

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PAMELA GOULD,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 97-236-B
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMEND DECISION¹

This Supplemental Security Income (“SSI”) and Social Security Disability (“SSD”) appeal raises the issues whether the Commissioner erred in determining that the plaintiff retained the residual functional capacity for sedentary and light work, with certain limitations, and specifically whether the Commissioner failed to give adequate consideration to the side effects of certain medications prescribed for the plaintiff and failed to include consideration of the plaintiff’s sitting ability and chronic pain syndrome. I recommend that the court remand the case for further proceedings on the SSI issue only.

¹This 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 June 12, 1998 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, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on October 8, 1986, the date on which she stated that she became unable to work, and had acquired sufficient quarters of coverage to remain insured only through September 30, 1990, Finding 1, Record p.39; that she had not engaged in substantial gainful activity since October 8, 1986, Finding 2, Record p.39; that she suffered from carpal tunnel syndrome, obesity and fibromyalgia, impairments which were severe but which did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 39; that her statements concerning her impairments and their impact on her ability to work were not entirely credible in light of discrepancies between her assertions and information contained in the medical reports and the findings made on examination, Finding 4, Record p. 39; that she retained the residual functional capacity to perform light work with non-exertional functional limitations which prevent her from performing tasks requiring repetitive bending, twisting or overhead reaching, Finding 5, Record p. 39; that she was unable to perform her past relevant work, Finding 6, Record p. 39; that, based on her age (34), education (high school graduate), unskilled work experience and exertional capacity for light work, application of Rule 202.20 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 date of the decision (December 18, 1996), Findings 8-11 & 13, Record pp. 39-40; and that, although she was unable to perform the full range of light work, she was capable of making an adjustment to work which exists in significant numbers in the national economy, Finding 12, Record p. 40. The Appeals Council declined to review the decision, Record

pp. 7-8, making it the final decision 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 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 was not capable of performing her past relevant work, the burden of proof shifted to the Commissioner at Step 5 of the evaluation process to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. §§ 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). The record therefore 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).

The plaintiff addresses her claims for SSI and SSD separately.

I. The Claim for SSI

The plaintiff attacks the hypothetical question posed to the vocational expert by the administrative law judge at the hearing on her SSI claim on the ground that the administrative law judge failed to consider her testimony concerning the side effects of medication, citing *Figueroa v.*

Secretary of Health & Human Servs., 585 F.2d 551 (1st Cir. 1978), and argues specifically that a question to the vocational expert should have included the sleepiness induced by medication, Statement of Specific Errors (Docket No. 3) at 4.

The testimony to which the plaintiff refers is found at page 54 of the record.² This is the only testimony regarding the side effects of medication to which the plaintiff directs the court's attention. In *Figueroa*, the claimant was impaired by epilepsy, which had been controlled by medication. 585 F.2d at 553. He testified that the medication made him so sleepy, hot and ill-tempered that it disabled him from working. *Id.* Because the regulations concerning epilepsy recognized that unusually large doses of medication could create problems, the First Circuit held that the administrative law judge should have made further inquiry concerning the claimed side effects of the medication, so that the reviewing court could know that the claim was "not entirely ignored." *Id.* at 554.

The Commissioner may not ignore the issue of the side effects of medication, especially when the claimant expressly or, as here, inferentially has contended in her testimony that they disable her from working, simply because the claimant's testimony comprises the only evidence of record that such side effects exist. *Id.* at 553-54. The administrative law judge in this case did not seek the assistance of an expert in determining the validity, severity and disabling consequences of the asserted side effect, nor did he otherwise inquire about the matter. The absence of complaints about

² Q [plaintiff's representative]: . . . Who prescribes the Relofin and Darvoscet [sic]?

A [plaintiff]: Let's see. Dr. Bradford prescribed the Relofin and Dr. Kline prescribed the Darvoscet.

Q: Do you have any side effects on those medications?

A: Darvoscet makes me want to sleep all the time.

Q: I trust no more so then [sic] the Demerol?

A: No, Demerol is even worse.

the side effect by the plaintiff to her doctor cannot by itself constitute substantial evidence. Under the circumstances present in this case, an administrative law judge must either seek further medical evidence or make some further inquiry. *Id.* at 554. The administrative law judge here did neither.

At oral argument, counsel for the plaintiff relied on a report of Dr. Badeen dated February 27, 1997, some two months after the administrative law judge's decision was issued, that was submitted to the Appeals Council in which Dr. Badeen states that the plaintiff was, at that time, "basically disabled" by seronegative rheumatoid arthritis leading to marked impairment in her abilities to engage in repetitive motion activities and heavy lifting. Record p. 27. Nothing in this report establishes the date of onset of the stated disability. *See* 20 C.F.R. § 416.1470(b) (Appeals Council will not consider new evidence unless it relates to period on or before date of hearing decision). The commissioner took the position at oral argument, without citation to authority, that this court may not use medical evidence filed after the decision of the administrative law judge has been issued to review the commissioner's decision on the merits, but only to determine whether that evidence is both new and material, *id.*, and therefore requires remand.

