

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHARLES F. JOHANSEN,)	
)	
Plaintiff)	
)	
v.)	Civil No. 91-372-P-C
)	
LOUIS SULLIVAN,)	
Secretary, Department of Health)	
& Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

¹ This action is properly brought under 42 U.S.C. ' 405(g). The Secretary 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 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 29, 1992 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

This Social Security Disability appeal raises the question whether the Secretary erred by finding that the plaintiff could return to his past relevant work as a club steward or sales clerk. Specifically, the plaintiff asserts that he did not knowingly waive his right to counsel when he appeared *pro se* at the June 6, 1990 hearing before the Administrative Law Judge and that the Secretary incorrectly determined the exertional requirements of his past relevant work, failed to show that he has the capacity to stand for the required period and failed to properly evaluate his allegations of pain.²

² The plaintiff also asserts that the Appeals Council erred by relying on the opinion of a medical advisor offered at the hearing as a basis for denying review because the medical advisor did not review any of the evidence submitted subsequent to the hearing. There is nothing in the record to dispute Johansen's assertion. However, the Administrative Law Judge did not rely on the medical advisor's opinion and the ultimate question is therefore whether there is substantial evidence to support his decision.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 404.1578; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff met the disability insured status requirements from October 26, 1982, the alleged date of onset of disability, through June 30, 1985, Finding 1, Record p. 22; that he has not engaged in substantial gainful activity since October 26, 1982, Finding 2, Record p. 22; that on and before the date his insured status expired he suffered from severe lung disease, obesity, ulcer disease and phlebitis, Finding 3, Record p. 22; that he does not suffer from any impairment or combination of impairments that meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Finding 3, Record p. 22; that his allegations that he was disabled during the relevant period are not persuasive in light of his medical history, his own description of his activities and the statements of the treating and examining physicians, Finding 4, Record p. 22; that he has at all relevant times retained the residual functional capacity ``to perform work-related activities except for work involving lifting and carrying very heavy objects, and performing other strenuous activities on a sustained basis" and that he ``retained the capacity to sit, stand and walk for vocationally meaningful periods of time," Finding 5, Record p. 22; that his past relevant work as a club steward and a sales clerk did not require the performance of work-related activities precluded by the above limitations, Finding 6, Record p. 22; that his impairments did not prevent him from performing his past relevant work on or before June 30, 1985, Finding 7, Record p. 23; and that, accordingly, he was not disabled during the relevant period, Finding 8, Record p. 23. The Appeals Council declined to review the decision,³ Record pp. 4-5, making it the final determination of the Secretary. 20 C.F.R. ' 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

³ In doing so, the Appeals Council -- apparently relying on the opinion of a medical expert who testified at the hearing that ``the medical evidence did not demonstrate limitations due to [Johansen's] history of deep vein thrombo-phlebitis during the period October 26, 1982 . . . through June 30, 1985," Record p. 4 -- found no basis for disturbing the Administrative Law Judge's decision.

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). 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).

Waiver of Counsel

The plaintiff asserts that he failed to understand the legal aspects and implications of the hearing before the Administrative Law Judge and that his choice to proceed *pro se* did not amount to a knowing waiver of counsel. Therefore, he argues, the hearing should have been postponed or a second hearing held so that he could be represented.

A social security claimant is entitled to have retained counsel represent him at the hearing before an administrative law judge. See *Evangelista v. Secretary of Health & Human Servs.*, 826 F.2d 136, 142 (1st Cir. 1987). However, the Court of Appeals for the First Circuit has firmly established that lack of counsel in and of itself is insufficient to warrant remand. *Id.* Rather, "remand for want of representation is necessitated only where there is a showing of unfairness, prejudice or procedural hurdles insurmountable by laymen." *Id.* (quoting *Teal v. Mathews*, 425 F. Supp. 474, 480 (D. Md. 1976)).

At the hearing, the Administrative Law Judge began by explaining to the plaintiff that in order to prevail he must show that he was disabled as of June 30, 1985, which was the end of his disability insured status period. Record p. 26. The plaintiff responded that he understood. *Id.* Shortly thereafter, the Administrative Law Judge made reference to a list of attorneys that had been sent to Johansen and advised him that he is "entitled to be represented by an attorney at each and every stage of these proceedings." *Id.* p. 27. He asked the plaintiff: "But have you considered this matter, do you want to be represented by an attorney?" Johansen explained that he had been unsuccessful in

his efforts to retain an attorney, to which the Administrative Law Judge responded: ``If you want an attorney, I'll postpone until you get one." *Id.* Johansen stated that he could not afford to wait. After two more attempts by the Administrative Law Judge to make certain that Johansen was sure of his decision, the plaintiff said that he understood his rights and concluded: ``I'd like to go on with the case, Your Honor." *Id.* p. 28. To assist the plaintiff the Administrative Law Judge also offered to secure medical reports for the plaintiff at no cost and stated that he would accept any evidence submitted within one month after the hearing. *Id.* pp. 39-41. It appears that the Administrative Law Judge obtained such reports and included them in the record. *See id.* pp. 43, 150-543.

