

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LINDA E. MASON,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 97-129-B
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security¹</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION²

This Supplemental Security Income (“SSI”) appeal raises issues concerning the plaintiff’s ability to perform a full range of light work, the need for testimony from a vocational expert and the severity of the plaintiff’s mental impairment. I recommend that the court remand the case for further proceedings.

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 Pursuant to Fed. R. Civ. P. 25(d)(1), Commissioner of Social Security Kenneth S. Apfel is substituted as the defendant in this matter.

² 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(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 7, 1997 pursuant to Local Rule 16.3(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 that the plaintiff had not engaged in substantial gainful activity since August 5, 1994, Finding 1, Record p. 17; that she suffered from intermittent back pain, an impairment that was severe but did not meet or equal any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 2, Record p. 17; that she lacked the residual functional capacity to lift and carry more than 20 pounds, stand for prolonged periods or bend repeatedly, Finding 4, Record p. 17; that she had no history of past relevant work, Finding 5, Record p. 17; that she had a non-exertional limitation which prevented her from bending repeatedly, Finding 6, Record p. 17; and that, based on her exertional capacity for light work, her age, educational background and work experience, use of Rule 202.20 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (“the Grid”), as a framework resulted in a conclusion that she was not disabled, Finding 9, Record p. 17.

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 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).

I. Severe Impairment at Step 2

At Step 2 of the sequential evaluation process, the plaintiff had the burden of demonstrating that she had a severe impairment or combination of impairments that significantly limited her ability to do basic work activities. 20 C.F.R. § 416.920(c); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). The burden at Step 2 is *de minimis*, “designed to do no more than screen out groundless claims.” *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). Therefore,

when a claimant produces evidence of an impairment or combination of impairments, 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.* (quoting Social Security Ruling 85-28). Significantly, the focus at Step 2 is entirely on the medical evidence, and the burden is on the plaintiff to provide medical evidence of sufficient completeness and detail to allow the Commissioner to ascertain the nature and limiting effects of the impairment. Social Security Ruling 85-28, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (1992), at 393; 20 C.F.R. § 416.913(d)(1). Here, the plaintiff contends that the Administrative Law Judge erred by failing to determine at Step 2 that she suffers from a severe mental impairment, based on medication for anxiety prescribed by John Woytowicz, M.D., and anxiety noted by Ras Masood, M.D.

The administrative law judge noted that the plaintiff complained of anxiety and stress to Dr. Masood on June 21, 1995, Record at 14, and that medication for stress was prescribed by the Family Medicine Institute (Dr. Woytowicz) in July 1996, *id.* at 15. The administrative law judge stated that the plaintiff’s “allegations of . . . high levels of anxiety cannot be accepted in light of her refusal of virtually all forms of treatment except for narcotic and psychoactive drugs.” *Id.* at 15. There is no evidence in the record that the plaintiff ever refused any treatment for anxiety or stress. The administrative law judge referred to a “report of contact with the claimant in February, 1996” in Exhibit 16F advising that “she is receiving no psychotherapy because she does not ‘like counseling,’” *id.* at 15, but no such report appears in Exhibit 16F. The administrative law judge concluded that “[n]either the objective medical evidence nor the credibility of the claimant’s statements supports a belief that she has a . . . severe anxiety related disorder.” *Id.* at 16.

The hearing in this matter was held on September 26, 1996, only two months after Dr. Woytowicz prescribed medication for anxiety. While the medical evidence may be minimal, the plaintiff's burden at Step 2 is also minimal. The plaintiff points out that the administrative law judge failed to follow the procedure set forth in 20 C.F.R. § 404.1520a for evaluation of a claim of mental impairment. For this SSI claim, the applicable regulation is actually 20 C.F.R. § 416.920a, but the substance is the same. When a mental impairment is asserted, an administrative law judge must assess its severity following the special procedure outlined in the regulation, which includes the completion of a Psychiatric Review Technique Form ("PRTF"). The failure to fill out the form necessitates remand. *Montgomery v. Shalala*, 30 F.3d 98, 100 (8th Cir. 1994).

