UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

EVA M. DOUCETTE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-89-P-S***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

The plaintiff in this Supplemental Security Income ("SSI") appeal raises many issues including whether the commissioner's decision with respect to her residual functional capacity is supported by substantial evidence, whether Social Security Ruling 00-4p was violated, whether the testimony of the vocational expert was erroneous, whether a single job description is sufficient to provide a significant number of jobs, whether the administrative law judge properly evaluated the reports of treating physicians, whether the administrative law judge was required to develop the record further, and whether the administrative law judge properly evaluated the plaintiff's claims of pain and her credibility. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

[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 9, 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 (*continued on next page*)

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 an unspecified, medically determinable severe impairment that 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 2, Record at 27; that the plaintiff's allegation of totally disabling, medically-imposed limitations was not credible, Finding 3, *id*.; that she retains the residual functional capacity to lift and carry up to 10 pounds frequently and 20 pounds occasionally, to stand and walk for up to 6 hours in an 8-hour day, to sit for up to 6 hours in an 8-hour day, to understand and remember a variety of tasks and instructions, to complete routine, simple tasks without constant supervision, to relate appropriately under superficial conditions, to cooperate and comply with expectations and to deal with changes in a routine within the above- and below-mentioned constraints, Finding 5, *id*. at 28 & *id*. at 25-26; that she has a slight limitation in reaching with the right arm, should avoid extreme cold and would function best in tasks that do not require ongoing interaction with others, *id*.; that given her age (44), education (high school), residual functional capacity and lack of past relevant work, consideration of the testimony of the vocational expert and Social Security Ruling 96-8p led to the conclusion that the plaintiff was not under a disability as that term is defined in the Social Security Act at any time through the date of the decision, Findings 7-9, *id*. at 26. The Appeals Council declined to review the decision, *id*. at 6-8, 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).

---

references to the administrative record.

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 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 process, at which stage 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. § 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 functional capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff contends that the "most blatant error here is the lack of substantial evidence for the crucial findings that [she] could do full time work even at the light level." Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 8) at 2. She relies on the opinions of two treating physicians to the effect that her "medical and/or mental conditions are so disabling that she was unable to work" and their records and notes. *Id*. Of course, these are opinions on the issue reserved to the commissioner and must be disregarded. 20 C.F.R. § 416.927(e).

Specifically, the plaintiff contends that the medical evidence does not support a residual functional capacity for light work under Social Security Ruling 96-8p because she is unable to work at any job on a full-time basis. Itemized Statement at 6-7. She cites the reports of Rebecca Byers, M.D., and Charles

Brindle, M.D., both treating physicians; Stephen D. Richards, D.O., a consulting physician; Darryl Leis, a licensed clinical social worker; three consulting psychologists; and a psychiatric review technique form completed by a state-agency psychologist.[2] *Id*. at 3-6.

In March 2001, Dr. Brindle simply stated that the plaintiff was "unable to be gainfully employed at this time" due to chronic pain. Record at 454. Dr. Richards did state that "[b]y her descriptions of her pain she would certainly seem incapable of handling any ordinary occupation whether it be active or sedentary for 8 hour work day," *id*. at 410, but he immediately followed that statement with the observation that "[h]er complaints of pain are solely subjective and are difficult to establish by physical examination," *id*. Physical limitations must be based on medically determinable signs and symptoms. 20 C.F.R. § 416.929. Dr. Richards found the absence of such data significant and did not suggest any physical basis for the plaintiff's complaints. The report of the state-agency physician who reviewed the plaintiff's medical records later in 2001 assigned lifting limits of 50 pounds occasionally and 25 pounds frequently and stated that the plaintiff can walk, stand and sit for up to 6 hours in an 8-hour workday. Record at 415, 421. Claude H. Koons, M.D., who also reviewed the plaintiff's medical records for a state review agency, noted that "[t]he claimant's allegations are markedly eroded by Dr. Richard's [sic] lack of finding positive physical findings relating to her symptomatology and this also erodes the allegations of pain everywhere and chronic fatigue." *Id*. at 441. The administrative law judge noted that he had assigned a physical residual functional capacity that was "more restrictive than that opined by State agency nonexamining medical consultants." *Id*. at 26.

