

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SANDRA PERRY on behalf of)
RANDIE PERRY,)
)
Plaintiff)
)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security,)
)
Defendant)

Civil No. 97-269-B

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income appeal involves an application for disability benefits submitted by the plaintiff on behalf of her minor daughter. The Commissioner awarded benefits, but only for the period from July 1, 1985 through January 1, 1987. The issue on appeal is whether, as to the period after January 1, 1987, the Commissioner properly determined that the claimant was not disabled because she did not have an impairment or combination of impairments that met or equaled any of those listed in 20 C.F.R. § 404, Subpart P, Appendix 1 (“the Listings”). Specifically, the plaintiff contends her daughter may have met the Listing for cerebral palsy after January 1, 1987 and that a remand for the taking of additional evidence is necessary. I recommend that the decision of

¹ 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 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.

the Commissioner be affirmed.

The sequential evaluation process generally followed by the Commissioner in making disability determinations, *see* 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), is somewhat modified when the claimant is a child, *see* 20 C.F.R. § 416.924.² In this instance, a prior determination that the claimant had been disabled from July 1, 1985 through January 1, 1987 was not at issue when the matter came before the Administrative Law Judge, who therefore adopted that finding. Finding 1, Record p. 27. In accordance with section 416.924, the Administrative Law Judge then determined that the claimant had not engaged in substantial gainful activity at any time since the asserted date of disability onset, Finding 2, Record p. 27; that she had developmental and motor delays, as well as mild cerebral palsy, and suffered from severe impairments subsequent to July 1, 1987, Findings 3 and 6, Record pp. 27-28; that she nevertheless did not have an impairment or combination of impairments that met or equaled any of the impairments described in the Listings, Finding 4, Record p. 27; that, as of January 1, 1987, she had no impairment or combination of impairments that so adversely affected her ability to function independently, appropriately and effectively in an age-appropriate manner such that she had an impairment of comparable severity to one that would render an adult incapable of engaging in substantial gainful activity, Finding 7, Record p. 28; and that the claimant was therefore not disabled at any time beginning on January 1, 1987, Finding 8, Record p. 28. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the

² Section 416.924 of the Commissioner's regulations was amended effective April 14, 1997. *See* 62 Fed.Reg. 6421 (1997). The Administrative Law Judge's decision antedated the amendment, but the decision of the Appeals Council affirming the prior determination followed it. Because the amendment does not appear to have been material to any of the issues raised on appeal, references are to the amended text of the regulation.

Commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).³

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).

The plaintiff contends that substantial evidence is lacking to support the Commissioner's determination that the claimant's impairments did not meet or equal Listing 111.07 after January 1, 1987. Listing 111.07 concerns cerebral palsy and contains the following requirements:

- A. Motor dysfunction meeting the requirements of [Listing] 111.06 or 101.03; or
- B. Less severe motor dysfunction (but more than slight) and one of the following:
 - 1. IQ of 70 or less; or
 - 2. Seizure disorder, with at least one major motor seizure in the year prior to application; or
 - 3. Significant interference with communication due to speech, hearing or visual defect; or
 - 4. Significant emotional disorder.

Listings at ¶ 111.07. The Administrative Law Judge discussed only the "B" criteria of the Listing.

³ For reasons that are not made clear, but that apparently have to do with the lack of a reasonably prompt response to the plaintiff's request to the Appeals Council for a copy of the administrative record pursuant to 20 C.F.R. § 416.1474, *see* Record pp. 13-15, more than 13 months elapsed between the Administrative Law Judge's decision and the Appeals Council's action. It seems to me that Social Security claimants deserve a more prompt resolution of matters consigned to the agency's administrative review process.

The plaintiff does not challenge the implicit finding that the “A” criteria are not applicable in the circumstances of the case.

At the hearing, the Administrative Law Judge received testimony from medical advisor Irwin Pasternak, M.D., a psychiatrist. Record pp. 58-63, 312. The plaintiff questions the value of the medical advisor’s testimony, suggesting that he was not fully aware of the medical record when he expressed his views at the hearing, that his limited opportunity to interact with the claimant at the hearing undermines his expressed views about the level of her coordination, and that the Administrative Law Judge should have sought expert input not from a psychiatrist but from a pediatrician or child psychologist. On the other hand, the plaintiff also directs the court’s attention to testimony from the medical expert she regards as favorable. Asked to consider whether the claimant’s impairments met Listing 111.07, Pasternak responded:

I think possibly, at one time, Randie may have me[t] the qualifications of that listing and, perhaps according to the record, that may have existed up until 1989. There’s a possibility that she may still have had some — enough impairment to meet the listing in 1992. At the present time, I don’t think there is sufficient evidence in the record to say that she meets the listing under 111.07.