Assuming without deciding that the commissioner's position is correct, he does not contest the fact that the report presents new information and that information appears to me to be material to the plaintiff's claim. Because rheumatoid arthritis is characterized in the listings as one of the diseases of the immune system that "generally evolve and persist for months or years, may result in loss of functional abilities, and may require long-term, repeated evaluation and management," 20 C.F.R. Part 404, Subpart P, Appendix 1, §§ 14.00(B) & (B)(5), it is possible that the rheumatoid arthritis diagnosed by Dr. Badeen as disabling may have progressed to that stage before the date of the hearing. This possibility makes Dr. Badeen's report material. It will be the plaintiff's burden

on remand to demonstrate that the newly-diagnosed condition was in fact present before the relevant date. *See Rafael Rico v. Secretary of Health, Educ. & Welfare*, 593 F.2d 431, 432 (1st Cir. 1979).

For the foregoing reasons, I recommend that the court remand the case for further proceedings on the SSI claim limited to the claimed side effect of Darvocet and its effect, if any, on the plaintiff's ability to perform the functions of light or sedentary work and the claimed disability due to rheumatoid arthritis, if that disability was present before June 26, 1996, the date of the initial hearing in this matter before an administrative law judge.

II. The SSD Claim

The plaintiff does not dispute the fact that she must demonstrate that she was disabled as of September 30, 1990, the date last insured, in order to qualify for SSD benefits. The plaintiff asserts that the medical records show that prior to that date she needed to keep her leg extended to relieve stiffness and she suffered "a considerable amount of pain," Statement of Specific Errors at 6, but she does not identify where in the extensive record of this case such reports appear. At oral argument, her counsel could not identify any such reference in the record. Because such a limitation was not included in the hypothetical question addressed to the vocational expert, the plaintiff nonetheless contends, she is entitled to a remand for further proceedings.

The medical records for the period preceding September 30, 1990 are found at pages 185-224 of the record. The only reference to a need to relieve stiffness in either knee is found in the records of Dr. Banks dated September 7, 1988, in which he states that "She could basically do any type of sitting work as long as she could move her knee for relief of the stiffness that occurs and therefore most clerical work would be accepted." Record p. 209. From Dr. Banks's earlier records, it is

apparent that it is the plaintiff's right knee that is at issue. *E.g., id.* at p. 207. In a medical record dated June 29, 1990 Dr. Bradford reports that the plaintiff's "report is now that the left knee is the problem, the right being relatively quiet." *Id.* at p. 221. The plaintiff's only testimony concerning either knee was that the two surgeries on her right knee, one in June 1987, *id.* at p. 213, and one in October 1989, *id.* at p. 217, limited her standing and walking at the time of the hearing, *id.* at p. 50. However, she told Dr. Bradford in June 1990 that "now the left knee is the problem, the right being relatively quiet." *Id.* at p. 221. Taken together, this evidence does not require the administrative law judge to include the plaintiff's "need to keep her leg extended to relieve stiffness" before September 30, 1990 in his hypothetical question to the vocational expert.

The plaintiff did not testify about the pain she may have suffered before September 30, 1990. There are some reports of pain in her medical records before that date, but no indication that any of the reported pain would prevent her from working or require limitations on her work beyond the level of light work included in the hypothetical question. At oral argument, the plaintiff's counsel argued that the administrative law judge was required to adopt the restrictions listed by Dr. Banks in 1988, *id.* at pp. 208-09, in his hypothetical question to the vocational expert. While Dr. Banks does list some general limitations ("she could do any type of work that would not involve a lot of stair climbing or scooching and in other words avoid repeated stress on the underside of her patella and on her knee," *id.* at p.209), he opined at the same time that the plaintiff was capable of clerical work, which is precisely the type of work that the vocational expert testified in response to the hypothetical question would be available for the plaintiff, *id.* at p. 60 ("cashier..., receptionist, sort of general office kind of work"), as well as "any type of sitting work," *id.* at 209. There is substantial evidence in the record to support the formulation of the hypothetical question posed to the vocational

expert by the administrative law judge.

The plaintiff also contends that she is entitled to remand on her SSD claim because a consultation report of Dr. John F. Bradford dated June 29, 1990, states, in relevant part: “In light of her history, strongly suggestive of Munchausen’s syndrome, I am reluctant to consider anything other than the usual conservative measures” for treatment of her left knee. *Id.* at p. 221. She contends that this mention in a single page of her medical records requires the administrative law judge to fill out a Psychiatric Review Technique Form (“PRTF”) for the SSD claim, which was not done in this case. Indeed, the only claim of mental disability drawn to the attention of the administrative law judge at the hearing by the plaintiff’s representative related to the report of William DiTullio, Ed.D., *id.* at 45, who saw the claimant once in 1996, *id.* at 425, and whose report therefore could not provide the basis for any finding concerning the claimant’s mental status before September 30, 1990. The absence of any testimony concerning any mental disability before that date, the absence from the record of any evidence of treatment for or further investigation of any such possibility, the fact that the only mention of a possible mental disability is found in the record of a physician treating a medical problem rather than a medical professional dealing in psychiatric or emotional problems, and the fact that the plaintiff’s representative made no reference at the hearing to any such possibility combine to support an inference that the administrative law judge found no mental impairment before the relevant date. Under these circumstances, the absence of a PRTF is at best harmless error. *See* 20 C.F.R. § 416.920a(b) (if mental impairment is found to exist based on medical evidence of signs and symptoms, usually a mental status examination and psychiatric history, then PRTF must be used).

III. Conclusion

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and remanded for further proceedings as to the application for Supplemental Security Income benefits based on the side effect of drowsiness caused by the medication Darvocet and the possible presence of rheumatoid arthritis and otherwise **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 this 18th day of June, 1998.

*David M. Cohen
United States Magistrate Judge*