

October 15, 1982, Finding 2, Record p. 47; that she met disability insured status requirements as of that date, but continued to meet those requirements only through December 31, 1987, Finding 1, Record p. 47; that as of December 31, 1987 she had severe symptoms of post-polio syndrome, but that she does not suffer from any impairment or combination of impairments that meets or equals any listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404 (the ``Listings"), Finding 3, Record p. 47; that her assertions concerning her impairment and its impact on her ability to work on or before her date last insured are not credible, Finding 4, Record p. 47; that prior to the expiration of her insured status she was unable to perform her past relevant work as an assembler, Finding 6, Record p. 47; that her residual functional capacity on or before December 31, 1987 was limited by her inability to lift or carry objects weighing more than ten pounds, to stand longer than a half hour, to sit for periods longer than one hour and to walk long distances, Finding 5, Record p. 47; and that, although she could not perform the full range of sedentary work on and prior to December 31, 1987, there were a significant number of jobs she could perform in the national economy, Finding 12, Record p. 48. Accordingly, the Administrative Law Judge concluded that the plaintiff was not under a disability at any time through December 31, 1987. Finding 13, Record p. 48. The Appeals Council declined to review the decision, 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).

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).

Because the Secretary determined that the plaintiff is not capable of performing her past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. ' 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting her ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

New and Material Evidence

The plaintiff first seeks remand on the ground that new and material evidence exists concerning her impairment. 42 U.S.C. ' 405(g). This evidence consists of the full medical records of Roger Robert, M.D., the plaintiff's treating physician in the 1950s, 1960s and 1970s. The Administrative Law Judge had before him portions of these records but not the full set when making his disability determination. Record pp. 146-59, 210-20.

I find that a remand is not required for consideration of the full set of records of Dr. Robert because the Secretary's disability determination would not likely have been different had it been considered. *Evangelista v. Secretary of Health & Human Servs.*, 826 F.2d 136, 139-140 (1st Cir. 1987). The medical records in question antedate by many years the plaintiff's alleged onset disability date; they do not relate at all to the Secretary's inquiry as to whether the plaintiff was disabled after October 15, 1982. To the extent that the medical records establish a medical history of polio, and thereby establish the predicate for her current claim of post-polio syndrome, I note that the Administrative Law Judge fully credited her history of polio. Record p. 40. Accordingly, I find that

the "new" and "material" evidence offered by the plaintiff is neither new nor material, so as to warrant a remand for consideration by the Secretary.²

Exclusion of Certain Evidence

The plaintiff also seeks remand on the ground that the Administrative Law Judge improperly excluded certain evidence from the record of the hearing. To assist in the determination of the plaintiff's ability to perform jobs in the national economy, the Administrative Law Judge heard the testimony of vocational expert Michael Williams. During the plaintiff's cross-examination of Williams, the Administrative Law Judge refused to permit any questioning about the plaintiff's volunteer activities. Record pp. 96-97. The plaintiff intended to ask the expert whether his stated opinion, that there were jobs in the national economy that she could perform, would have been affected by her testimony about the difficulty she was having performing her volunteer tasks. *Id.* at 97. The plaintiff also challenges the Administrative Law Judge's refusal during her own testimony to permit her to state whether she felt that her physicians were ignoring her complaints, presumably of pain and discomfort. *Id.* at 78-79. In both instances, the plaintiff contends that the Administrative Law Judge's ruling deprived her of the protections afforded by the due process and confrontation clauses of the Constitution, as well as the provision in the Secretary's regulations permitting a party to elicit testimony on any material issue. *See* 20 C.F.R. ' 404.950(e) ("The administrative law judge may ask the

² To the extent that the subpoena for Dr. Robert's records was not properly enforced, *see* 42 U.S.C. ' 405(e), no harm has resulted. As noted above, the missing medical records, given their age, provide no information that would have altered the Secretary's disability determination.

witnesses any questions material to the issues and shall allow the parties or their designated representatives to do so.").

Social Security proceedings at the administrative level are non-adversarial in nature and the Secretary has a duty to develop an adequate record from which a reasonable conclusion can be drawn. *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991). Remand is appropriate when the court determines that further evidence is necessary to develop the facts of the case fully, that such evidence is not cumulative, and that consideration of the evidence is necessary to a fair hearing. *Id.* Although the rules of evidence that would apply in a courtroom do not apply in administrative proceedings to determine a claimant's Social Security Disability status, *see* 20 C.F.R. ' 404.950(c), this does not mean that the administrative law judge may not exercise discretion to exclude evidence that is irrelevant, *see, e.g., Doustou v. Bowen*, 640 F. Supp. 217, 219 n.4 (D.Me. 1986). The test is whether the administrative law judge has accorded the claimant a full and fair opportunity to develop her case.