Id. at p. 59.

There is no rule suggesting that because the medical advisor equivocated on the issue of whether the claimant’s impairment was of Listing severity during part of the period in question, the Administrative Law Judge could not make an unequivocal and negative finding on the issue. To the contrary, because the burden of proof at Step 3 of the sequential evaluation process rests squarely with the plaintiff, *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987), the Administrative Law Judge’s finding must be sustained if supported by substantial evidence.

The record reveals the requisite underpinnings to the Step 3 determination. The

Administrative Law Judge explicitly relied on reports from the claimant’s treating physician, a pediatrician, dating from 1986 and 1995, to determine that the claimant had not suffered any major motor seizures. *See id.* at pp. 24, 203, 318. She further relied on a 1988 report by a child development specialist, a 1989 report by a speech-language pathologist and school records from 1992 to support a determination that there was no evidence that the claimant experienced significant interference with communication due to speech, hearing or visual loss. *See id.* at 24, 209-11, 246-51, 259, 262-63.

In August 1986, when the claimant was just over two years old, the claimant’s treating physician referred to the claimant’s history of “[s]eizure disorder — recurrent episodes of staring spells and posturing of the right hand for which she had been treated with phenobarbital [sic].” *Id.* at 203. Nine years later, in May 1995, the same treating physician described the claimant’s medical history as including “recurrent seizure disorder *as an infant* with abnormal EEG pattern — no seizures since 1988.” *Id.* at 318 (emphasis added). In my view, this evidence provides the requisite support for the Administrative Law Judge’s finding that the plaintiff had not experienced major motor seizures.

The child development specialist who evaluated the claimant in 1988 at age four listed improving of “speech articulation” as among the child’s needs. *Id.* at 210. Approximately a year later, when the claimant was in kindergarten, a speech-language pathologist found that the child’s speech articulation skills were “moderately delayed” and recommended remedial attention to those skills. *Id.* at 250. A report from 1992 reveals that the claimant was participating in her elementary school’s speech-language program and working on her articulation of certain sounds. *Id.* at 259. In 1992, in the context of an annual review of the claimant’s special education program, her speech

therapist reported that the child

has developed a lisp and has reverted to babyish talk. She said that Randie can correct her speech on her own but she doesn't. All of these represent areas of regression. She has made progress in some other speech and language areas.

Id. at 262, 265. While this evidence certainly suggests that speech problems remained an issue for the child during the period in question, it also supports the Administrative Law Judge's determination that there was no significant interference with communication due to speech.

Two ancillary concerns raised by the plaintiff do not fatally undermine the Administrative Law Judge's determination. According to the plaintiff, "[t]he Administrative Law Judge seems to suggest that with evidence of seizure disorder, there must also be significant interference with communication due to speech, hearing, or visual defect in order to reach Listing levels." Statement of Specific Errors (Docket No. 3) at 5. What the Administrative Law Judge actually wrote is this: "Disability is established under Section 111.07(B) only if there is evidence of a seizure disorder, with at least one major motor seizure in the year prior to application or where there is significant interference with communication due to speech, hearing or visual defect." Record p. 24. I agree that the sentence does not take into account the potential role of the claimant's IQ or possible emotional disorder for purposes of the Listing. It is nevertheless clear that neither IQ nor emotional disorder were at issue, and that the Administrative Law Judge determined in conformance with the criteria of the Listing that the claimant had neither seizure disorder nor speech problems of the requisite severity. Second, the plaintiff argues forcefully that the claimant's motor dysfunction, while possibly mild and thus less than moderate, was more than slight and thus within the Listing. The court need not reach this issue as it did not form the basis for the Administrative Law Judge's determination that the claimant's impairment did not meet or equal the Listing in question.

Accordingly, I recommend that the decision of the Commissioner 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 this 18th day of June, 1998.

*David M. Cohen
United States Magistrate Judge*