UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CRAIG NELSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-90-B***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether substantial evidence supports the commissioner's determination that for the one-year period prior to the date the plaintiff's multiple sclerosis was found to be totally disabling, it was non-severe. I recommend that the decision of the commissioner be vacated and remanded for further proceedings.

On January 18, 2000 the plaintiff filed an application for SSD benefits. Record at 12. They were awarded retroactive to June 1, 1999. *Id*. The plaintiff challenged the commissioner's finding of onset date, contending that he had in fact been disabled since June 1, 1998. *Id*. In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of*

[1] This action is properly brought under 42 U.S.C. § 405(g). 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 November 19, 2002, 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.

Health & Human Servs., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from multiple sclerosis, Finding 3, Record at 14; that he did not have any impairment that significantly limited his ability to perform basic work-related functions prior to June 1, 1999 and therefore did not have a severe impairment prior to that time, Finding 4, *id*.; and that he had not been under a disability prior to that time, Finding 5, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, 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 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 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs*., 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may 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*. at 1124 (quoting Social Security Ruling 85-28).

The plaintiff complains that the administrative law judge erred in determining that he did not have an impairment that significantly limited his ability to perform basic work-related activities prior

to June 1, 1999. *See generally* Statement of Specific Errors ("Statement of Errors") (Docket No. 3). I agree.

I. Discussion

The Record in this case contains uncontroverted evidence that (i) the plaintiff first suffered symptoms of multiple sclerosis at age 23 in 1965, (ii) prior to June 1998 he experienced an exacerbation of that disease, as a result of which he had symptoms of fatigue, left-sided weakness, lack of coordination and intermittent subtle slurring of speech, (iii) he was placed on Avonex in June 1998, (iv) in July 1998 he was admitted as an inpatient to Massachusetts General Hospital for a nine-day course of treatment with intravenous Solu-Medrol, followed by a course of home treatment, (v) his condition improved until mid-September 1998, when he began to sleep longer and noticed his left leg and foot flopping as he walked on the beach, (vi) he thereafter experienced episodes of sharp, stabbing eye pain, left-sided weakness, difficulty sleeping and significant fatigue, leading to a five-day course of treatment with intravenous methylprednisolone in December 1998, and (vii) although he again seemed to improve, by March 1999 he was having difficulty with severe fatigue, episodic paresthesias in his left lower extremity and numbness in his left upper extremity, *see, e.g.*, Record at 13, 149 (November 17, 1998 note of treating nurse practitioner Marsha Williams, R.N., N.P. and treating physician Peter N. Riskind, M.D.), 152-53 (progress note of Dr. Riskind dated May 20, 1998), 175-77 (letter dated March 8, 1999 from treating physician John Kelly Sullivan, M.D. to Michael Shuman, M.D.); *see also, e.g., id*. at 33-34, 36 (plaintiff's testimony at hearing).[2]

[2] The Record contains a letter to the DDS dated February 2, 2000 from a treating physician, Michael L. Shuman, M.D., stating that Dr. Shuman had last seen the plaintiff on March 30, 1999 at which time the plaintiff "was doing reasonably well" and his physical examination "was essentially unremarkable." Record at 178. Inasmuch as Dr. Shuman does not state that he saw the plaintiff at any other point during the year in question, these comments, standing alone, cannot provide substantial evidence that the plaintiff's condition (which tended to wax and wane) was non-severe during that year. Indeed, these comments at most raise a question concerning the extent of the plaintiff's impairment in March 1999; however, the administrative law judge seemingly resolved that question in the plaintiff's favor, noting that by March 1999 the plaintiff's severe fatigue had returned and he began not to attain the sort of improvement noted in the past. *Id*. at 13.

The Record also contains evaluations of two non-examining Disability Determination Services ("DDS") physicians, Drs. Charles E. Burden and Lawrence P. Johnson. *Id*. at 181-96. Both Drs. Burden and Johnson pinpointed the plaintiff's onset date of disability as June 1, 1999; however, neither suggested that his condition was non-severe prior to that time. *See generally id*. To the contrary, both identified limitations in his work capacity, including, in Dr. Burden's view, limitations in use of both upper and lower extremities and postural limitations, and in Dr. Johnson's view, postural limitations. *See, e.g.*, *id*. at 182-83, 191. Dr. Burden explained: "This man appears to have excellent work ethic + examinations are consistent with symptoms when he seeks medical advice[.] His allegations are credible but not consistently debilitating during the period[.]" *Id*. at 186.

