

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KAREN STINE,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 97-88-P-H</i>
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,¹</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal requires the court to decide two issues: (1) whether the Commissioner erred in analyzing the claimant’s exertional and non-exertional limitations, and (2) whether the Commissioner appropriately determined that there is work available in the national economy that the plaintiff is capable of performing. I recommend that the court affirm the Commissioner’s decision.

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. §§ 405(g) and 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(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 November 7, 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.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5. 6 (1st Cir. 1982), the Administrative Law Judge found that the plaintiff had not engaged in substantial gainful activity since August 2, 1990, Finding 2, Record p.17; that she has a vertebrogenic disorder with pain, an impairment which was severe but did not meet or equal any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 3, Record p.17; that she lacked the residual functional capacity to lift and carry more than ten pounds, to stand or walk for prolonged periods, or to perform tasks requiring more than limited climbing, balancing, stooping, kneeling, crouching and crawling or more than very limited forward twisting and turning, Finding 5, Record p.18; that she was unable to perform her past relevant work, Finding 6, Record p.18; that she was unable to perform the full range of sedentary work but was capable of making an adjustment to work that exists in significant numbers in the national economy and was, therefore, not disabled, Finding 12, Record p.18. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *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), 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 conclusion 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).

Analysis

Both of the issues raised by the plaintiff deal with the evaluation performed by the administrative law judge at Step 5 of the sequential evaluation process. First, the plaintiff asserts that the hypothetical question posed to the vocational expert by the administrative law judge did not accurately reflect her limitations. The hypothetical question included the following limitations: sedentary work only, lifting ten pounds or less; standing continuously less than two hours; sitting continuously less than six hours; sit/stand option acceptable; pushing and pulling limited in the lower extremities; occasional kneeling, crouching and crawling. Record p. 51. The plaintiff argues that the hypothetical question is fatally flawed because it omits the two “most significant” limitations found by the administrative law judge: very limited forward twisting and turning. The Commissioner responds that these limitations are included in the limitations stated in the hypothetical question although the words “twisting” and “turning” are not used, referring to Social Security Ruling 83-10, entitled “Titles II and XVI: Determining Capability to Do Other Work — The Medical-Vocational Rules of Appendix 2.”

In defining sedentary work, that Ruling provides, in relevant part: “By its very nature, work performed primarily in a seated position entails no significant stooping.” Social Security Ruling 83-10, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (1992) 24, 29. There is no explicit mention of twisting and turning, nor does stooping necessarily include both twisting and turning, or either activity. However, courts that have addressed twisting limitations have found them not to be incompatible with jobs in the light work category. *E.g., Hayes v. Chater*, 73 F.3d 769, 771 (8th Cir. 1996) (medical report stated that plaintiff could not tolerate repetitive twisting or turning “anymore than an occasional activity;” light work jobs identified by vocational expert

required twisting “to some extent;” denial of benefits upheld); *Faford v. Shalala*, 856 F. Supp. 13, 17, 18 (D. Mass. 1994) (restriction against excessive bending, twisting or stooping not inconsistent with residual functional capacity for full range of light work). Such work requires more exertional capacity than does the sedentary work capacity found by the administrative law judge in this case. Social Security Ruling 83-10 at 29. Here, limited twisting and turning does not appear to be inconsistent with the jobs in the category of sedentary work that the vocational expert testified would be available for the plaintiff. I find the reasoning of the Eighth Circuit in *Hayes* to be persuasive on this point.

The plaintiff also mentions her subjective pain as having been omitted from the hypothetical question by the administrative law judge, but that claimed limitation was presented to the vocational expert during cross-examination by the plaintiff’s attorney. See *Torres v. Secretary of Health & Human Servs.*, 870 F.2d 742, 746 (1st Cir. 1989) (plaintiff has obligation to pose own hypothetical question to vocational expert if she finds the administrative law judge’s question inadequate). There is no sense in which the hypothetical questions posed to the vocational expert, taken in their entirety, were insufficient. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982).

In a final argument on this point, the plaintiff asserts that the Commissioner did not comply with Social Security Ruling 96-9p in some unspecified fashion. I have reviewed that Ruling, entitled “Policy Interpretation Ruling Titles II and XVI: Determining Capability to Do Other Work -- Implications of a Residual Functional Capacity for Less Than a Full Range of Sedentary Work,” and find no failure of compliance. In the absence of a specific reference to some section of the Ruling, no further analysis is possible.

The plaintiff next argues that the testimony of the vocational expert provided insufficient

evidence of jobs which she could perform. The expert offered the jobs of receptionist with a sit/stand option and order clerk. Record pp. 52-53. He provided the number of such positions in the national and state economies. Nothing further was required to meet the Commissioner's burden. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995) (testimony that two appropriate jobs existed sufficient).

In a very general statement, the plaintiff maintains that the administrative law judge "did not correctly assess [her] pain allegations," Statement at 2, citing *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986). *Avery* requires the administrative law judge, in cases in which there is a claim of pain not supported by objective findings, to obtain detailed descriptions of the plaintiff's daily activities by directing specific inquiries about the pain and its effects to the plaintiff. *Id.* at 23. The record in this case demonstrates that such inquiries were made. Record pp. 31-33, 42-46. Nothing further was required.³

Conclusion

For the foregoing reasons, 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

³ The plaintiff's Statement of Itemized Errors (Docket No. 5) also mentions "chronic gastrointestinal abnormalities" at page 1. No such alleged limitation was brought to the attention of the administrative law judge. When asked at oral argument to specify all errors that should be considered by the court on this appeal, counsel for the plaintiff did not mention this claimed limitation. In any event, there is nothing in the record to suggest that the plaintiff suffered any such limitation at the time of her application for benefits or at the time of the hearing. Under the circumstances, I do not consider any such limitation in my review of this matter.

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 12th day of November, 1997.

David M. Cohen
United States Magistrate Judge