At oral argument the plaintiff admitted that, in and of itself, lack of representation in his case does not warrant remand but argued that in conjunction with other deficiencies a remand is warranted. The record is absolutely clear that the Administrative Law Judge carefully informed the plaintiff of his right to counsel and that Johansen knowingly waived that right. The plaintiff, a high school graduate, former club manager who dealt with liquor laws and club bylaws, as well as a former aeronautical engineer for the Air Force, *see* Record pp. 28, 38, 74, was sophisticated enough for the Administrative Law Judge to reasonably respect his wish to proceed on his own. *See Evangelista*, 826 F.2d at 142. Furthermore, the record shows that the Administrative Law Judge secured records to assist the plaintiff and left the record open for further submissions. It is not enough for the plaintiff to assert that counsel would have presented a more persuasive case. He must show prejudice and I find none evident.

Allegations of Pain

The plaintiff next asserts that the Secretary failed to develop the record regarding his allegations of pain as required by *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986) (construing instructions for the Secretary's Program Operations Manual System DI T00401.570), and Social Security Ruling 88-13.

In two disability reports, the plaintiff complained of swelling of his legs, blood clots, headaches and terrible pain requiring him to elevate his feet all day and he alleged that he uses a cane. Record pp. 63-66, 81-82.

As a method of inquiry at the hearing, the Administrative Law Judge discussed portions of the medical evidence and asked the plaintiff whether they were correct. *Id.* pp. 29-32. Then the Administrative Law Judge asked a medical advisor to evaluate the plaintiff's impairments according to the medical evidence. During this time, Johansen interrupted several times to describe his present impairments and limitations and explain that he had been unable to secure medical records from his Veterans hospital to support his assertions. *Id.* pp. 32-43. The Administrative Law Judge and the medical advisor variously responded to these statements by pointing out that Johansen simply had not presented medical evidence bolstering his pain complaints for the relevant period of time. *See, e.g., id.* pp. 36-37. The Administrative Law Judge described the proceedings as follows: "At hearing, Mr. Johansen testified at length about his present condition but offered little comment concerning his impairments and their impact on his ability to work prior to the date his insured status expired." *Id.* p. 21. Although the Administrative Law Judge noted the plaintiff's allegations of pain in his decision, he commented that the reports have no bearing on the period of Johansen's insured status and, therefore, he found the plaintiff's allegations not persuasive. *Id.* p. 21.

Avery requires the Secretary to determine whether the plaintiff has an injury that can reasonably be expected to cause pain and, if so, then to carefully inquire into the plaintiff's subjective complaints. *Avery*, 797 F.2d at 21, 23. Social Security Regulation 88-13 mandates that this inquiry include such matters as:

1. The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
2. Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);
3. Type, dosage, effectiveness, and adverse side-effects of any pain medication;
4. Treatment, other than medication, for relief of pain;
5. Functional restrictions; and
6. The claimant's daily activities.

Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service* at 739 (Supp. 1991).

The record reveals an absence of a clear investigation into the plaintiff's pain allegations. The Administrative Law Judge made a finding that Johansen suffered from ailments which could reasonably be expected to cause pain. He found that "on and before the date his insured status expired, [Johansen] had severe lung disease, obesity, ulcer disease and phlebitis." Finding 3, Record p. 22. Having so found, he failed to elicit from the plaintiff a complete picture of his pain allegations, his treatment and his daily activities as envisioned by *Avery* and Social Security Ruling 88-13. At the hearing the plaintiff was not asked to describe the pain he felt during the period in question. Nor was he asked to recount his daily activities prior to the expiration of his insured disability status. After the hearing, Johansen was permitted to supplement the medical evidence that he presented relating to the relevant period, but neither before nor after this submission did the Administrative Law Judge follow through with an *Avery* inquiry into the extent or severity of the plaintiff's allegations of pain.⁴ The First Circuit has repeatedly stated that "social security proceedings are not strictly adversarial" and "the Secretary bear[s] a responsibility for adequate development of the record," especially where the claimant is unrepresented. *Evangelista*, 826 F.2d at 142 (citation omitted). The Secretary cannot obviate the need for a pain inquiry simply by asserting that any complaints of pain are not credible based on a lack of supporting medical evidence. If such a shortcut were permitted there would rarely be a need for an inquiry into the plaintiff's allegations of pain, which may not fully be reflected by medical evidence. *See* Social Security Ruling 88-13, at 738.

Past Relevant Work

Finally, Johansen contends that there is not substantial evidence in the record to support the Administrative Law Judge's characterization of the exertional demands of his past relevant work or to

⁴ During the hearing the Administrative Law Judge stated: "I'm going to give you one month to submit to me evidence between those years of '79 to '85. If you have it, I'll reconvene a hearing." Record p. 39. Numerous medical reports were submitted during that month but the Administrative Law Judge did not reconvene a hearing.

support the finding that during the relevant period the plaintiff was able to meet the standing requirements of his past relevant work.⁵

In a written disability report Johansen indicated that his job as a club steward (manager) required that during an eight-hour workday he walk for two hours, stand for two hours, sit for four hours and bend occasionally. Record p. 74. He stated that he was not required to lift anything. *Id.* His report further noted that his job as a part-time sales clerk required that he had to walk for one hour, stand for three hours and bend occasionally but that the job involved no lifting. *Id.* p. 73. Based on the fact that this was a part-time job and that Johansen only listed four hours of exertional activity, it appears that he only worked for four hours per workday as a sales clerk. During his testimony, the plaintiff asserted that due to an injury to his leg in 1979 he cannot stand or walk for any length of time. *Id.* pp. 34-35.

