UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRENDA PACKARD,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-233-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises questions concerning the standard applied by the administrative law judge to the evidence presented at the hearing held before her, the existence of limitations beyond those found by the administrative law judge before the date last insured, the evaluation of the plaintiff's testimony concerning pain, the weight given to the opinion of a treating physician and the failure of the vocational expert to provide specific references to the Dictionary of Occupational Titles. I recommend that the court affirm the commissioner's decision.

[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 April 28, 2004 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, *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, who had not engaged in substantial gainful activity since December 31, 1993, acquired sufficient quarters of coverage to remain insured only through December 31, 1998, Findings 1 & 2, Record at 20; that the plaintiff had multiple sclerosis, neck pain and back pain that were severe but which did not meet or equal the criteria of any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), Finding 3, *id*.; that her statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, *id*.; that she lacked the residual functional capacity to lift and carry more than 20 pounds, or more than 10 pounds on a regular basis, and that she would also require a sit/stand option, Finding 5, *id*.; that she was unable to perform her past relevant work as a licensed practical nurse, Finding 6, *id*.; that her functional capacity for the full range of sedentary or light work was diminished by her need for a sit/stand option, Finding 7, *id*.; that given her age on the date last insured (48), high school education, skilled work experience and exertional capacity for light work, application of section 404.1569 and Rule 201.21 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the "Grid") would direct a conclusion that the plaintiff was not disabled, Findings 8-11, *id*. at 21; that although the plaintiff was unable to perform the full range of light and sedentary work, she would have been capable of performing work that existed in significant numbers in the national economy, resulting in a finding that she was not disabled within the framework of the Grid rule, Finding 12, *id*.; and that the plaintiff therefore was not under a disability at any time through the date last insured, Finding 13, *id*. The Appeals Council declined to review the decision, *id*. at 8-10, making it the final determination 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 made 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 administrative law judge reached Step 5 of the sequential evaluation process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. § 404.1520(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).

Discussion

The plaintiff first contends that the administrative law judge "appl[ied] the wrong standard to determine [her] eligibility for disability benefits," pointing to her statements that the plaintiff's ability to ride a horse "a few times over the summer" was inconsistent with "an individual who is unable to perform any work activities" and that the plaintiff had attempted to ride a snowmobile. Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 7) at 1-2. Contrary to the plaintiff's assertion, the administrative law judge did not require the plaintiff to prove that she was unable to perform any work activity. Her opinion, considered as a whole, applies the appropriate legal standard. The statement regarding riding a horse was made in the context of evaluating the plaintiff's credibility. Record at 17-18. The plaintiff had testified that as of the date last insured she was unable to do "sit down type work," *id.* at

40-41, which could reasonably be construed as an assertion that she was unable to work at all. The plaintiff's attorney said at the hearing that the plaintiff's "work limitations would prohibit her from doing any work." Id. at 25-26. Both of the administrative law judge's observations which the plaintiff isolates[2] constitute acceptable discussion of the reasons why the administrative law judge found the plaintiff's testimony to be "not entirely credible," *id*. at 20, an exercise required by Social Security Ruling 96-7p. Social Security Ruling 96-7p ("SSR 96-7p"), reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) at 134-36. The administrative law judge's opinion cannot reasonably be interpreted to rest solely on the two isolated statements identified by the plaintiff.

The plaintiff next contends that she is entitled to remand because "[t]here is medical evidence in the record which would support that [her multiple sclerosis] existed prior to her date last insured" and because she "had much more of a significant back problem than the Administrative Law Judge has found." Itemized Statement at 3-4. With respect to the first claim, the plaintiff cites an MRI done in 1988 "for an evaluation of Multiple Sclerosis." *Id*. at 3. That evaluation resulted in a "normal brain MRI study" and a spinal study "unremarkable" except for degeneration and mild bulging of the L-4-5 and L-5S-1 disks. Record at 240. This evidence does not establish that multiple sclerosis was present in 1988, and in fact a later treating physician noted in 1991 that the plaintiff's "work-up for MS in 1988 . . . was negative." Record at 243. Even if the 1988 record could somehow be construed to show the presence of multiple sclerosis, however, it is the plaintiff's burden to show that it constituted a severe impairment before the date last insured. Here, the plaintiff's own testimony is that she worked full-time as a licensed practical nurse through 1993 and that