The plaintiff testified that she volunteers at the library of her daughter's school once or twice a week for approximately two hours each time. Record pp. 67-68. She indicated that this work consists mainly of sitting at a desk and checking books in as they are returned by students. *Id.* In his decision, the Administrative Law Judge noted this testimony, as well as the plaintiff's description of her activities around her house, in concluding that "[t]he claimant's own description of her activities supports a finding that she can perform non-strenuous work tasks" and that her assertions concerning her level of impairment are "not credible." *Id.* at 44. Thus, the plaintiff contends, because the evidence concerning her volunteer work was material to the outcome of the proceeding, it was fundamentally unfair to prevent her from raising this issue with the vocational expert. The flaw in this contention is that the vocational expert's testimony did not go to the level of her impairment, but to her capacity to perform work given the level of impairment as reflected in the hypothetical propounded to him by the

Administrative Law Judge. In other words, even if the vocational expert had been permitted to answer the question on this issue, and even if he had thereby stated a different opinion in light of the capacity for work reflected in the plaintiff's description of her volunteer activities, this would have had no material bearing on the outcome in light of the Administrative Law Judge's determination of her level of impairment. It therefore cannot be said that the plaintiff was denied a full and fair hearing with respect to the issues raised by the testimony of the vocational expert.

For similar reasons, remand is not required as a consequence of the Administrative Law Judge's decision to exclude the plaintiff's response to the question about whether her physicians were ignoring any of her complaints. In his opinion, the Administrative Law Judge noted:

Although the claimant stated that she is incapable of working due to many symptoms which she relates to post-polio syndrome, there is little evidence to support a finding that Ms. Mercier complained of such difficulties to her physicians at the time her insured status expired.

Record p. 44. The Administrative Law Judge then went on to observe that the physician who cared for the plaintiff during the 1980s, William Frank, M.D., had treated her for conditions unrelated to post-polio syndrome in 1986 and 1987, that there was nothing in his records to suggest that she ever complained to him of symptoms related to post-polio syndrome, and that "[i]f a claimant's condition were as bad in 1987 as she now contends it was, it is likely that she would have made many complaints to her treating physician." *Id.* at 44-45. She now contends that in light of the Administrative Law Judge's reliance on her doctor's failure to diagnose post-polio syndrome, it was improper for the Administrative Law Judge to prevent her from stating whether she felt her doctors were ignoring her complaints. However, as the plaintiff herself notes, she testified that she had raised the possibility of her post-polio syndrome with Dr. Frank but that he was "not that familiar" with the condition. *Id.* at

62. The plaintiff was thus not prevented from introducing evidence as to why her physician did not diagnose the condition she was claiming to have suffered from in 1987. In fact, a fair reading of the excluded question is that it goes to a tangential issue, i.e., the plaintiff's level of frustration with her physician's alleged failure to diagnose her medical condition properly. Accordingly, the Administrative Law Judge's ruling was not in error and the plaintiff remained free to introduce evidence on the question of whether she suffered from post-polio syndrome at the times relevant to this proceeding.

Listings

The plaintiff next contends that the Administrative Law Judge erred in concluding that her impairment did not meet or equal sections 1.03(A) or 11.04(B) of the Listings. Listing 1.03(A), concerning arthritis of a major weight-bearing joint, requires "gross anatomical deformity of hip or knee . . . supported by X-ray evidence of either significant joint space narrowing or significant bony destruction and markedly limiting ability to walk and stand." Listing 11.04(B), concerning central nervous system vascular accidents, requires "significant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station."

First, as to listing 1.03(A), the plaintiff argues that the Administrative Law Judge erred in failing to recognize that an ankle can substitute for a hip or knee as a major weight-bearing joint under that listing. This argument is without merit. The listing speaks specifically in terms of a hip or knee impairment. In addition, the Administrative Law Judge, a layperson untrained in medical science, is not free to substitute an ankle for a hip or knee as a "major weight-bearing joint." The testimony of the medical expert, William Laschey, M.D., that the plaintiff did not meet or equal the listing because her ankle, and not her hip or knee, was involved is sufficient to support the Administrative Law Judge's

determination on this point. *See* Social Security Ruling 86-8, reprinted in *West's Social Security Reporting Service*, at 427.

As to listing 11.04(B), the medical expert testified that the plaintiff did not meet or equal the listing because the medical evidence showed that only one leg was affected. Listing 11.04(b) requires that two extremities be affected. The plaintiff argues that she testified that both of her legs hurt and are a problem. Record p. 59. However, a determination whether a claimant's condition is equivalent to the Listings must be based on "medical evidence only." 20 C.F.R. ' 404.1526(b). In the absence of any medical evidence to the contrary, the testimony of the medical expert that the plaintiff did not meet or equal the listing because only one extremity was affected provides substantial evidence to support the Administrative Law Judge's determination on this issue.