Nonetheless, the administrative law judge found the plaintiff's condition prior to June 1, 1999 to have been non-severe, stating:

> . . . The claimant experienced another exacerbation [of multiple sclerosis] in 1998, however, after treatment he bounced back. A second episode in 1998 with sensory symptoms occurred and again the claimant improved (Exhibit 7F).
>
> Nevertheless, by March 1999, the record begins to show that Mr. Nelson's severe fatigue returned and Avonex therapy continued as improvement did not occur as in the past. By July 20, 1999, notes form [sic] John K. Sullivan, M.D. show that the claimant was not doing well. It [sic] states that in mid-June, Mr. Nelson's fatigue became more of an issue. He had waves on [sic] numbness in his left leg and it didn't function well (Exhibit 7F).
>
> Thus, the undersigned finds that prior to his current onset date of June 1, 1999, Mr. Nelson recovered well from exacerbation of multiple sclerosis. He had a detached retina, however, that resolved with treatment. Likewise, other exacerbations were treated with medication and he improved. It was not until June 1999 that the record shows the claimant was no longer responding to treatment. . . . Although his allegations of symptoms are credible and supported by the record, they are not consistently debilitating prior to June 1, 1999 (Exhibit 10F).

Id. at 13-14.

In so finding, the administrative law judge essentially collapsed the Step 2 and Step 5 analyses, truncating the sequential-evaluation process prematurely. The Record makes manifest that

the plaintiff met his *de minimis* Step 2 burden of demonstrating that his impairment had more than a minimal effect on his capacity to work from June 1, 1998 through June 1, 1999. That he was able to achieve periods of remission or improvement as a result of treatment during that period does not preclude a finding that his condition was "severe" for purposes of Step 2.[3]

The plaintiff accordingly is entitled to the relief requested – continuation of the sequential evaluation process beyond Step 2. *See* Statement of Errors at 5.[4]

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the cause **REMANDED** with instructions to continue the sequential evaluation process.

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.

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[3] Citing *Barnhart v. Walton*, 122 S. Ct. 1265 (2002), counsel for the commissioner contended at oral argument that the administrative law judge properly halted analysis at Step 2 on the basis of a supportable determination that the plaintiff did not meet a threshold durational requirement. Specifically, counsel argued that inasmuch as the plaintiff's impairment was found not to have been "severe" for "twelve straight months," the administrative law judge need not have reached the question whether it was disabling for twelve months. However, the Supreme Court in *Walton* did not hold that a condition must be "severe" day in and day out for twelve straight months. Rather, the Court upheld the commissioner's position that a claimant must show both that his or her impairment has lasted (or is expected to last) for twelve months and – ultimately – that it is severe enough to prevent him or her from engaging in substantial gainful activity for at least twelve months. *Walton*, 122 S. Ct. at 1270. In this case there can be no serious question that the plaintiff passes the first of these two durational requirements: His impairment has lasted since 1965. Nor does anything in *Walton* suggest that the plaintiff necessarily ultimately would be found to fail the second durational requirement simply because he had a condition that tended to wax and wane. As counsel for the plaintiff observed at oral argument, many chronically ill people experience "good days and bad days," and a vocational expert quite properly could be asked whether intermittent incapacitation – say, one day a week or six days a month – would preclude the performance of substantial gainful activity.

[4] The plaintiff also asks the court to instruct the commissioner to take vocational evidence if Step 4 is reached. *See* Statement of Errors at 5. At hearing, counsel for the commissioner agreed that if remand were ordered, and the commissioner reached Step 4, it would be "natural" to seek the assistance of a vocational expert. I construe this as a concession that if Step 4 is reached, the assistance of a vocational expert will in fact be sought.

Dated this 20th day of November, 2002.

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David M. Cohen
United States Magistrate Judge

MAG PORTLD
ADMIN

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

CIVIL DOCKET FOR CASE #: 02-CV-90

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

CRAIG NELSON
plaintiff

DAVID A. CHASE, ESQ.
[COR LD NTC]
MACDONALD, CHASE & SZEWCZYK
700 MOUNT HOPE AVENUE
440 EVERGREEN WOODS
BANGOR, ME 04401
942-5558

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

PETER S. KRYNSKI, ESQ.
[COR LD NTC]
SOCIAL SECURITY DISABILITY
LITIGATION - ANSWER SECTION
OFFICE OF THE GENERAL COUNSEL
5107 LEESBURG PIKE ROOM 1704
FALLS CHURCH, VA 22041-3255
(703) 305-0183

ESKUNDER BOYD, ESQ.
[COR LD NTC]
ASSISTANT REGIONAL COUNSEL
OFFICE OF THE CHIEF COUNSEL,
REGION 1
2225 J.F.K. FEDERAL BUILDING

BOSTON, MA 02203
617/565-4277