

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LYNN McGEE,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 97-387-P-H</i>
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises issues concerning the Commissioner’s evaluation of an alleged mental impairment, assessment of the claimant’s credibility, and consideration of the claimant’s reports of pain. I recommend that the court affirm the denial of benefits.

In accordance with the Commissioner’s sequential evaluation process, 20 C.F.R. § 404.1520; *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 had not engaged in substantial

¹ 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 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.

gainful activity since April 11, 1990, Finding 2, Record p. 26; that on December 31, 1995, the date upon which her insured status expired, the plaintiff had carpal tunnel syndrome and tenosynovitis, impairments which were severe but did not meet or equal any of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Findings 1 & 3, Record p. 26; that the plaintiff's testimony concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, Record p. 26; that on the date her insured status expired the plaintiff lacked the residual functional capacity to lift and carry more than 20 pounds, to perform tasks requiring repetitive hand motions, to use small tools, or to work in a cold environment, Finding 5, Record p. 26; that in her past work as an office clerk, the plaintiff was not required to lift more than 10 pounds and that this work did not require the performance of work functions precluded by her medically determinable impairments, Findings 6 & 7, Record pp. 26-27; that the plaintiff's impairments did not prevent her from returning to her past relevant work on the date her insured status expired, Finding 8, Record p. 27; and that the plaintiff was not under a qualifying disability at any time through the date upon which her insured status expired, Finding 9, Record p. 27. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final decision 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 administrative law judge determined that the plaintiff was able to perform her past relevant work, a decision at Step 4 of the sequential evaluation process. The plaintiff does not contest this determination based on her complaints of carpal tunnel syndrome and tenosynovitis. However, the plaintiff contends that she also suffers from a somatoform disorder, based on the records of a clinical psychologist to whom she was referred for evaluation by a physician by 1990, which was not taken into consideration at Step 2 of the process. She contends that the administrative law judge failed to develop an adequate record concerning this complaint, that he improperly failed to consider her testimony concerning pain in evaluating her residual functional capacity at Step 4, and that he improperly assessed her credibility in evaluating her symptoms.² The plaintiff also challenges the hypothetical question posed to the vocational expert by the administrative law judge at the hearing on her claim, but that challenge would only be relevant if the decision on the claim had been made at Step 5 of the process.

A somatoform disorder is a mental impairment characterized by “[p]hysical symptoms for which there are no demonstrable organic findings or known physiological mechanisms.” 20 C.F.R. pt. 404, subpart P, App. 1 § 12.07.

The burden is on the plaintiff at Step 4 of the process. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). The plaintiff was represented by counsel at the hearing. The plaintiff argues that all she had to do to meet her burden was to raise the issue of a possible somatoform disorder, and that it then became the duty of the administrative law judge to develop the

² The plaintiff also contends that the administrative law judge improperly “presumed” that she did not have a psychological disorder because she had not been treated by a psychologist or psychiatrist. The portions of the record cited by the plaintiff in connection with this argument do not support it. I see no indication in the record, let alone the strong suggestion asserted by the plaintiff, that the administrative law judge drew any such conclusion.

record further on this point. The administrative law judge must develop the record further when the evidence presented by the claimant raises a meaningful issue as to her incapacity to perform her prior work. *Id.* at 6. To do so, a claimant must produce relevant evidence of the physical and mental demands of her prior work, including some information about the activities that the work required, specifically identifying those which can no longer be performed. *Id.* at 5.

The plaintiff relies on *May v. Bowen*, 663 F. Supp. 388 (D. Me. 1987), in which this court interpreted Social Security Ruling 82-62 and concluded that the administrative law judge had not made the necessary explicit findings concerning the physical and mental demands of the claimant's former work. *Id.* at 394. Both Social Security Ruling 82-62 and the *May* opinion are based on 20 C.F.R. § 404.1520(e), which requires, before review of the claimant's residual functional capacity is undertaken at Step 4 of the process, that the claimant have a severe impairment. Here, the administrative law judge specifically found that the somatoform disorder mentioned by the plaintiff's counsel at the hearing, Record p. 34, and diagnosed by the clinical psychologist some five years earlier, *id.* at p. 264, was not severe, *id.* at p. 24. It is therefore necessary to determine as a threshold matter whether the plaintiff met her burden at Step 2 of the process to show that her somatoform disorder was a severe impairment.

