to the effect that her affective disorder drained her of energy, particularly in winter, *see id.* at 29, 40, at the least raised a serious question whether the plaintiff’s mood disorder might have more than a minimal impact on her ability to work. The administrative law judge himself implicitly recognized as much, ruling that “new and material evidence” – presumably including Dr. Pahilan’s January 2002 letter – caused “the findings of the medical experts at the state Disability Determination Services [(“DDS”)] . . . to be no longer consistent with the record as a whole.” *Id.* at 15. Yet the issue remains unresolved. There is, for example, no updated DDS opinion and no clarification from Dr. Pahilan of record.

Although the two reasons given for the implicit finding of non-severity do not survive close scrutiny, arguably this would yet be harmless error were that finding supported by substantial evidence. *See, e.g., Bryant ex rel. Bryant v. Apfel*, 141 F.3d 1249, 1252 (8th Cir. 1998) (“We have often held that [a]n arguable deficiency in opinion-writing technique is not a sufficient reason for setting aside an administrative finding where . . . the deficiency probably ha[s] no practical effect on the outcome of the case.”) (citations and internal quotation marks omitted). In this case, it is not.

In the absence of any meaningful DDS assessment, the administrative law judge necessarily had to deduce from the plaintiff's testimony and the raw medical evidence whether her affective disorder imposed more than minimal limitations on her ability to work. For the reasons discussed above, he could not have so found based on her testimony, and the raw medical evidence raises a serious but unresolved question about the extent of the impact of the condition. Thus, the record is devoid of substantial evidence supporting the implicit Step 2 finding. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (Although an administrative law judge is not precluded from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record."); *Stanwood v. Bowen*, 643 F. Supp. 990, 991 (D. Me. 1986) ("Medical factors alone may be used only to screen out applicants whose impairments are so minimal that, as a matter of common sense, they are clearly not disabled from gainful employment. . . . [A]n impairment is to be found not severe only if it has such a minimal effect on the individual's ability to do basic work activities that it would not be expected to interfere with his ability to do most work.") (citations and internal quotation marks omitted).

This flaw calls into question the validity of the RFC finding, which in turn calls into question the validity of the ultimate Step 5 determination. *See, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) ("[I]n order for a vocational expert's answer to a hypothetical question to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities. To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.").

Although remand for further proceedings is warranted on this ground alone, for the benefit of the parties I briefly consider the plaintiff's remaining points of error, which have merit with respect to the plaintiff's fibromyalgia but not with respect to her knee condition:

1. Knee condition. The administrative law judge's treatment of the plaintiff's claimed knee impairment again leaves much to be desired. He merely restates the contents of the medical evidence of record, making no findings whatsoever regarding the knee. *See* Record at 13. Nonetheless, despite a complete lack of articulation of a basis for decision-making, the error in this instance clearly was harmless. As counsel for the commissioner pointed out at oral argument, the knee condition began bothering the plaintiff in August 2001. *See id.* at 237-38. The condition had persisted for less than a year as of April 2002, the date of decision, *see id.* at 18, and the plaintiff adduced no evidence tending to suggest that it was expected to last for more than a year. The condition therefore did not meet the commissioner's durational requirement. *See, e.g.,* 20 C.F.R. § 416.905(a) ("The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.").

2. Fibromyalgia. The plaintiff posits that inasmuch as the administrative law judge determined she had fibromyalgia, even taking into account certain claimed fibromyalgia symptoms, he was bound to conclude that she suffered from its usual symptoms – specifically chronic fatigue – absent substantial record evidence to the contrary. *See* Statement of Errors at 10-11; *Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994); Record at 60. The Record itself is barren of any evidence that fatigue is a customary symptom of fibromyalgia. However, at oral argument, the plaintiff's counsel cited an unpublished First Circuit case that does indeed suggest that this is so. *See Mitchell v. Secretary of Health & Human Servs.*, No. 93-1612,

1994 WL 96966, at **3 n.7 (1st Cir. Mar. 25, 1994) (noting that fibromyalgia “causes severe musculoskeletal pain, stiffness and fatigue due to sleep disturbances, although physical examinations will generally be normal.”). Consistent with this description, the plaintiff testified at hearing that she had chronic difficulty sleeping despite the use of the medication Elavil to address her sleeping difficulties, and awoke not feeling rested after a bad night. *See* Record at 39, 40. In an office note of May 11, 2000 Dr. Pahilan also noted that the plaintiff blamed “feelings of constant fatigue and increasing irritability” on her fibromyalgia. *Id.* at 222. As late as December 20, 2001, he noted that the plaintiff had “not been sleeping well with Elavil.” *Id.* at 234. Under the circumstances, the rule of *Rose* applied, and the administrative law judge erred in overlooking fatigue as a fibromyalgia symptom.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for further 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 30th day of January, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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