UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DEBORAH L. CHUTE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-417-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises two related issues: whether the commissioner erred in concluding that (i) the plaintiff's anxiety condition was non-severe and (ii) the plaintiff was able to return to past relevant work as a sales clerk and cashier. I recommend that the court vacate the commissioner's decision and remand for further proceedings with respect to the plaintiff's SSI claim.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520,

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[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 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 November 17, 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 and case authority and page references to the administrative record.

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 sustained a median nerve injury to her left wrist, an impairment that was severe but did not meet or equal the criteria for any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 52; that her statements concerning her impairment and its impact on her ability to work were not entirely credible in light of her own description of her activities and lifestyle and discrepancies between her assertions and information contained in the documentary reports, Finding 4, Record p. 52; that she lacked the residual functional capacity to lift and carry more than twenty pounds or more than ten pounds on a regular basis, to perform tasks requiring bilateral manual dexterity or to use her left hand for lifting, handling or grasping, Finding 5, Record p. 52; that in her past relevant work as a sales clerk and a cashier she was not required to lift more than twenty pounds or to have full use of both hands for activities requiring handling, grasping and manual dexterity, Finding 6, Record p. 52; that her medically determinable impairment did not prevent performance of her past relevant work, Findings 7-8, Record p. 52; and that she accordingly had not been under a disability at any time through her date last insured or through the date of decision, Finding 9, Record p. 53.[2]

The administrative law judge made no official findings concerning the plaintiff's anxiety; however, he discussed in the body of his opinion his determination that the condition was non-severe. Record pp. 49-50. He also completed a Psychiatric Review Technique Form ("PRTF") acknowledging the existence of a documented anxiety-related disorder but determining that the plaintiff suffered only "slight" restrictions in activities of daily living and "slight" difficulties in

[2]To be eligible to receive SSD benefits the plaintiff had to have been disabled on or before her date last insured (March 31, 1995); however, eligibility for SSI benefits is not dependent on insured status. Record p. 47.

maintaining social functioning. *Id*. at 54-55. The PRTF in addition reflected findings that the plaintiff "seldom" had deficiencies of concentration, persistence or pace and "never" had an episode of deterioration or decompensation in work or work-like settings. *Id*. at 55.

The Appeals Council declined to review the decision, Record pp. 23-24, 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 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 administrative law judge in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). However, with respect to the plaintiff's claim of anxiety the administrative law judge ended his analysis at Step 2 of the sequential process. Although a claimant bears the burden of proof at this step as well, 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." *McDonald*, 795 F.2d at 1124 (quoting Social Security Ruling 85-28).

The plaintiff asserts that the administrative law judge erred in (i) deeming her anxiety condition non-severe, (ii) basing his conclusions regarding her capacity to return to past relevant work on a hypothetical question posed to a vocational expert that omitted any consideration of her anxiety condition, and (iii) discrediting some of her testimony. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 5) at [3]-[10]. Remand is warranted on the basis of the first statement of error with respect to the plaintiff's SSI claim.

I. Analysis

The record in the instant case is noteworthy for the fact that it contains no direct assessment, other than the PRTF completed by the administrative law judge, of the impact of the plaintiff's anxiety condition on her ability to work. In neither her initial application for benefits nor her request for reconsideration did the plaintiff mention her anxiety condition. *See* Record pp. 147-57 (application dated November 15, 1994), 164-69 (reconsideration report dated July 20, 1995), 170-75 (reconsideration report dated January 28, 1997). Social Security consulting physicians Paul Brinkman, M.D., and Lawrence P. Johnson, M.D., accordingly also omitted any mention of it and made no cross-referral for psychiatric evaluation. *See id.* at 176-83, 184-91.

The plaintiff nonetheless supplied the following documentation relevant to her anxiety condition: (i) Brighton Medical Center records of two emergency-room visits for panic attacks in June and August 1991, *id*. at 7-16, (ii) the raw medical records of her longtime treating physician, Carl Schuler, D.O., spanning the period from June 1991 through December 1996, *id*. at 203-06, 230-49, 292-349, (iii) a summary by her treating psychologist, Bruce H. Thurlow, Ed.D., of her treatment

and condition as of December 15, 1992, *id*. at 287-91, (iv) an evaluation by consulting psychologist Frank Luongo, Ph.D., based on examination in August and September 1997, *id*. at 279-83, and (v) the office notes of a new treating physician, neurologist Leonard C. Kaminow, M.D., reflecting his findings in visits of June and July 1998, *id*. at 18-22.[3]

At oral argument the commissioner conceded that it was a "close call" whether (for purposes of SSI eligibility) substantial evidence supported the administrative law judge's determination that the plaintiff's anxiety through the date of decision was non-severe. However, he argued persuasively that (for purposes of SSD eligibility) such a finding was supportable with respect to her condition as of March 1995, her date last insured.[4] He noted — and the record reflects — that:

1. The plaintiff omitted any mention of anxiety in initial and reconsideration applications (one of which was completed approximately four months prior to, and one approximately four months following, the expiration of her date last insured).

2. As of December 1992 the plaintiff's anxiety condition was reported to be stable. *See id.* at 290 (report of Dr. Thurlow that "Ms. Chute's underlying anxiety level has greatly abated, characteristics of panic attacks only occasionally appear and general coping skills are improved.").

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[3]The plaintiff also testified at hearing that she experiences feelings of anxiety every morning, must speak two to three times a week to her mother on the phone to calm herself down, has a severe anxiety attack approximately once a month and seeks treatment for anxiety at a hospital about once or twice a year. Record pp. 91-92. The administrative law judge found the plaintiff less than credible; *id*. at 34; however, even were I to discredit the foregoing subjective testimony, remand still would be warranted in this case with respect to the plaintiff's SSI claim.

