

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PRISCILLA OUELLETTE,)
)
 Plaintiff)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 00-112-P-H

REPORT AND RECOMMENDED DECISION¹

In this Supplemental Security Income (“SSI”) appeal, the commissioner has moved for a remand to take additional evidence and the plaintiff has objected, asserting that on the record as it now stands she is entitled to remand with directions to award benefits. I recommend that the court deny the commissioner’s motion for remand, vacate the decision of the commissioner and remand with directions to award the plaintiff benefits.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. § 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 had borderline intellectual functioning, a personality

¹ This action is properly brought under 42 U.S.C. § 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 December 1, 2000, 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.

disorder and a congenital deformity of the second to fifth fingers of each hand, impairments that were severe but did not meet or equal the criteria of impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 2, Record at 28; that she had no history of past relevant work, Finding 5, *id.*; that her capacity for the full range of medium work was diminished by her inability to do work involving sustained repetitive or forceful use of the hands or to understand and carry out tasks involving more than one- or two-step instructions, Finding 6, *id.*; that considering her age (48), educational background (high school) and residual functional capacity, she was able to make a successful vocational adjustment to work existing in significant numbers in the national economy, including hand packer, vehicle washer and census production checker inspector and examiner, Findings 7-8, 10, *id.* at 28-29; and that she had not been under a disability at any time through the date of decision, Finding 10 [sic], *id.* at 29. The Appeals Council declined to review the decision, *id.* at 4-5, making it the final determination of the commissioner, 20 C.F.R. § 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. § 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).

The plaintiff contends that the commissioner erred at Steps 3 and 5 of the sequential-evaluation process in that (i) the record establishes that her impairments meet Listing 12.05(C), (ii) the administrative law judge found her capable of performing jobs that her disabilities preclude and omitted a significant limitation (of concentration, persistence and pace) in transmitting a hypothetical

question to the vocational expert, and (iii) the administrative law judge inexplicably ignored certain mental limitations found by state agency consultants, in violation of Social Security Rulings 96-5p and 96-6p. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff (“Statement of Errors”) (Docket No. 6).

At Step 3 of the sequential-evaluation process a claimant has the burden of proving that his or her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. § 416.920(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment the claimant’s medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the listing for that impairment. 20 C.F.R. §§ 416.925(d), 416.928. To equal a listing, the claimant’s medical findings must be “at least equal in severity and duration to the listed findings.” 20 C.F.R. § 416.926(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 416.926(b).

At Step 5 the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner’s findings regarding the plaintiff’s residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Following the filing of the Statement of Errors, the commissioner filed a motion to remand for the taking of additional evidence pertinent to Steps 3 and 5, including further vocational-expert testimony and evidence regarding the plaintiff’s adaptive capabilities and the limitations imposed by her hand deformities. *See generally* Defendant’s Motion for Remand (“Motion for Remand”) (Docket No. 7). The plaintiff objected, contending that the record as it stood demonstrated that she met Listing

12.05(C) and, alternatively, that the commissioner should not be allowed a second bite at the apple to satisfy his burden at Step 5. *See generally* Plaintiff’s Objection to Defendant’s Motion for Remand, etc. (“Opposition”) (Docket No. 8). I agree that the record establishes that the plaintiff meets Listing 12.05(C).

II. Discussion

Listing 12.05 provides in relevant part:

12.05 *Mental Retardation and Autism*: Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22). . . .

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function;

Counsel for the commissioner conceded at oral argument that the plaintiff meets the requirements of subsection (C). *See also* Defendant’s Response to Plaintiff’s Objection to His Motion for Remand (“Reply”) (Docket No. 9) at 1 (acknowledging same). However, the commissioner argues that a claimant also must meet an additional requirement contained in the preamble language: that “deficits in adaptive behavior [were] initially manifested during the developmental period (before age 22).” *Id.* at 1-2; Motion for Remand at 1-2. This he claims she cannot do inasmuch as she demonstrates adaptive ability per her testing with consulting psychologist Ann H. Crockett, Ph.D.; her completion of the ninth grade and her GED; her lack of any problem reading and writing; and her maintenance of her own household consisting of herself and two children. Reply at 2-4; Motion for Remand at 2; *see also* Record at 160-66 (Crockett report).

The plaintiff rejoins that, as a matter of law, she is not required to meet a separate test of demonstrating deficits in adaptive ability prior to age 22 and that, in any event, she demonstrates such deficits by virtue of (i) Dr. Crockett’s finding that she suffered from a “life-long learning problem,” (ii) the finding that she often had deficiencies in concentration, persistence or pace and (iii) various limitations found by state consultants, including moderation limitations on “ability to accept instructions and respond appropriately to criticism from supervisors.” Opposition at 1-2.²

