

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANTHONY BUDZKO,)
)
 Plaintiff)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 98-246-P-C

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the issue of whether substantial evidence supports the commissioner’s determination that the plaintiff, who suffers from alcoholism, borderline intellectual functioning, a personality disorder, deafness in one ear, and the aftereffects of an ankle fracture, no longer is entitled to benefits when his drug and alcohol dependency is factored out. I recommend that the decision of the commissioner be affirmed.

This appeal comes to the court via a winding route. On March 23, 1992 the commissioner

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 his 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 he 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 May 7, 1999, 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.

determined that the plaintiff was disabled effective July 1, 1989 on the basis of a substance-addiction disorder meeting the requirements of Section 12.09, Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”). Record p. 42. By a writing dated October 12, 1995 the commissioner notified the plaintiff that both SSI and SSD benefits would cease effective December 1995 because the plaintiff failed to undergo a medical examination. *Id.* at 89-92. The plaintiff filed a request for reconsideration. *Id.* at 94-102. At that stage, the commissioner in February 1996 reversed his previous determination, finding that the plaintiff continued to be disabled inasmuch as “drug addiction and/or alcoholism is a contributing factor material to your disability.” *Id.* at 110, 115. “This means if we had not considered your drug addiction and/or alcoholism, we would not have found you disabled.” *Id.* The commissioner warned the plaintiff of the requirement, in such cases, that claimants undergo addiction treatment or risk loss of benefits. *Id.*

By letter dated February 1, 1996 the plaintiff was informed that his SSI payments would stop effective March 1, 1996 because he had ceased participating in treatment. *Id.* at 105. Payments were not to resume until the plaintiff was both back in treatment and had made progress for two months in a row. *Id.* By letter dated April 11, 1996 the plaintiff was similarly informed that he could not be paid SSD benefits right away because “the first you do not go for treatment or make progress in it, we must stop your payments for 2 months.” *Id.* at 120. The plaintiff was reported in May 1996 to have been non-compliant with treatment. *Id.* at 122.

At approximately the same time as the plaintiff faced temporary loss of benefits resulting from his non-compliance with treatment programs, the legal landscape changed dramatically. On March 29, 1996 Congress enacted Pub. L. No. 104-121, eliminating drug or alcohol addiction as a basis for obtaining disability benefits. *See* Historical and Statutory Notes to 42 U.S.C. § 1382c;

Jones v. Apfel, 997 F. Supp. 1085, 1093 (N.D. Ind. 1997). Under the new provision, “an individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner’s determination that the individual is disabled.” 42 U.S.C. § 1382c(a)(3)(J). Thus, the very finding that served as the basis for the plaintiff’s continuing eligibility for benefits in February 1996 would now comprise the basis for his ineligibility.

On or prior to July 1, 1996 the plaintiff was notified that effective January 1, 1997 his eligibility for benefits would terminate because his disability was considered to be based on drug and/or alcohol addiction. He completed a form, dated July 1, 1996, in which he protested the proposed action on grounds that he was disabled without considering drug addiction or alcoholism. Record p. 126. He sought an evidentiary hearing. *Id.* A psychological examination was scheduled for November 27, 1996 and an evidentiary hearing for December 31, 1996. *Id.* at 139, 141. The plaintiff failed to appear for either. *Id.* Although therefore unable to assess the plaintiff’s current mental capacity, the hearing officer nonetheless determined, based on the evidence of record, that the plaintiff was ineligible for benefits effective January 1, 1997. *Id.* at 137-48. The plaintiff filed a request for a hearing before an administrative law judge, *id.* at 149, which he attended with counsel on July 29, 1997, *id.* at 25.

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 medical evidence established that the plaintiff had substance abuse (alcohol), a severe impairment, Finding 3, Record p. 19; that the plaintiff’s impairment met the requirements of Listing 12.09, Finding 4, Record p. 19; that, upon

eliminating the plaintiff's substance abuse from the determination of disability he had no severe impairment, Finding 4, Record p. 19; and that the medical evidence established that the plaintiff would not be disabled if he stopped using alcohol, and therefore, in accordance with section 105 of Pub. L. No. 104-121, the plaintiff was ineligible for disability benefits under title II of the Social Security Act,² Finding 5, Record p. 19. The Appeals Council declined to review the decision, Record pp. 7-8, 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).

The commissioner in this case reached Step 2 of the sequential evaluation process, at which stage the claimant bears the burden of demonstrating that he or she has a severe impairment or combination of impairments that significantly limit his or her ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). The burden at Step 2 is *de minimis*, "designed to do no more than screen out groundless claims." *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). Therefore, when a claimant produces evidence of an impairment or combination of impairments, the commissioner may

² The commissioner confirmed at oral argument that this was a typographical error inasmuch as both SSD and SSI benefits (Titles II and XVI) were at stake.

make a determination of non-disability at Step 2 only when the medical evidence “establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work even if the individual’s age, education, or work experience were specifically considered.” *Id.* (quoting Social Security Ruling 85-28).