[2] Contrary to the plaintiff's characterization, the administrative law judge's second statement — "She was able to ride a snowmobile and fell off the snowmobile," Record at 17 — cannot reasonably be construed, based on the evidence in the record, *id*. at 192-93, to refer to "a one time attempt at snowmobiling," Itemized Statement at 2. The only references to snowmobiling in the record are dated in February 2002 and refer to "a fall from a snow mobile" and the plaintiff's fall "from
(*continued on next page*)

she left that job for reasons unrelated to her health. Record at 28, 94. There is no medical evidence of any limitations caused by multiple sclerosis from 1993 through December 1998, when the plaintiff was last insured. The diagnosis of multiple sclerosis was not made until 2001. Record at 163, 180. The plaintiff offers no evidence that would allow, let alone compel, the commissioner to infer from that diagnosis that the condition caused significant limitations in 1998. The administrative law judge correctly observed that "there is no evidence that [the plaintiff] was suffering from symptoms of this process at any time prior to her date last insured." Record at 17.

With respect to the "back problem," the plaintiff relies on MRIs done in 1988, 1994 and 1996. Itemized Statement at 3. However, as the administrative law judge noted, surgery was performed on the plaintiff's back on December 12, 1996 and there was no evidence that she sought treatment thereafter for back pain until June 16, 2000, Record at 16, well after the date last insured.[3] The administrative law judge did "assume that the claimant did have some residual effects" of the back surgery before her date last insured and accordingly limited her residual functional capacity to light or sedentary work. *Id*. at 18. Nothing further was required with respect to the effects of the plaintiff's back pain, which is also an issue on which she bore the burden of proof.

The plaintiff next asserts that the administrative law judge erred in her evaluation of the plaintiff's credibility with respect to her testimony concerning pain because "all of her treating physicians documented

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her snowmobile." Record at 192, 193.

[3] At oral argument, counsel for the plaintiff asserted, without citation to the record, that Dr. Sangalang reported chronic back and neck pain during this period and put the plaintiff on Ultram "for a number of years." However, Dr. Sangalang's written report does not mention any back or neck pain after 1996, Record at 264, and his virtually indecipherable handwritten notes for the period from January 1997 through June 13, 2000, *id*. at 278-80, show one identifiable reference to neck pain in April 1997, *id*. at 279, and one prescription for Ultram with no identified purpose on April 17, 2000, *id.* at 280. This is insufficient evidence to establish that the plaintiff's back pain was a severe impairment before the date last insured. The plaintiff is left with her own testimony, for which her counsel at oral argument again offered no citation to the record, which may not serve alone as evidence of a severe impairment. 20 C.F.R. § 404.1529(a) & (b).

her pain," and Dr. Sangalang "had her on Ultram for several years . . ., placed her on Flexeril and believed that her pain was so significant that he ordered MRIs." Itemized Statement at 4-5. The assertion that "all of her treating physicians documented her pain" is unaccompanied by any citation to the record and accordingly cannot be evaluated. A conclusory assertion that "[t]he pain in her low back was documented by objective medical evidence," *id*. at 5, unsupported by citations to the record, cannot provide a basis for remand. Neither the prescribing of medications for pain nor the ordering of an MRI is necessarily inconsistent with the administrative law judge's conclusion, supported by the analysis required by SSR 96-7p, that the plaintiff's own testimony concerning the effects of her pain was not entirely credible. It is the degree of that pain, not its very existence, that is typically at issue in connection with the evaluation of a claimant's credibility.

The plaintiff's next asserted ground for remand is that the administrative law judge failed to give proper weight to the opinion of a treating physician, Leonard Kaminow, M.D., "essentially . . . that she had the ability to do less than sedentary type work." *Id*. at 5. The opinion to which she refers is dated October 10, 2002, well after the date last insured. Record at 221-25. She states that Dr. Kaminow had been treating her since December 11, 2001 and based his opinions "upon the fact that he had MRIs of her brain from many years earlier and the fact that the Claimant was complaining of Multiple Sclerosis type complaints from at least 1988." Itemized Statement at 5-6. The latter assertion is unsupported by Dr. Kaminow's medical records; counsel for the plaintiff was unable at oral argument to identify any such entry in those records. There is simply no indication in Dr. Kaminow's records that any of the limitations he identifies were present before December 31, 1998. Contrary to the plaintiff's assertion, the administrative law judge was not required to "[take] the opportunity to determine whether or not Dr. Kaminow's opinions related further back than the date that he completed the form." *Id*. at 6. The burden to produce such evidence was

on the plaintiff, who was represented by counsel. *See generally Shaw v. Secretary of Health & Human Servs.*, 25 F.3d 1037 (table), 1994 WL 251000 (1st Cir. June 9, 1994), at **5.

