

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<i>INA WATKINS,</i>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<i>v.</i>	)	<i>Civil No. 95-25-B</i>
	)	
<i>SHIRLEY S. CHATER,</i>	)	
<i>Commissioner of Social Security,<sup>1</sup></i>	)	
	)	
<i>Defendant</i>	)	

**REPORT AND RECOMMENDED DECISION<sup>2</sup>**

This Social Security Disability appeal raises the single issue of whether there is substantial evidence in the record supporting the Commissioner's determination that the plaintiff is able to perform jobs that exist in substantial numbers in the national economy, and thus that the plaintiff is

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<sup>1</sup> Donna E. Shalala, Secretary of Health and Human Services, was originally named as the defendant in this matter. On March 31, 1995 the Social Security Administration ceased to be part of the Department of Health and Human Services and became an independent executive branch agency. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, §§ 101, 110(a). Concerning suits pending as of that date against officers of the Department of Health and Human Services, sued in an official capacity, Congress has authorized the substitution of parties as necessary to give effect to the change. Such substitution is so ordered here and I will therefore refer to all determinations made by the Social Security Administration in this case as those of the Commissioner.

<sup>2</sup> This action is properly brought under 42 U.S.C. § 405(g). 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 26, 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 July 19, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

not under a disability. The plaintiff contends that the required evidentiary foundation is lacking, and thus that she is entitled to have the case remanded to the Commissioner, because the administrative law judge improperly failed to credit her testimony and did not take into account the effect of her likely absenteeism on her ability to find work. I recommend that the court affirm the decision of the Commissioner.

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 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since April 2, 1992, Finding 2, Record p. 15; that she met disability insured status requirements as of that date, but continued to meet those requirements only through March 31, 1992, Finding 1, Record p. 15; that on the date her insured status expired she suffered from a hip fracture and allergies, but that she did not have an impairment or combination of impairments that meets or is equal to any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record p. 15; that prior to the expiration of her insured status she was unable to perform her past relevant work as a cook, cleaner, crab picker, sardine packer, assembly worker, seamstress and laundry worker, Finding 6, Record p. 16; that before her date last insured she lacked the residual functional capacity to lift and carry more than ten pounds, to sit, stand or walk for prolonged periods, or to work in cold and damp environments, and that she required the option of sitting or standing at will, Finding 5, Record p. 16; that her statements concerning her impairments and their impact on her ability to work on the date her insured status expired are not entirely credible, Finding 4, Record p. 16; that, based upon an exertional capacity for sedentary work, her age (48), education (high school) and vocational background (unskilled), application of Rule 201.21 of Appendix 2, Subpart B, 20

C.F.R. § 404 (the “Grid”), would direct a conclusion of “not disabled,” Findings 9-11, Record p. 16; that she was unable to perform the full range of sedentary work on her date last insured, Finding 12, Record p. 16; but that, using the Grid rule as a framework for decisionmaking, the plaintiff was not disabled on the date her insured status expired because there exists a significant number of jobs in the national economy she could perform, including those of shoe industry blemish repair worker, packager, ticketer and cashier, *id.*; and that, therefore, the plaintiff was not disabled at any time through the expiration of her insured status on March 31, 1992, Finding 13, Record p. 17. The Appeals Council declined to review the decision, Record pp. 3-4, 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); *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 Commissioner determined that the plaintiff is not capable of performing her past relevant work, the burden of proof shifted to the Commissioner at Step 5 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 Commissioner'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).

Citing *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986), the plaintiff contends that the administrative law judge improperly declined to credit her testimony about her pain and its impact on her ability to work. In *Avery*, the First Circuit stressed that the adjudicator is not required to credit any statements made by a claimant as to her experience of pain, but that, “so long as statements of a claimant or [her] doctor are not inconsistent with the objective findings, they could, *if found credible by the adjudicator*, permit a finding of disability where the medical findings alone would not.” *Id.* at 21 (emphasis added).