[2] At oral argument, counsel for the commissioner contended that the plaintiff could not rely on the reports of Dr. Byers and J. D. Forsyth, a consulting psychologist, because they were written more than two years before the date of onset alleged in this claim. Dr. Byers examined the plaintiff on August 15, 1997, Record at 343, and Dr. Forsyth's evaluation took place on June 19, 1999, *id*. at 312. The plaintiff did not appeal from an adverse initial determination in 1999 on an earlier claim that included the period in which these reports were completed, *id*. at 21, and the commissioner correctly asserted that the plaintiff is therefore foreclosed from relying on the reports in support of a claim covering a later period, (*continued on next page*)

The administrative law judge was entitled to rely on the reports of the state-agency reviewing physicians with respect to the plaintiff's physical limitations; in this case his conclusion was more favorable to the plaintiff than that of those physicians.

With respect to psychological limitations, which are not specific to a particular level of physical residual functional capacity, the plaintiff relies heavily on an evaluation provided by Darryl Leis, a licensed clinical social worker whom counsel for the plaintiff characterizes as her "therapist." The only document in the file generated by Leis is a three-page form entitled "Medical Source Statement — Mental," dated March 3, 2003, on which Mr. Leis checked boxes for marked limitation in the following areas: ability to maintain attention and concentration for extended periods; ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; ability to maintain a normal workday and work week without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; ability to interact appropriately with the general public; and ability to accept instructions and respond appropriately to criticism from supervisors. *Id*. at 477-78. The administrative law judge discounted Leis's opinions because "the record does not show any basis for Mr. Leis' opinion [sic] or the basis for them. No records have been submitted to show that he ever saw or treated the claimant." *Id*. at 23.[3] However, the plaintiff testified that she had been seeing Leis for "a year and a half or two years" approximately twice a week "until just recently," when the frequency diminished to twice a month. *Id*. at 52. The lack of any indication of the basis for Leis's

20 C.F.R. § 416.1405. *See Wauzinski v. Shalala*, 1994 WL 725176 (D. Mass. Dec. 29, 1994), at *1 n.1. I accordingly will not refer to the reports of these individuals any further.

[3] The administrative law judge also refers to Leis's "lack of professional license," Record at 26, but Leis is identified on the form he filled out as an "MSW, LCSW," *id*. at 476. "LCSW" refers to a licensed clinical social worker. At oral argument, counsel for the commissioner conceded that the administrative law judge's conclusions that Leis lacked a professional license and had not seen or treated the plaintiff were "technically" incorrect.

opinions does allow the administrative law judge to give them less weight than would otherwise be the case. *See* 20 C.F.R. § 416.927(d)(3).

The plaintiff asserts that Leis's opinions are supported by those of three consulting psychologists, J. D. Forsyth, Ann M. Rotter and John H. Tedesco.[4] Itemized Statement at 4. The record contains an extensive report from Dr. Rotter on her single meeting with the plaintiff. While Dr. Rotter does note "significant difficulty" with remembering and understanding novel and complex instructions and procedures, *id*. at 407, that finding is consistent with the limitations adopted by the administrative law judge, *id*. at 25 ("The claimant is able to understand and remember a variety of tasks and instructions. She has some slight limitation in her ability to sustain complex task activities. She can complete routine, simple tasks."). It is not possible to characterize the remainder of the limitations described by Dr. Rotter, *id*. at 407, as necessarily either "moderate" or "marked," *see id*. at 476, and thus not possible to determine whether Dr. Rotter's report "supports" Leis's specific conclusions. While Dr. Tedesco did find that the plaintiff was "likely to have marked impairments in concentration, attention and pace" and "moderate to marked limitations in other respects as well," he also found that any marked limitations would subside to a moderate level in fewer than 12 months. *Id*. at 422. Limitations must exist for over 12 months in order to provide the basis for a finding of disability. 20 C.F.R. § 416.905. The plaintiff offers Leis's evaluation as evidence that these limitations did not, in fact, become less than marked over the 22 months that intervened between the two reports, Itemized Statement at 5, but the administrative law judge was not required to credit Leis's characterizations for the reasons already stated.

[4] See footnote 2, *supra*, regarding Dr. Forsyth.

As was the case with the plaintiff's claimed physical impairments, reviews by the state-agency psychologists did not find marked mental impairment. Record at 423-40 (Dr. Tedesco);[5] 449-52, 458-74 (Janet McDonough, Ph.D.).[6] While these evaluations predate that of Leis, the lack of supporting data for his form allows the administrative law judge to give them more weight than that of Leis. Counsel for the plaintiff suggests that Dr. McDonough's evaluation should be discounted because it "contains some contradictory statements." Itemized Statement at 6. However, Dr. McDonough's noting of moderate restrictions in some areas of functioning as well as "severe impairments," Record at 473, are not necessarily contradictory. A mental impairment may be severe at Step 2 of the sequential review process without imposing marked restrictions as that term is used in the Psychiatric Review Technique Form. *See* 20 C.F.R. §§ 416.920(a)(4)(ii) (whether impairment is severe determined at Step 2), 416.920a(a) (steps set forth in § 416.920 apply to evaluation of mental impairments; rating degree of functional limitation imposed by impairment is additional step). The only other statement of Dr. McDonough alleged by the plaintiff to be contradictory, Itemized Statement at 6, that the plaintiff's "allegations are generally supported by evidence