The plaintiff also contends that the administrative law judge wrongly disregarded the conclusions of Lee Kendall, M.D., a neurologist who "diagnosed her with fibromyalgia and mild osteoarthritis in her fingers." Itemized Statement at 6. Dr. Kendall's records, generated in 1991, reflect that he "suspect[ed]" mild osteoarthritis in the plaintiff's fingers, but that the x-rays he ordered to confirm this showed "no evidence for arthritis." Record at 247-48. As previously noted, the plaintiff was working as a licensed practical nurse at this time, and continued to do so for two more years thereafter. Dr. Kendall's records do not include any evidence of significant limitations on the plaintiff's ability to perform work activities as a result of the fibromyalgia, and certainly cannot reasonably be interpreted to impose limitations more extensive than those found by the administrative law judge.

The plaintiff next asserts that the administrative law judge committed reversible error by failing to obtain the codes used in the *Dictionary of Occupational Titles* for all of the jobs identified by the vocational expert in response to the administrative law judge's hypothetical questions. Itemized Statement at 7. The administrative law judge did defer the request of the plaintiff's attorney at the hearing that the vocational expert identify the codes, stating that she would "ask him to do that after the hearing." Record at 44. The plaintiff now asserts that these codes "were never provided to the Claimant nor her attorney." Itemized Statement at 7. There is no indication in the record that the plaintiff ever raised this issue with the administrative law judge or the Appeals Council post-hearing. While a claimant pursuing judicial review of the commissioner's decision does not waive any issues by failing to include them in a request for review by the Appeals Council, *Sims v. Apfel*, 530 U.S. 103, 105 (2000), the plaintiff's counsel would have acted in her best interest had he simply reminded the administrative law judge of her promise. In any event, the

codes are readily obtainable from the *Dictionary of Occupational Titles* given the job titles included in the vocational expert's testimony, Record at 43-44.[4] The only apparent error in the vocational expert's testimony with respect to these jobs was his assignment of a sedentary exertional level to the job of security guard. The *Dictionary of Occupational Titles* assigns it an exertional level of light work. Even so, each of the jobs identified by the vocational expert falls within the parameters of the hypothetical question posed by the administrative law judge, Record at 43, and the plaintiff accordingly could not have been harmed in any way by the failure of the administrative law judge to provide her with the codes as promised. It is therefore unnecessary to reach the contention of counsel for the plaintiff that he is entitled to remand merely due to the administrative law judge's failure to provide him with the codes because the decision in this case was made at Step 5, where the burden of proof rests with the commissioner. Remand for that reason under the circumstances of this case would be an empty exercise indeed.

The plaintiff's final argument is a conclusory assertion that the administrative law judge "failed to identify any specific factors impacting her credibility" and therefore was required to find that the plaintiff could not work at the relevant time "based upon her testimony." Itemized Statement at 8. As already discussed, the factual assertion is incorrect; the administrative law judge adequately discussed her reasons for finding the plaintiff's testimony to be "not entirely credible." The argument is also invalid on the merits. A finding of disability may never be based solely on the testimony of a claimant. Medical evidence of a disability is required. 20 C.F.R. § 404.1508.

Conclusion

[4] The codes are as follows: medical record clerk, 245.362-010; phlebotomist, 079.364-022; companion, 309.677-010; toll collector, 211.462-038; mail clerk (erroneously identified by the administrative law judge as "mail carrier," Record at 19), 209.687-026; security guard, 372.667-034; cashier, 211.362-010; automatic photo developing machine operator, 976.685-014; and storage facility rental clerk, 295.367-026. *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. rev. 1991).

For the foregoing reasons, 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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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 30th day of April, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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