UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL GARDNER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-176-P-C***
	)	
SHIRLEY S. CHATER,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the issue of whether the Commissioner properly determined that the plaintiff was not suffering from a severe mental impairment as of his date last insured. The Administrative Law Judge made this determination without consulting a medical advisor. I recommend that the court vacate the decision of the Commissioner and remand for further proceedings.

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 had not engaged in substantial gainful activity since March 25, 1992, Finding 2, Record p. 26; but that, as of June 30, 1993, the date

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[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 26, 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 December 9, 1996 pursuant to Local Rule 26(b) 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.

he last enjoyed insured status under the SSD program, he did not suffer from a medically determinable medical impairment,[2] Finding 3, Record p. 26, and, therefore, the plaintiff was not under a disability at any time prior to the date her insured status expired, Finding 11, Record p. 27. The Appeals Council declined to review the decision, Record pp. 3-4, 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 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).

I. The Evidence before the Commissioner

At his hearing before the Administrative Law Judge, the plaintiff testified that he had a memory problem that began in 1990. Record pp. 48-49. He stated that, at first, he and his wife thought the problem was related to his history of substance abuse, but that as time passed they came to rule out that theory because the plaintiff had not abused any substances since 1984. *Id.* at 50, 51, 56. He testified further that he experienced dizziness, mood swings and panic attacks. *Id.* at 48, 50-51, 53-54. The plaintiff told the Administrative Law Judge that he suffered a head injury in a car

[2] The Administrative Law Judge did determine that the plaintiff suffered from certain non-mental impairments as of his date last insured, Finding 3, Record p. 26, but ultimately found him not disabled based on his residual functional capacity for work, Findings 5-10, Record p. 27. The plaintiff does not challenge the determinations made on his non-mental impairments.

accident that took place in the late 1970s. *Id.* at 57.

The record further reveals that a psychiatrist, James M. Todd, M.D., evaluated the plaintiff in October 1993 and diagnosed "[m]ajor depression with anxiety." *Id.* at 162. Todd noted at that time that the plaintiff complained of anxiety attacks dating back two years, with the episodes worsening over the previous six months. *Id.* at 161. Todd referred the plaintiff to psychologist Margaret Zellinger, whose extensive neuropsychological evaluation dated May 1994 is also of record. *Id.* at 187-95. Zellinger found that

> [n]europsychological tests are suggestive of organic impairment which is mild in severity, affecting motor and sensory abilities on the right side of [the plaintiff's] body (a consistent result but the magnitude of the difference is such that it would not necessarily be noticed in practice), abstract problem solving deficits, and in certain situations attention and concentration deficits.

Id. at 194. According to Zellinger, these findings are "consistent with the results expected from a prior closed head injury, although it is not a definitive connection." *Id*. Zellinger administered an extensive battery of tests in order to reach her conclusions. *Id.* at 187. One was the "Millon Clinical Multiaxial Inventory II," the results of which Zellinger reported in her assessment of the plaintiff's personality functioning. *Id.* at 193. She noted that the plaintiff "was able to obtain a valid personality profile [on the Millon test] but there was a high degree of disclosure in debasement suggesting that the severity of his deficits may be somewhat exaggerated. This may be seen as a cry for help, rather than an indication of malingering." *Id*.

The Administrative Law Judge noted that the plaintiff was treated at the Veterans Administration hospital at Togus on two occasions in late 1992 for ailments unrelated to his present contentions concerning mental impairment. *Id.* at 20, 129-136. Appended to the plaintiff's Statement of Errors (Docket No. 5) are notes from a third visit to Togus during this period.

According to these notes, the plaintiff was seen on December 18, 1992 by a social worker at the hospital who noted that the plaintiff was complaining on that occasion of mood swings, anger, depression, ringing in his ears, problems with balance and headaches. The notes further state that the plaintiff was accompanied to the hospital by a psychologist, who was "helpful in clarifying the nature of the veteran's problem." The social worker's notes conclude with a reference to the plaintiff's 1978 accident and resulting head injury, quoting the plaintiff as stating that he did not seek treatment for any resulting mental impairments "due to anger with the Navy over how the accident was handled."

Although these notes appear nowhere in the administrative record, counsel for the Commissioner conceded at oral argument that they should be treated as having been duly submitted to the Social Security Administration prior to its determination. This was an appropriate concession, given that the Appeals Council indicated that it "considered the arguments" raised in a letter submitted by the plaintiff's representative on July 20, 1995. *Id.* at 3. This letter complained, *inter alia,* of the Administrative Law Judge's failure to take notice of the hospital visit in question. *Id*. at 6-7. It would be unfair to the plaintiff not to infer in these circumstances that the Appeals Council reviewed the hospital records at issue.

II. Failure to Consult a Medical Advisor

Citing Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* (1992) at 49, the plaintiff next contends that remand is required because the Administrative Law Judge failed to call on the services of a medical advisor to assist him in making the necessary inference concerning the onset of the plaintiff's mental impairment. I agree.