According to my research, at least five circuit courts of appeals have addressed the language in Listing 12.05 describing “deficits in adaptive behavior initially manifested during the developmental period (before age 22).” *Clark v. Apfel*, 141 F.3d 1253, 1256 (8th Cir. 1998); *Lowery v. Sullivan*, 979 F.2d 835, 837 (11th Cir. 1992); *Williams v. Sullivan*, 970 F.2d 1178, 1185 (3d Cir. 1992); *Brown v. Secretary of Health & Human Servs.*, 948 F.2d 268, 271 (6th Cir. 1991); *Luckey v. United States Dep’t of Health & Human Servs.*, 890 F.2d 666, 668-69 (4th Cir. 1989). The language has been construed to impose what amounts to an additional requirement; however, it consistently has been described merely as a requirement that the claimant’s mental retardation have manifested itself before age 22. *Id.*³

In addition — and while the appeals courts are not uniform on this point — at least two have held that, absent evidence to the contrary, a person’s IQ and/or the condition of mental retardation is presumed to have been approximately constant throughout his/her life. *Guzman v. Bowen*, 801 F.2d

² In a related vein, the plaintiff’s counsel pointed out at oral argument that (i) two consultants checked boxes in Psychiatric Review Technique Forms (“PRTFs”) indicating that the plaintiff met the standards contained in the preamble language, (ii) the PRTF completed by the administrative law judge presupposed that the language of the preamble would be satisfied if at least one listed condition were found present, and (iii) the administrative law judge checked a box indicating the presence of one listed condition (borderline intellectual functioning). See Record at 30-31, 124, 137. Counsel for the commissioner did not contest this characterization. There are no other PRTFs of record. The plaintiff’s counsel contended — and I agree — that regardless of the meaning of the preamble language, the PRTF findings alone form an independent basis for a determination that the plaintiff meets Listing 12.05(C).

³ The commissioner cites *Ray v. Chater*, 934 F. Supp. 347, 349 (N.D. Cal. 1996), for the proposition that there is a separate “adaptive capabilities” prong to analysis whether a plaintiff meets Listing 12.05. Reply at 2. Confusingly, the *Ray* court initially describes the preamble language as “the first prong of § 12.05,” *id.*, but applies only the substantive criteria of Listing 12.05(D), which
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273, 275 (7th Cir. 1986); *Branham v. Heckler*, 775 F.2d 1271, 1274 (4th Cir. 1985); *see also Luckey*, 890 F.2d at 668-69; *but see Clark*, 141 F.3d at 1256 (noting that nothing in claimant’s extensive medical records indicated that she was ever suspected of being mildly mentally retarded prior to age 29); *Williams*, 970 F.2d at 1185 (claimant’s current IQ score was insufficient to establish level of intellectual functioning prior to age 22). Even under the more stringent tests of *Clark* and *Williams*, the plaintiff in this case prevails. The only evidence of record addressing onset is that of Dr. Crockett: “It is clear that this is a life-long learning problem.” *See Record* at 165.

I find no published case in which a federal court, on the strength of the preamble language at issue here, peered behind the veil of the diagnosis of mental retardation to establish whether a claimant specifically manifested deficits in adaptive behavior prior to age 22. This is not surprising, inasmuch as the preamble language essentially defines the condition of mental retardation — *i.e.*, “a significantly subaverage intellectual functioning with deficits in adaptive behavior” — and then goes on to impose the limitation that the condition have “initially manifested during the developmental period.” It would be neither necessary nor appropriate for the commissioner to dissect the plaintiff’s specific deficits in adaptive behavior (or lack thereof) inasmuch as her IQ test score, the validity of which he has not questioned, established that for purposes of Listing 12.05 she was “mentally retarded.”⁴

In sum, the evidence of record corroborates that the plaintiff meets Listing 12.05(C), obviating the need for remand for further development in this case.

it also describes as the first and second “prongs” of the analysis, *id.* at 349-50.

⁴ The commissioner may challenge the validity of an IQ test score based on its inconsistency with other evidence of record (presumably including adaptive capability), *see, e.g., Clark*, 141 F.3d at 1256; *Lowery*, 979 F.2d at 837; however, counsel for the commissioner made clear at oral argument that the commissioner does not challenge the validity of the IQ finding in this case.

II. Conclusion

For the foregoing reasons, I recommend that the Motion for Remand be **DENIED** and that the decision of the commissioner be **VACATED** and the cause **REMANDED** with directions to award the plaintiff benefits.

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 4th day of December, 2000.

*David M. Cohen
United States Magistrate Judge*

STAY ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-112

OUELLETTE v. SOCIAL SECURITY, COM
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Filed: 04/17/00

Referred to: MAG. JUDGE DAVID M. COHEN

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Cause: 42:405 Review of HHS Decision (SSID)

PRISCILLA OUELLETTE
plaintiff

DANIEL W. EMERY, ESQ.
[COR LD NTC]
36 YARMOUTH CROSSING DR
P.O. BOX 670
YARMOUTH, ME 04096
(207) 846-0989

v.

SOCIAL SECURITY ADMINISTRATION
COMMISSIONER
defendant

JAMES M. MOORE, Esq.
[COR LD NTC]
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344

JOSEPH DUNN, ESQ.
[COR LD NTC]
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
617/565-4277