The listing for a somatoform disorder is found at 20 C.F.R. pt. 404, Subpart P, App. 1, § 12.07. A somatoform disorder is a mental impairment. A mental impairment is severe if it significantly limits the ability to perform basic work activities, including understanding, carrying out and remembering simple instructions; use of judgment; responding appropriately to supervision, co-workers and usual work situations; and dealing with changes in a routine work setting. 20 C.F.R. § 404.1521(b). At Step 2, 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* at 390-95. While the burden on the plaintiff at Step 2 has been characterized as *de minimis*, she must establish that her mental impairment significantly limits her ability to do basic work activity. *Bowen v. Yuckert*, 482 U.S. 137, 145-46 (1987). The report of the clinical psychologist who evaluated the plaintiff does not mention any limitation on the ability to perform basic work activities resulting from the somatoform disorder. Record pp. 258-64. None of the other medical records mentions any such limitation. The records of Dr. Farrand, the plaintiff's primary treating physician, mention a "cervical somatic dysfunction s[tatus]/p[ost] cervical strain injury" on May 3, 1990, as well as carpal tunnel syndrome and wrist tenosynovitis, and notes "no work doing repetitive hand/wrist activity." *Id.* at p. 180. Dr. Farrand's next entry, dated May 11, 1990, states "OMT — I don't think somatic dysfunction is contributing." *Id.* at p.179. There is no other mention of the somatoform disorder in the medical records. The plaintiff has not met her burden at Step 2 with respect to the somatoform disorder. As a result, her argument concerning the need for further investigation of the disorder at Step 4 must fail.³

The remaining issue involves the plaintiff's testimony concerning pain and the administrative law judge's consideration of her pain in evaluating her residual functional capacity at Step 4. Here, the plaintiff relies on Social Security Ruling 96-7p to argue again that the administrative law judge failed adequately to develop the record concerning the somatoform disorder.⁴ She also contends that

³ When, as here, the administrative law judge's conclusion that there is no mental impairment is supported by substantial evidence in the record, there is no need for him to complete a Psychiatric Review Technique Form 20 C.F.R. § 404.1520a(b)(2).

⁴ The plaintiff also relies on and quotes from Social Security Ruling 88-13, which was superceded by Social Security Ruling 95-5p, which in turn has been superceded by Social Security (continued...)

the administrative law judge improperly evaluated her credibility and failed to consider her reported pain “and her symptoms from her somatoform disorder,” Plaintiff’s Itemized Statement of Specific Errors (Docket No. 3) at 6, as non-exertional impairments when evaluating her residual functional capacity.

The plaintiff points to the following footnote from Social Security Ruling 96-7p:

The adjudicator must develop evidence regarding the possibility of a medically determinable mental impairment when the record contains information to suggest that such an impairment exists, and the individual alleges pain or other symptoms, but the medical signs and laboratory findings do not substantiate any physical impairment(s) capable of producing the pain or other symptoms.

Footnote 3, Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 1996) at 120. This footnote is attached to the first sentence in the following statement in the introduction to the Ruling:

First, the adjudicator must consider whether there is an underlying medically determinable physical or mental impairment(s) — i.e., an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques — that could reasonably be expected to produce the individual’s pain or other symptoms. . . . If there is no medically determinable physical or mental impairment(s), or if there is a medically determinable physical or mental impairment(s) but the impairment(s) could not reasonably be expected to produce the individual’s pain or other symptoms, the symptoms cannot be found to affect the individual’s ability to do basic work activities.

The administrative law judge’s obligation to develop evidence is most compelling when the claimant is not represented by counsel at the hearing. *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 80-81 (1st Cir. 1982). “[T]his responsibility increases in cases where the

⁴(...continued)
Ruling 96-7p. I refer only to the latter Ruling in this opinion.