The Administrative Law Judge made a finding that during the relevant period Johansen had the residual functional capacity to perform sedentary work and to walk or stand for "vocationally meaningful periods of time." Record p. 20. He apparently based this conclusion on his finding that "[t]here is no record of any postural limitations on and before the date his insured status expired" and that by 1981 one doctor found him asymptomatic and subsequent medical records did not suggest otherwise. *Id.* The Administrative Law Judge accepted the plaintiff's description of the exertional

⁵ The plaintiff also contends that the Administrative Law Judge concluded in the body of his decision that the claimant can perform sedentary work and then, inconsistently, made a formal finding that Johansen was capable of standing for the longer period of time required for his past relevant work. Johansen is incorrect in suggesting any inconsistency since the Administrative Law Judge found that Johansen has the capacity to perform "at least sedentary work," which implies no limitations on the extent of the plaintiff's ability to stand. Record p. 20 (emphasis added).

requirements of his past relevant work and went on to find that he had the residual functional capacity to perform this work. *Id.* p. 19; Finding 6, *id.* p. 22.

At this stage of the evaluative process, Step Four, the burden is on the plaintiff to show that he cannot perform his past relevant work. *Goodermote*, 690 F.2d at 7. In determining ability to perform past relevant work, the Secretary must determine whether an individual can do his "usual work or other applicable past work." 20 C.F.R. ' 404.1561. This means that a claimant will not be found disabled if he can perform "(1) [t]he actual functional demands and job duties of a particular past relevant job; or (2) [t]he functional demands and job duties of the occupation as generally required by employers throughout the national economy." Social Security Ruling 82-61, reprinted in *West's Social Security Reporting Service* at 838 (1983) (emphasis in original). To accomplish this task the Secretary must make a finding of the plaintiff's residual functional capacity, a finding of the physical and mental demands of past work and a finding that the plaintiff's residual functional capacity would permit performance of that work. *May v. Bowen*, 663 F. Supp. 388, 393-94 (D. Me. 1987); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* at 813; 20 C.F.R. ' 404.1520(e).

These findings need only be made when the claimant has first made a reasonable threshold showing of an inability to return to his past work because of his alleged disability. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). This simply involves "describ[ing] those impairments or limitations which [he] says [he] has" and how these limitations "preclude[] the performance of the particular prior job." *Id.* at 5 (emphasis in original). "Once this threshold is crossed, the [Administrative Law Judge] has the obligation to measure the requirements of former work against the claimant's capabilities; and, to make that measurement, an expert's [residual functional capacity] evaluation is ordinarily essential unless the extent of functional loss, and its effect on job performance, would be apparent even to a lay person." *Id.* at 7.

The plaintiff sufficiently alerted the Secretary that during the relevant period he had difficulty walking or standing, which precluded him from doing so for the four hours per eight-hour workday necessary to perform his past relevant work. Therefore, the Secretary was required to make the three findings mandated by Social Security Ruling 82-61. In making the first finding, the Administrative Law Judge concluded that Johansen had the residual functional capacity to perform sedentary work and to walk and stand for "vocationally meaningful periods of time." In the plaintiff's case this phrase can only be intended to refer to the four hours per eight-hour workday required by his past relevant work -- which amount exceeds the approximately two hours required for sedentary work. 20 C.F.R. § 404.1567(a); Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* at 51 (Supp. 1991). However, the Secretary may not exercise his lay judgment as to a claimant's exertional capacity for exceeding the demands of sedentary work, *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990), and there is no medical residual functional capacity assessment in the record to support the Administrative Law Judge's finding as is normally required, *Santiago*, 944 F.2d at 5, 7. In this case the Secretary overstepped his limited authority by rendering what amounts to a medical opinion as to the plaintiff's functional limitations. Therefore, this finding cannot stand.

The Administrative Law Judge proceeded to make the second required finding. He determined the exertional demands of Johansen's past relevant work by simply reiterating the plaintiff's own description which, contrary to the plaintiff's assertion, is sufficient. "The claimant is the primary source for vocational documentation," Social Security Ruling 82-62, at 811, and he need only be capable of performing the actual tasks of his past relevant work, not those generally required to perform his job according to the *Dictionary of Occupational Titles*, see Social Security Ruling 82-61, at 838.

In the Administrative Law Judge's third required finding he concluded that the plaintiff had the residual functional capacity to perform his past relevant work. However, because of the absence of substantial evidence to support the Secretary's residual functional capacity assessment, this finding is flawed.

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **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 at Portland, Maine this 7th day of July, 1992.

David M. Cohen
United States Magistrate Judge