

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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| <i>CONSTANCE M. DOW,</i> |) | |
| |) | |
| <i>Plaintiff</i> |) | |
| |) | |
| <i>v.</i> |) | <i>Civil No. 96-347-P-H</i> |
| |) | |
| <i>JOHN J. CALLAHAN,</i> |) | |
| <i>Acting Commissioner of Social Security,¹</i> |) | |
| |) | |
| <i>Defendant</i> |) | |

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) appeal raises only the issue of whether remand for further proceedings or remand with a direction to award benefits is appropriate under the circumstances presented. In accordance with previous actions of this court, I recommend that the court vacate the Commissioner’s decision and remand the cause with directions to award benefits to the plaintiff.

In accordance with the Commissioner’s sequential evaluation process, 20 C.F.R. § 404.1520;

¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security John J. Callahan is substituted as the defendant in this matter.

² 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 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 before me on June 23, 1997 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.

Goodermote v. Secretary of Health & Human Servs., 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since March 31, 1991, Finding 2, Record p. 20; that she suffers from degenerative disc disease of the cervical spine, an impairment that does not meet or equal any of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 20; that she has the capacity for sedentary work, diminished by limitations involving repetitive lifting, extending her arms, and working with her hands in an overhead position, Finding 5, Record p. 21; that she is unable to perform her past relevant work, Finding 6, Record p. 21; that, based on an exertional capacity for sedentary work, her age (39), her educational background (high school graduate), and her unskilled work experience, application of Rule 201.27 of Appendix 2 to Subpart P, 20 C.F.R. § 404 (“the Grid”), directed a conclusion that she was not disabled at any time prior to the administrative law judge’s decision on June 27, 1995, Findings 7-10, Record p. 21; and that although she is unable to perform the full range of sedentary work, she is capable of making an adjustment to work which exists in significant numbers in the national economy, Finding 11, Record p. 21. 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); *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).

The Commissioner filed a motion to remand on June 2, 1997, conceding that the use of the Grid in this case was inappropriate because the occupational base for sedentary work had been eroded. Memorandum in Support of Defendant's Motion to Remand (Docket No. 5) at 3. The parties agree that the testimony of a vocational expert was necessary at this point in Step 5 of the sequential evaluation process. I denied the motion to remand (Docket No. 4 endorsement) "in the absence of any showing that there is *new* evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in the prior proceeding." 42 U.S.C. § 405(g).

Nothing presented to me by counsel for the defendant at oral argument causes me to change my conclusion that this case is indistinguishable from *Field v. Chater*, 920 F. Supp. 240 (D. Me. 1995). The burden of proof is on the Commissioner at Step 5. *Goodermote*, 690 F.2d at 7. By failing to provide the testimony of a vocational expert, the Commissioner failed to meet that burden. The Commissioner is not entitled to remand to remedy his error; nothing in statute or regulation gives him sequential bites at the apple until he gets everything right. "In circumstances where the claimant has made out a prima facie case for benefits and the Commissioner's vocational expert does not present the required evidence of the claimant's ability to perform work that exists in the national economy, the appropriate relief is an award of benefits absent some good cause for the evidentiary gap." *Field*, 920 F. Supp. at 245. The Commissioner is not entitled to a more relaxed standard of review when he neglects altogether to provide any testimony from a vocational expert, merely because he concedes that he has also incorrectly applied the relevant law. He has made no showing of good cause for the lack of such testimony.

Accordingly, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff.

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 24th day of June, 1997.

*David M. Cohen
United States Magistrate Judge*