[5] The one exception is a notation of "marked" in the category of "Difficulties in Maintaining Concentration, Persistence, or Pace" in Dr. Tedesco's report. Record at 437. As noted above, Dr. Tedesco stated in the narrative portion of his report that he expected any marked limitations to improve to the moderate level within 12 months.

[6] At oral argument, counsel for the plaintiff raised for the first time, in violation of Local Rule 16.3(a), a contention that the administrative law judge failed to appreciate that both Exhibit 29F and Exhibit 31F were prepared by Dr. McDonough, asking the vocational expert separate hypothetical questions based on each. Counsel contends that, when the vocational expert responded to those questions differently, Record at 59-60, the administrative law judge could only rely on the response to the question based on Exhibit 29F, which should "trump" Dr. McDonough's statements in Exhibit 31F. Counsel for the commissioner understandably objected to consideration by the court of this new argument and contended that it had been waived by counsel's failure to raise it in his written submission. In light of *Sims v. Apfel*, 530 U.S. 103, 105 (2000), I am reluctant to find a waiver under these circumstances. *But see Ward v. Apfel*, 1999 WL 1995199 (D. Me. June 2, 1999), at *5. In any event, the plaintiff takes nothing by this argument. For the reasons set forth in the text of this opinion, Dr. McDonough's conclusions as set forth on the mental residual functional capacity form that is Exhibit 29F, Record at 449-52, are not necessarily inconsistent with her conclusions on the PRTF form and accompanying report that is Exhibit 31F, *id*. at 458-74. Both forms bear the same date. *Id*. at 451, 458. Dr. McDonough obviously intended that the two forms be considered together, and she noted in conclusion to her narrative report that "the degree of functional limitations is not severe enough to be considered disabling for purposes of this program." *Id*. at 474. The fact that the administrative law judge and the vocational expert apparently found significant differences between the two documents is not controlling given the existence of substantial evidence supporting the administrative law judge's

(*continued on next page*)

of . . . record, although the degree of functional limitation is not severe enough to be considered disabling for purposes of this program," Record at 474, is not contradictory at all.

The plaintiff's argument that the administrative law judge failed to follow Social Security Ruling 96-8p is based solely on her assertion that the residual functional capacity assessment was erroneous and not supported by substantial evidence. *Id*. at 7. Because neither is the case, as discussed above, this argument also fails.

The plaintiff next contends that the only job specifically identified by the vocational expert in her testimony was not consistent with the Dictionary of Occupational Titles ("DOT") and therefore the testimony violated Social Security Ruling 00-4p, requiring remand. *Id*. at 7-9. The vocational expert identified the light, unskilled job of officer helper, section 239.567-010 in the *Dictionary of Occupational Titles*, as one that would be available for the plaintiff. Record at 60. Social Security Ruling 00-4p provides, in relevant part:

> Occupational evidence provided by a VE . . . generally should be consistent with the occupational information supplied by the DOT. When there is an apparent unresolved conflict between VE . . . evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE . . . evidence to support a determination or decision about whether the claimant is disabled. At the hearings level, as part of the adjudicator's duty to fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such consistency.

Social Security Ruling 00-4p ("SSR 00-4p"), reprinted in *West's Social Security Reporting Service* Rulings (Supp. 2004), at 244. In this case, the administrative law judge apparently did so inquire, although the quality of the transcription makes it difficult to be sure. Record at 59. In any event, the failure to ask such a question is harmless if there is in fact no conflict that could affect the outcome of the plaintiff's claim.

---

ultimate conclusion on this point.

The plaintiff specifically contends, Itemized Statement at 9, that the job of office helper is inconsistent with the limitation on reaching with the right upper extremity included in the administrative law judge's hypothetical question, Record at 59-60.