Invoking this language, the plaintiff contends that the administrative law judge should have credited her testimony to the effect that on some days she is almost completely unable to move one of her legs as a result of pain in her hip, so that it is difficult for her even to get out of bed. Record p. 33. In rejecting this assertion, the administrative law judge noted the testimony of the medical advisor, Carl Irwin, M.D., who stated that the medical evidence of record does not support the plaintiff's contentions regarding pain. *Id.* at 13, 54. The plaintiff's position is that Dr. Irwin expressed that view because he was unaware that she had begun suffering from arthritis subsequent to the hip fracture. I disagree. Dr. Irwin actually testified he found no indication in the medical records of any arthritis following the plaintiff's two surgeries, in April 1991 and October 1992, related to her hip fracture. *Id.* at 55, 135. He suggested that a finding of arthritis would make it more likely that the plaintiff's pain testimony was credible, but he also stressed that the medical records did not establish a diagnosis of arthritis. *Id.*

The plaintiff directs the court's attention to the progress notes of treating physician Peter Pascal, M.D., dating from August 1993, that report “minor to moderate degenerative changes about the hip joint.” *Id.* at 166. The medical advisor testified that such degenerative changes could be a sign of arthritis, but that Dr. Pascal's notes were “not very clear” on that point. *Id.* at 56. The observation of degenerative changes in 1993 would not be relevant to the question of whether the plaintiff was disabled as of March 31, 1992, the last date on which she was insured. Evidence of an impairment that reached a disabling level of severity after the date last insured, or that was exacerbated after this date, cannot be the basis for a disability determination, even though the impairment may have had its roots prior to the date on which insured status expired. *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 79 (1st Cir. 1982); *Flint v. Sullivan*, 743 F. Supp. 777, 783 (D. Kan. 1990), *aff'd*, 951 F.2d 264 (10th Cir. 1991). Accordingly, even if Dr. Pascal's August 1993 progress notes tended to corroborate the plaintiff's testimony concerning pain, their temporal irrelevance made it proper for the administrative law judge not to take them into consideration. In this regard, it is important to note that the administrative law judge did not sweepingly reject the plaintiff's testimony, which related to the pain she was experiencing up to and including the hearing on March 31, 1994, but stated that he found her testimony on that date to be less than fully credible as to her ability to work as of the date her insured status expired. Finding 4, Record p. 16.

When an administrative law judge questions a claimant thoroughly about her subjective symptoms in accordance with the principles set forth in *Avery*, which requires detailed questioning about daily activities and the effect of pain thereupon, *Avery*, 797 F.2d at 23, “[t]he credibility determination by the [administrative law judge], who observed the claimant, evaluated [her]

demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.” *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987). The administrative law judge conducted the appropriate inquiry at the hearing and made the requisite specific findings, determining that the plaintiff’s written statements and testimony about doing housework, gardening and aerobics, and a treating physician’s notation that her hip was asymptomatic prior to a fall in April 1992, are inconsistent with her pain allegations and justify a finding that these allegations are not credible. *See* Record pp. 13, 45-46, 91, 135, 152. I therefore find no reason to disturb his credibility determination.

At oral argument, the plaintiff urged the court to take into consideration the fact that she was close to age 50 on the date her insured status expired, and the fact that, had she then been 50, Grid Rule 201.14 would have directed the Commissioner to find her disabled. On the date she was last insured, the plaintiff was 48 years old, making her a “younger individual age 45-49” for purposes of the Grid. Finding 8, Record p. 16. As the administrative law judge noted, strict application of the Grid would therefore have compelled a finding that the plaintiff was not disabled. Finding 11, Record p. 16; Grid Rule 201.21. However, the plaintiff’s inability to perform the full range of sedentary work made use of the Grid appropriate only as a framework for decisionmaking. Finding 12, Record p. 16; *see Rose v. Shalala*, 34 F.2d 13, 19 (1st Cir. 1994) (strict application of Grid appropriate only when non-exertional limitations do not significantly impair claimant’s ability to perform at given exertional level). The plaintiff cites no authority, and I know of none, for the notion that the administrative law judge should not have used Grid Rule 201.21 as a framework for decisionmaking because the plaintiff was less than two years away from meeting the age

requirements of Grid Rule 201.14, a framework for decisionmaking that would have pointed the administrative law judge toward a finding the plaintiff was disabled. The Grid is by definition a mechanical device, even when used simply as a decisionmaking framework; within its paradigm, “almost” does not count.

Finally, the plaintiff challenges the finding that there exists a significant number of jobs in the national economy that she is capable of performing, pointing to the vocational expert's testimony that an absentee rate of three to five days a month would have a “significant impact” on her finding that such jobs exist for the plaintiff. *Id.* at 65. The plaintiff points to no medical evidence of record, and I am unable to find any, that would require such a restriction to be included in the hypothetical posed to the vocational expert that became the basis of the ultimate finding that the plaintiff was not disabled from work. *Cf. Rose*, 34 F.3d at 19 (administrative law judge omitted significant functional limitation from hypothetical; finding of no disability vacated).

Accordingly, I recommend that the Commissioner'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 25th day of July, 1995.*

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*David M. Cohen*

*United States Magistrate Judge*