Ability to Perform Sedentary Work

Finally, the plaintiff contends that there is a lack of substantial evidence to support the Secretary's determination that, during the period of her insured status, she was capable of performing a wide range of sedentary jobs that were available in the national economy. The Administrative Law Judge found that the plaintiff's residual functional capacity for the full range of sedentary work "was reduced by her inability to sit for prolonged periods." Finding 7, Record p. 48. The Administrative Law Judge nevertheless determined that there were a significant number of jobs in the national economy that the plaintiff could have performed, citing as examples the jobs of "ticket taker and seller, telemarketing worker, and sedentary cashier." Finding 12, Record p. 48.

It is the plaintiff's position that the Administrative Law Judge erred by basing his decision on "201.27 of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the "Grid"). As the plaintiff notes, section 201.27 applies to a claimant who is capable of performing the full range of sedentary work. Although the Administrative Law Judge noted that section 207.27 would direct a finding of not disabled, Finding 11, Record p. 48, he did not base his determination on the Grid. Rather, using the Grid as a "framework for decisionmaking," Finding 12, Record p. 48, the Administrative Law Judge properly went on to make an additional determination of the plaintiff's residual functional capacity after considering additional evidence. *Cf. Rosado*, 807 F.2d at 294 (bare medical testimony insufficient for determining residual functional capacity); *see also Rose v. Secretary of Health & Human Servs.*, No. 94-1013, slip op. at 16 (1st Cir. Sep. 7, 1994); Social Security Ruling 83-12, reprinted in *West's Social Security Reporting Service*, at 38-39.

As is appropriate in the circumstances, the additional evidence considered by the Administrative Law Judge was the testimony of the vocational expert. *See id.* The Administrative

Law Judge asked the expert to assume as a hypothetical that the plaintiff's ability to walk had been "severely compromised" and was limited to a quarter of a mile, that she was able to stand 20 or 30 minutes and sit for one hour before needing to stand and walk around, and that she was able to lift 10 pounds on a competitive basis. Record p. 93. The expert inquired about the impact of these restrictions on the plaintiff's ability to get to work, and was asked to assume that she could drive to work and walk from her parking spot to her work site. *Id.* at 93-94. The expert concluded that there are a significant number of jobs in the national economy that the plaintiff would be able to perform. *Id.* at 94. As examples, he cited the jobs of ticket taker or seller, telemarketer, and "sedentary cashier work." *Id.*

The plaintiff contends that no evidence is proffered that she could meet the limited requirements of a sedentary job, as defined. As noted above, the Administrative Law Judge did not determine that the plaintiff could perform the full range of sedentary work, but rather concluded that her residual functional capacity included some sedentary work as limited, *inter alia*, by her reduced capacity to walk. I therefore assume that the plaintiff's present position is that the evidence is insufficient to support the finding that she is capable of performing even limited sedentary work in light of the evidence as to her limited walking abilities. I disagree. The plaintiff testified at the hearing that she walks with a limp and that her legs "feel heavy." *Id.* at 57. She stated that her walking ability has been deteriorating, and that crossing the street to attend the hearing was the extent of her ability to walk as of that date. *Id.* at 58. The medical expert agreed that the plaintiff has difficulty walking. *Id.* at 86. However, he later qualified this opinion by noting that the plaintiff's own testimony did not suggest that walking in her present life was a problem over short distances. *Id.* at 93. Accordingly, the Administrative Law Judge directed the vocational expert to assume that the plaintiff's walking ability was limited to distances of a quarter mile or less. *Id.* In doing so, he addressed the vocational expert's

concern as to the plaintiff's ability to walk from her parked car to her actual job site. *Id.* at 93-94. Given that the vocational expert was careful to base his opinion on an assessment of the plaintiff's limited ability to walk, this opinion is sufficient to support the Administrative Law Judge's finding as to the existence of jobs in the national economy that the plaintiff is capable of performing.

Concerning the evidence as to the plaintiff's ability to sit and its impact on her ability to perform jobs in the national economy, the plaintiff separately contends that the Administrative Law Judge's findings contradict one another. However, a careful reading of the Administrative Law Judge's opinion reveals no such contradictions. Although he found that the plaintiff was unable to sit for periods in excess of one hour, Finding 5, Record p. 47, and that her residual functional capacity was accordingly reduced by her inability to sit for "prolonged periods," Finding 7, Record p. 48, he was careful to include this limitation in the hypothetical that he posed to the vocational expert, Record p. 93. Accordingly, the finding made by the Administrative Law Judge, based on the vocational expert's opinion, as to the plaintiff's residual functional capacity is fully consistent with the Administrative Law Judge's other findings. In the absence of any reason to question the relevance of the vocational expert's opinion, the Secretary is justified in relying upon that opinion to make a finding that there are specific jobs in the national economy that the plaintiff can perform. *See Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982).

For the foregoing reasons, I recommend that the Secretary's decision 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 at Portland, Maine this 29th day of September, 1994.

**David M. Cohen
United States Magistrate Judge**