The hypothetical question states that the claimant is "slightly limited in right upper extremity reaching." Record at 59. The job of office helper is described in the DOT as involving frequent reaching, from 1/3 to 2/3 of the time. *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. rev. 1991) § 239.567-010. The plaintiff offers no authority in support of her assertion that this requirement is necessarily inconsistent with a "slight" limitation on reaching with one arm, but my independent research has located no authority on point. Counsel for the commissioner asserted at oral argument that the administrative law judge could rely on his common sense on this issue to conclude that a slight limitation on reaching with one upper extremity is not inconsistent with frequent reaching. That argument assigns too much scope to lay common sense. Without more specific testimony from the vocational expert, and without knowing which is the plaintiff's dominant hand, it is not possible to know whether the apparent inconsistency between the DOT and the hypothetical was sufficient in this case to make the job of office helper essentially unavailable for this plaintiff. Remand is therefore required. *See generally Herbert v. Barnhart*, 2002 WL 31180762 (D. Kan. Sept. 19, 2002), at *6-*9.

To guide further proceedings in this case, I will discuss the remaining issues raised by the plaintiff. She contends that, because the officer helper job requires a general educational development ("GED") reasoning level of 2, it is necessarily inconsistent with "a limitation to simple tasks." Itemized Statement at 9. However, the hypothetical question posed to the vocational expert did not include such a limitation. The question incorporated by reference, Record at 59-60, page 16 of Exhibit 31F, Dr. McDonough's report, which states that the plaintiff "is able to understand and remember a variety of tasks and instructions. . . .

She would have some limitation in her ability to sustain complex task activities," *id*. at 473. This statement of the plaintiff's limitation is not necessarily inconsistent with a GED reasoning level of 2, which requires the ability to "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions. Deal with problems involving a few concrete variables in or from standardized situations." DOT Appendix C, § III.

The plaintiff also argues that a single DOT job classification is insufficient to provide a significant number of jobs. This court has rejected that argument. *Brun v. Barnhart*, 2004 WL 413305 (D. Me. Mar. 3, 2004), at *5-*6; *aff'd* 2004 WL 1572695 (D. Me. Apr. 5, 2004).

The plaintiff next contends that the administrative law judge failed to explain why he did not give controlling weight to the opinions of her treating physicians. Itemized Statement at 11-12. However, I have already discussed the evidence in the record that conflicts with the opinions of the plaintiff's treating physicians on which she relies, which makes it impossible to give their opinions controlling weight. 20 C.F.R. § 416.927(d)(2). The lack of support for Leis's opinion requires the same outcome. *Id*.

As he does in virtually every Social Security appeal that he brings to this court, counsel for the plaintiff asserts next that the administrative law judge "failed to properly develop the record." Itemized Statement at 14. He states, erroneously, that the administrative law judge "simply ignored the [treating] doctors' view" "[w]ithout making any attempt to clarify the issues." *Id*. At oral argument, he was unable to identify any entry in the record that could reasonably be construed to show that the administrative law judge the information in the treating physicians' reports was inadequate. He contended that the administrative law judge did not understand Dr. Brindle's reports or the reasons for his conclusions because Dr. Brindle diagnosed fibromyalgia, a condition which "is not determinable by objective evidence" and is "essentially subjective in nature," so that the administrative law judge's repeated references to the lack of objective

medical evidence must mean that he did not understand Dr. Brindle's reports. Counsel's characterization of fibromyalgia is incorrect. *See, e.g., Willoughby v. Commissioner of Soc. Sec.*, 332 F.Supp.2d 542, 547 (W.D.N.Y. 2004) (discussing objective medical evidence of fibromyalgia); *Gister v. Massanari*, 189 F.Supp.2d 930, 934 (E.D.Wis. 2001) (same). In addition, there was medical evidence, as discussed above, that contradicted Dr. Brindle's conclusions. Merely adopting medical opinion evidence that contradicts that of a treating physician does not constitute a failure to develop the record properly.

With respect to the final issue raised by the plaintiff, Itemized Statement at 16-21, the administrative law judge's discussion of his assessment of the plaintiff's credibility and her testimony concerning her pain, Record at 24-26, is adequate, *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987); *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986).

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case remanded for further proceedings consistent with this opinion.

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 13th day of December 2004.

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

Plaintiff

EVA M DOUCETTE represented by **FRANCIS JACKSON**
JACKSON & MACNICHOL
85 INDIA STREET
P.O. BOX 17713
PORTLAND, ME 04112-8713
207-772-9000
Email: mail@jackson-macnichol.com

V.

Defendant

COMMISSIONER OF SOCIAL SECURITY represented by **SUSAN B. DONAHUE**
SOCIAL SECURITY ADMINISTRATION
OFFICE OF GENERAL COUNSEL, REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617-565-4288
Email: susan.donahue@ssa.gov