[4]To be entitled to SSD benefits, a claimant must not only demonstrate disability on or before the date last insured but also must *inter alia* "file an application while disabled, or no later than 12 months after the month in which your period of disability ended." 20 C.F.R. § 404.320(b)(3). The plaintiff's disability application was filed as of January 30, 1995. *See* Record p. 164. She thus would have to demonstrate the existence of disability during the period from January 31, 1994 through January 30, 1995.

3. The record reveals only one documented panic attack throughout 1994 and 1995 — in December 1995, approximately nine months after expiration of the plaintiff's date last insured. *See id.* at 203-06 (notes of Dr. Schuler for period from April 13, 1994 to October 3, 1994), 244-49 (notes of Dr. Schuler for period from January 10, 1995 through December 13, 1995, including note of March 31, 1995 that "has been seeing a counsellor which is helping at this point anxiety is under control"), 348-49 (notes of Dr. Schuler for period from January 19, 1994 through March 28, 1994).

The plaintiff countered at oral argument that, as noted by Dr. Thurlow, she was indeed in treatment for anxiety throughout 1994 and 1995 with Caroline Thorne-Lyman, *see id.* at 288, but that she had been unable to obtain Thorne-Lyman's records. The plaintiff nonetheless bore the burden of adducing evidence at Step 2 that her anxiety condition was severe on or before her date last insured and within the twelve months prior to the filing of her application. Thorne-Lyman's records might have revealed additional panic attacks or might have shown the condition to have been under control; in their absence, one can do no more than speculate. The fact remains that, on this record, there is only one documented incident of a panic attack throughout 1994 and 1995, and that occurred approximately nine months after the plaintiff's date last insured. The plaintiff herself did not deem her anxiety condition significant enough to report to the commissioner in the four months preceding or the four months following her date last insured. The administrative law judge thus supportably determined that as of March 1995 (and for the twelve months preceding the filing of the plaintiff's SSD application) the plaintiff's anxiety disorder was non-severe.[5]

[5]The plaintiff also argues that, even if the administrative law judge correctly determined that her anxiety was non-severe, he was required to factor any resulting limitations into hypotheticals posed to the vocational expert. *See* 20 C.F.R. §§ 404.1545(e), 416.945(e) ("we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual (continued...)

As the commissioner acknowledged, the administrative law judge's determination that, for SSI purposes, the plaintiff's anxiety remained non-severe through the date of decision rests on much shakier ground. Dr. Schuler's office notes reflect several anxiety flareups and at least one panic attack throughout 1996. *Id*. at 230 (anxiety flareup on December 27, 1996), 234 (under a lot of stress, nerves worse as of July 31, 1996 and August 15, 1996), 238 (panic attacks noted as of May 15, 1996), 241 (noted to be more panicky as of March 13, 1996), 242 (noted to be more anxious as of February 27, 1996). As of September 1997 Dr. Luongo observed, "overall impressions are of an individual who is suffering from a multiplicity of circumstances and medical conditions which create a significant functional impairment . . . . she is suffering from associated anxiety of at times a rather severe nature, and at other times, somewhat manageable . . . ." *Id*. at 282-83. As of June 1998 Dr. Kaminow diagnosed the plaintiff with both anxiety and obsessive/compulsive disease. *Id*. at 21. None of these notes purports to relate these increased anxiety conditions to a workplace setting. The administrative law judge thus necessarily translated raw medical data into assessments of such work-related capacities as the plaintiff's persistence, concentration and pace. As the First Circuit has clarified: "With a few exceptions (not relevant here), an ALJ, as a lay person, is not qualified to interpret raw data in a medical record." *Manso-Pizarro*, 76 F.3d at 17.

To the extent there is any medical documentation even obliquely addressing the recent impact of the anxiety disorder on the plaintiff's ability to work, it suggests that the disorder would have

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[5](...continued)
functional capacity"). Given the lack of evidence that the plaintiff's anxiety condition as of March 1995 imposed any limitations, the administrative law judge did not err in refusing to factor in such limitations through the date last insured. On remand for purposes of reevaluating the plaintiff's eligibility for SSI, the administrative law judge should of course factor in any limitations determined to exist currently.

more than a minimal impact.[6] Dr. Luongo observed: "It is important to note that [the plaintiff's] extreme sense of responsibility toward her disabled two-and-a-half year old son is a prominent part of the clinical picture. The extreme commitment which she has to this disabled child may well approach symbiotic proportions. If it were necessary for her to substantially reduce her time with this child her anxiety symptoms might well be exacerbated."[7] Record p. 283.

On this record, the determination that the plaintiff's anxiety condition was non-severe through the date of decision (for SSI purposes) accordingly is not supported by substantial evidence. Remand is warranted on this basis.

II. Conclusion

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

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

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[6]The plaintiff at oral argument contended that records of Drs. Luongo and Kaminow addressed the impact of her anxiety on her ability to work inasmuch as they contained findings concerning her obsessive behavior, difficulty concentrating and judgment problems, among other things. *See, e.g.*, Record pp. 20-21, 283. However, these raw findings are not translated into a workplace context.

[7]The plaintiff engaged in no substantial gainful activity after sustaining a hand injury in April 1994; prior thereto she worked mowing cemetery lawns, a task that she was able to perform with little supervision and much flexibility, bringing her children to the job site. Record pp. 32, 79-80.

by the district court and to appeal the district court's order.

Dated this 22nd day of November, 1999.

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David M. Cohen
United States Magistrate Judge