Regardless of the seriousness of the plaintiff's present condition, to establish his entitlement to disability benefits he must adequately demonstrate that his disability existed prior the expiration of his insured status. *Cruz Rivera v. Secretary of Health & Human Servs.*, 818 F.2d 96, 97 (1st Cir. 1986); *cert. denied*, 479 U.S. 1042 (1987); *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 79 (1st Cir. 1982). As the Commissioner pointed out at oral argument, evidence of an impairment that reached a disabling level of severity after the last insured date, or that was exacerbated after this date, cannot be the basis for a disability determination, even though the impairment may have had its roots prior to the date on which insured status expired. *Deblois*, 686 F.2d at 79.

The First Circuit found substantial evidence in *Deblois* to sustain the administrative finding that the claimant in that case, although suffering from paranoid schizophrenia, was not disabled as of his date last insured, which was more than seven years prior to the administrative hearing. *Id*. at 77-78, 80. What the First Circuit found dispositive was not just the lack of any such diagnosis during the insured period, but also the fact that subsequent medical reports did nothing but "evaluate the claimant's current mental status." *Id*. at 79-80.

In some cases, however, the medical evidence goes beyond merely evaluating the claimant's current condition and supports an inference that the onset of the disabling condition may significantly antedate the evaluation or evaluations in question. Not long after the First Circuit decided *Deblois*, the Social Security Administration explicitly acknowledged this principle by issuing Ruling 83-20. The ruling noted:

> In some cases, it may be possible, based on the medical evidence to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination, e.g., the date the claimant

> stopped working. How long the disease may be determined to have existed at a disabling level of severity depends on an informed judgment of the facts in the particular case. This judgment, however, must have a legitimate medical basis. At the hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred.

SSR 83-20 at 51.

For present purposes, the question thus becomes whether the plaintiff has presented enough medical evidence to generate the necessity of drawing an inference concerning the date of disability onset. If so, the administrative law judge erred by failing to solicit the input of a medical advisor at the hearing.

In my view, the Todd and Zellinger reports provide such a basis. Todd's October 1993 diagnosis of "[m]ajor depression with anxiety," only four months after the end of the plaintiff's insured status, is accompanied by the notation that the plaintiff complained at that time of having suffered anxiety attacks for the previous two years with worsening episodes over the previous six months. Record pp. 161-62. Perhaps even more significant is Zellinger's determination in 1994 that the neuropsychological problems she diagnosed were "consistent" with the results expected from the plaintiff's 1978 head injury. *Id.* at 194. Although these reports do not amount to a full-fledged diagnosis that the plaintiff suffered from a disabling condition as of his date last insured, they go beyond evaluating the plaintiff's current medical status. They generate sufficient medical ambiguity to require the expert views of a medical advisor in order to make an informed determination as to the onset date. *Bailey v. Chater*, 68 F.3d 75, 79 (4th Cir. 1995); *Spellman v. Shalala*, 1 F.3d 357, 362 (5th Cir. 1993); *cf. James v. Chater*, 96 F.3d 1341, 1343 (10th Cir. 1996) (pertinent examinations before and after date last insured failed to reveal psychological impairment; no medical advisor required); *Morgan v. Sullivan*, 908 F.2d 1426, 1428 (9th Cir. 1990) (no medical advisor

required where nothing in medical record supports possible finding of any impairments prior to date last insured); *Pugh v. Bowen*, 870 F.2d 1271, 1278 n.9 (7th Cir. 1989) (medical advisor unnecessary in light of "relatively complete medical chronology" of claimant's medical condition during relevant period).

That it was error to eschew a medical advisor in these circumstances is illustrated by the Administrative Law Judge's reliance in his opinion on Zellinger's reference to "disclosure in debasement" associated with the Millon Clinical Multiaxial Inventory II test. The Administrative Law Judge took this comment as suggestive that the plaintiff was generally inclined to "exaggerat[e] the severity of his deficits." Record, p. 25. Perhaps "disclosure in debasement" in connection with such a personality assessment instrument suggests precisely what the Administrative Law Judge thinks it does, but as a lay person he is not qualified to make such determinations. An Administrative Law Judge may unilaterally draw inferences as to disability onset, dispensing with the services of a medical advisor, only in "the most plain cases." *Bailey*, 68 F.3d at 80. This is not such a case.

As noted at oral argument, what is required for a finding of disability is not simply that the onset of impairment antedated the expiration of insured status, but rather that the condition had reached a disabling level of severity prior to that date. But review here is confined to whether the findings actually made by the Administrative Law Judge are supported by substantial evidence. As the Fourth Circuit has noted, the requirement that a medical advisor be consulted prior to inferring an onset date is "merely a variation" on the substantial evidence "theme." *Id*. The finding under review here -- and thus the finding that is not supported by substantial evidence absent the input of a medical advisor -- is that there is "insufficient medical evidence" to establish that, prior to the

plaintiff's date last insured, he had a "medically determinable medical impairment." Record p. 26. The Administrative Law Judge never reached the question of whether such an impairment was of disabling severity, and therefore neither does the court -- although that issue will obviously be central to the ultimate determination of the plaintiff's claim.

III. Conclusion

For the foregoing reasons, I recommend that the decision of the Commissioner 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 by the district court and to appeal the district court's order.

Dated this 12th day of December, 1996.

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David M. Cohen
United States Magistrate Judge