[claimant] is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence necessary to a reasoned evaluation of the claim, and where it is within the power of the administrative law judge, without undue effort, to see that the gaps are somewhat filled.” *Currier v. Secretary of Health, Educ. & Welfare*, 612 F.2d 594, 598 (1st Cir. 1980). Here, the claimant was represented, and she does not specify any gaps in the evidence or what evidence reasonably available to the administrative law judge would fill those gaps. There is no evidence in the record that any of the basic activities of daily living that are affected by a mental impairment, as set forth at 20 C.F.R. § 404.1520(b), are significantly affected in the plaintiff.

Specifically, in evaluating residual functional capacity when a mental impairment is alleged, the administrative law judge must evaluate essentially the same functional areas as are applicable at Steps 2 and 3. Social Security Ruling 85-16, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991*, at 353. For somatoform disorders, the following four factors are evaluated to determine the severity of impairment:

1. Marked restriction of activities of daily living;[]
2. Marked difficulties in maintaining social functioning; []
3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere);[]
4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behavior).

20 C.F.R. pt. 404, subpart P, App. 1, § 12.07(B). The record presents no evidence of the second, third, or fourth factors. The evidence of restriction of activities of daily living elicited by the administrative law judge at the hearing is found at pages 38-45 of the record. The plaintiff’s counsel also elicited testimony in this regard. Record pp. 45-52. The plaintiff states in her disability report

dated March 23, 1995 that she is “unable to use [her] hands for most anything.” *Id.* at pp. 115, 120. The plaintiff’s niece reports that the plaintiff occasionally needs help dressing, cannot operate a hand can opener or peel fruits or vegetables, sometimes drops things, and usually cannot perform small repairs. *Id.* at pp. 233-35. The plaintiff’s mother reports that the plaintiff needs help with grocery shopping and that major housework causes a lot of pain in her hands. *Id.* at p. 238. The only pain mentioned in the record other than in the plaintiff’s hands is lower back pain, *id.* at p. 40, and the plaintiff denies any injury to or treatment of her back, *id.*

No further investigation of the effect of the plaintiff’s pain on activities of daily living is necessary. The administrative law judge found that the plaintiff lacked the residual functional capacity to perform tasks requiring repetitive hand motions, use of small tools or work in a cold environment, *id.* at p. 26, and those limitations represent an appropriate evaluation of the claims of pain. The administrative law judge discounted the plaintiff’s claims that she could not do anything due to the pain in her hands based on the medical evidence in the record, including her treating physician’s statement in March 1995 that “I clearly feel this woman can work.” *Id.* at p. 212.

The plaintiff’s argument appears to be that the diagnosis of somatoform disorder means that her statements concerning the intensity of her pain must be accepted at face value. To the contrary, the administrative law judge notes the 1992 report of Dr. Attwood that he was able to palpate a scar that the plaintiff maintained was sensitive “quite nicely” when the plaintiff’s attention was distracted, *id.* at pp. 24, 220, lending support to the administrative law judge’s evaluation of the plaintiff’s credibility. The plaintiff’s argument, in any event, is incorrect. The administrative law judge evaluated the evidence presented by the plaintiff in the light of the only one of the severity factors in the somatoform disorder listing that was implicated by that evidence. The administrative law

judge complied with Ruling 96-7p by considering, in addition to the objective medical evidence, the plaintiff's daily activities, *id.* at pp. 39-40, 42-43, 45, 49, 233-40; the location, duration, frequency and intensity of her pain, *id.* at pp. 40, 41, 43-44, 49-50, 210-13, 230; factors that precipitate and aggravate the pain, *id.* at pp. 230, 235, 240; the fact that the plaintiff was not taking any medication for the pain, *id.* at pp. 39, 44; the treatment other than medication that the plaintiff had received for relief of the pain, *id.* at pp. 42, 45-46, 52, 210, 216; and the lack of any measures used by the plaintiff to relieve the pain. I cannot conclude that there is no substantial evidence in the record to support that evaluation and the resulting conclusion.

Accordingly, 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 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 19th day of June, 1998.

*David M. Cohen
United States Magistrate Judge*