The record includes two PRTFs completed by psychologists at the time of the first evaluation of the plaintiff's claim, in February 1996, Record at 79-86, and at the time of reconsideration of the denial of her claim, in March 1996, *id.* at 101-08. The administrative law judge refers to neither, and in any event the regulation requires that a PRTF be completed at each level of administrative and adjudicative level of review. 20 C.F.R. § 416.920a(a) & (c)(4). The record contains no PRTF completed at the level of the administrative law judge hearing or the Appeals Council level.

An impairment is considered severe only if it significantly limits physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c). At Step 2 of the sequential evaluation process, medical evidence alone is evaluated in order to assess any limitations caused by an impairment. Social Security Ruling 85-28, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (1992) at 390-95. Such evidence must include an assessment supported by medical signs and findings "complete and detailed enough to allow [the Commissioner] . . . to determine . . . the nature and limiting effects of [any] impairments." 20 C.F.R. § 416.913(d)(1). There is no indication in the record that the administrative law judge specifically considered the effect of the plaintiff's asserted mental

impairment on her ability to perform basic work activities as required by 20 C.F.R. § 416.921(a) & (b). *See generally Sprague v. Heckler*, 595 F. Supp. 1380, 1382-83 (D. Me. 1984). Only if I could conclude that there is substantial evidence in the record to support an inferred finding that the plaintiff has no mental impairment would the absence of a PRTF be harmless error. The record does not allow such a conclusion in this case. *See also Stambaugh v. Sullivan*, 929 F.2d 292, 296 (7th Cir. 1991) (absence of PRTF requires remand); *Hill v. Sullivan*, 924 F.2d 972, 975 (10th Cir. 1991) (same).

II. Other Claimed Errors

While remand is necessary due to the absence of a PRTF, some discussion of the further points raised by the plaintiff in this action may assist the Commissioner in further proceedings. The plaintiff contends that the finding that she cannot stand for prolonged periods, Finding 4, Record at 17, is inconsistent with the administrative law judge's conclusion that she has the exertional capacity for light work, because that category of work requires "a good deal of walking or standing," citing 20 C.F.R. § 404.1567(b). Again, the correct regulation for this claim is 20 C.F.R. § 416.967(b), which provides, in relevant part:

Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

In the First Circuit, inability to undertake prolonged standing was at one time held not to be inconsistent with a finding of capacity for light work. *Lopez Diaz v. Secretary of Health, Educ. & Welfare*, 585 F.2d 1137, 1138 (1st Cir. 1978). However, a subsequent Social Security Ruling, still in effect, calls this holding into question. SSR 83-12, entitled Titles II and XVI: Capability to Do Other

Work — The Medical-Vocational Rules as a Framework for Evaluating Exertional Limitations Within a Range of Work or Between Ranges of Work, provides the following guidance under the subheading “Special Situations:”

1. *Alternate Sitting and Standing*

In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for awhile before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work . . . or the prolonged standing or walking contemplated for most light work.

SSR 83-12, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (1992) at 39-40. Courts that have specifically reviewed an administrative law judge’s finding that a plaintiff who is incapable of prolonged standing may nevertheless be characterized as capable of light work have found the two conclusions to be inconsistent in light of the language of SSR 83-12. *E.g.*, *Peterson v. Chater*, 96 F.3d 1015, 1016 (7th Cir. 1996); *Jesurum v. Secretary of the U. S. Dep’t of Health & Human Servs.*, 48 F.3d 114, 120 (3d Cir. 1995). At the least, testimony of a vocational expert or use of a vocational dictionary is required when claimants present such a limitation, *Peterson*, 96 F.3d at 1016; *Books v. Chater*, 91 F.3d 972, 980 (7th Cir. 1996), neither of which was used by the administrative law judge here. On remand, this issue must be addressed as well.

The plaintiff’s remaining contentions, that the administrative law judge failed to adequately evaluate her testimony concerning pain and to make an evaluation of her credibility in accordance with Social Security Ruling 96-7p, are incorrect. The decision complies with the requirements of that Ruling and those of SSR 96-8p and *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986), the authorities cited by the plaintiff.

III. Conclusion

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for 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 17th day of November, 1997.

David M. Cohen
United States Magistrate Judge