The plaintiff argues, in essence, that there is no substantial evidence that his many previously documented functional deficits would disappear were he not abusing alcohol. Plaintiff’s Itemized Statement of Specific Errors (“Statement of Errors”) (Docket No. 5) at [6]. I disagree.

Applicable Social Security regulations provide that:

(1) The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.

(2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.

(i) If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability.

(ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.

20 C.F.R. §§ 404.1535(b), 416.935(b).

The administrative law judge in the instant case determined in relevant part that:

Mr. Budzko further alleges that his personality disorder and borderline intellectual functioning prohibit him from gainful employment regardless of any active alcohol abuse. However, the undersigned disagrees. While the record supports a finding of borderline intellectual functioning, it also shows that the claimant is able to understand, carry out and remember simple instructions, he can respond to

supervision and pressures in a workplace setting Moreover, while the record also shows that Mr. Budzko thinks of himself as hopeless and helpless and unmotivated, he has likewise been unwilling to consider any work programs

The undersigned further finds that Mr. Budzko's alcoholism drives any limitations which may exist due to his personality problems and supports a conclusion that any limitations which exist result from his own choice and substance abuse. The record is replete with instances of failed attempts at sobriety, and, by his own admission, he lacks motivation to participate in a work program.

Record p. 18.

The record contains only one assessment postdating the enactment of Public L. No. 104-121 in which a consultant addressed the question whether, apart from the plaintiff's drinking, he would evidence any severe impairments. *Id.* at 187-95. That assessment supports the commissioner's finding. Scott Hoch, Ph.D., a non-examining consultant, determined in a Psychiatric Review Technique Form ("PRTF") dated October 4, 1996 that alcoholism was the plaintiff's primary problem and that while professionals had at times considered personality disorder and depression secondary to drinking, the evidence indicated that alcohol abuse in and of itself functionally limited the plaintiff, with no mental disorder outside of alcohol.³ *Id.* at 187-88. The commissioner attempted, following passage of Public L. No. 104-121, to obtain a fresh consultative examination of the plaintiff to address the precise question at issue; however, the plaintiff failed to appear. *Id.* at 141.

³ Other PRTFs of record do not address the question. Ake Akerberg, M.D., completed a PRTF dated February 9, 1996 in which he determined the plaintiff's drug and alcohol abuse to be "material." Record pp. 168-69. However, this assessment, which formed a basis for the finding that the plaintiff still qualified for benefits inasmuch as he continued to meet Listing 12.09, predated the change in law. Dr. Akerberg did not purport to consider the question of the extent of the plaintiff's impairments in the absence of drug and alcohol abuse. *See also id.* at 43-51 (PRTF by Dr. Akerberg dated March 20, 1992 finding that plaintiff met Listings); 166-67 (PRTF by David R. Houston dated October 6, 1995, noting insufficient evidence to make an evaluation).

Evidence cited by the plaintiff does not direct a conclusion otherwise but at most demonstrates the existence of conflicting evidence that Dr. Hoch, and in turn the administrative law judge, were entitled to resolve unfavorably to the plaintiff. *See Rodriguez*, 647 F.2d at 222 (“The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.”) (citations omitted). The plaintiff points out that Dr. Akerberg completed a PRTF in March 1992 finding that the plaintiff met not only Listing 12.09 (substance addiction disorders) but also Listing 12.08 (personality disorders). *See* Statement of Errors at [6]-[7]; Record p. 43. However, Listing 12.09 is met only if a claimant’s substance abuse problems cause deficits that meet other Listings. Thus, Dr. Akerberg’s findings are not tantamount to a determination that the plaintiff would meet Listing 12.08 were his substance abuse to cease.

Other reports of examining consultants and treating physicians identify serious functional deficits but do not purport to consider whether these deficits would remain absent ongoing substance abuse. *See, e.g.*, Record pp. 216 (note from St. Mary’s General Hospital recording history of depression related to chemical use, childhood with alcoholic parents suggestive of abuse and codependency), 253-54 (impression of consultant Frank Luongo, Ph.D., based on examination, that plaintiff an addictive personality with depression, borderline intellectual functioning), 374 (report of consultant Ann H. Crockett, Ph.D., based on examination, that plaintiff suffering from borderline intellectual functioning and mixed personality disorder with anti-social, avoidant and dependent traits, in addition to alcohol dependence), 375 (discharge summary by treating physician, Stanley J. Evans, M.D., noting that plaintiff suffered among other things from mood disorder primary/secondary and a personality disorder with antisocial features).

The administrative law judge supportably determined that the plaintiff's borderline intellectual functioning and fracture of the left ankle, in themselves, did not pose significant restrictions on his capacity to work. *See id.* at 18-19 (decision), 254 (finding by Dr. Luongo that plaintiff "would be able to understand, carry out and remember simple manual job instructions"), 394 (progress note from Raymond R. White, M.D., noting that plaintiff "ambulating well without a limp").

I accordingly 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 11th day of May, 1999.

David M. Cohen
United States Magistrate Judge