UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHARON L. SNOW,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-331-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability appeal requires the court to determine whether there is substantial evidence in the record to support the Commissioner's determination of non-disability, given the plaintiff's inability to make repetitive use of her upper extremities. I conclude that the Commissioner has failed to meet his burden of demonstrating that the plaintiff is capable of performing work that exists in substantial numbers in the national economy, and I therefore recommend remanding the matter with directions to award benefits.

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

[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 June 13, 1998 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.

gainful activity since July 2, 1994, Finding 2, Record p. 19; that she had "a bilateral overuse syndrome with chronic tendonitis, right medial epicondylitis, AC joint irritation, . . . a right ulnar neuropathy[] and mild chronic smoker's laryngitis with a polypoid lesion of the left true vocal cord," impairments that do not singly or in combination meet or equal the specific criteria of any of the impairments described in the Listing of Impairments set out in 20 C.F.R. § 404, Subpart P, Appendix 1, Findings 3-4, Record pp. 19-20; that she was unable to perform her past relevant work, Finding 7, Record p. 20; that she was able to perform light and sedentary work, with certain limitations, Finding 6, Record p. 20; that she nevertheless was capable of performing work as a "daily examination clerk, credit reporting clerk, checker II, equipment operator, rental clerk, hotel clerk, information clerk, airline security worker, parking lot attendant, surveillance systems monitor, order clerk, and telegraph service rater," jobs that exist in significant numbers in the national economy, Finding 12, Record p. 12; and that she was therefore not disabled, Finding 13, Record p. 21. 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. 1981). 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 proceedings before the Administrative Law Judge took place in Bozeman, Montana

because the plaintiff was a resident of that state at the time of the hearing. Record pp. 33, 38. While the matter was pending before the Appeals Council, the plaintiff moved from Montana to Maine. *Id.* at p. 5. The plaintiff cites First Circuit case law in her Itemized Statement of Errors and does not otherwise contend that First Circuit case law is inapplicable because the administrative proceedings began in another circuit.

The plaintiff raises several issues, the most significant of which concerns the determination made at the fifth and final step of the sequential evaluation process. Because the Commissioner determined that the plaintiff was not capable of performing her past relevant work, the burden of proof shifted to the Commissioner at Step 5 to show the plaintiff's ability to do other work in the national economy. 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 supporting the Commissioner's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting her ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The Administrative Law Judge found that the plaintiff's ability to perform the full range of light and sedentary work was limited to work "not requiring rapid repetitive or ongoing use of the upper extremities for reaching, handling, manipulating, pushing or pulling; significant vibrations; or a high degree of concentration or attention to task." Finding 6, Record p. 20. He relied on the testimony of Colleen Lordemann, a vocational expert, to determine that these limitations did not preclude the plaintiff from performing other jobs that exist in significant numbers. Record pp. 59-

64. Asked whether, in light of the plaintiff's transferable skills,[2] there would be sedentary or light-work jobs available to the plaintiff "that did not involve rapid, repetitive use of the upper extremity," the vocational expert responded affirmatively and cited the jobs of "data examination clerk,[3] credit reporting clerk . . . [,] checker II[,] . . . peripheral equipment operator, rental clerk and hotel clerk." *Id*. at 60-61. The Administrative Law Judge then further clarified the plaintiff's limitations, noting that "[t]he physicians have been quite clear that [the plaintiff] could not perform work . . . where there was repetitive ongoing use of the upper extremities" but that the plaintiff could "use her hands for gross manipulations, . . . can do grasping of light weights for short periods of time," could "make entries on an occasional basis as opposed to a repetitive ongoing basis," and could "handle small objects and light weights." *Id*. at 61. He also asked the vocational expert to assume that the plaintiff "may experience some discomfort that would preclude jobs requiring a high degree of concentration and attention to tasks." *Id*. at 61-62. The vocational expert responded that all of the jobs she had previously cited would remain within the plaintiff's capabilities because "[t]he same task is not performed continuously as in data entry" and "handling objects would occur on a frequent basis although not repetitively and not continuously." *Id*. at 62. The Administrative Law Judge then asked the vocational expert to apply these limitations to unskilled jobs and she cited the positions of information clerk, "airline security," parking lot attendant, surveillance system monitor, order clerk and "telegraph service rater." *Id*. at 62-63.

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[2] The vocational expert opined that the plaintiff had transferable work skills consisting of the ability to enter data into a terminal, to compare the entered data with source documents, to verify the accuracy of the entries, to correct errors, to compile and sort data and to achieve standards. Record p. 61.

[3] It is therefore obvious that the reference to "daily examination clerk" in the Administrative Law Judge's findings is actually intended to refer to the position of data examination clerk.

Although the Commissioner may meet his burden at Step 5 by posing hypothetical questions to a vocational expert, the answer thus adduced is only relevant if the "inputs into [the] hypothetical . . . correspond to conclusions that are supported by the outputs from the medical authorities." *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). In this instance, the plaintiff contends that the requisite correspondence is missing. Specifically, the plaintiff's position is that the vocational expert misunderstood the limitations the Administrative Law Judge intended to convey and thus cited jobs that require frequent use of the upper extremities that is inconsistent with an inability to make repetitive use of these extremities.

I agree with the plaintiff that an inability to use one's upper extremities on a repetitive basis is a more restrictive limitation than simply not performing a task continuously or handling objects less than frequently, the assumptions made by the vocational expert according to her testimony. As the plaintiff notes, the *Dictionary of Occupational Titles ("DOT")*[4] specifies that "frequently" means between one-third and two-thirds of the time. *See, e.g., Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. rev. 1991) at § 209.387-022 (job description for data examination clerk, requiring frequent reaching, handling and fingering). There is at least a rebuttable presumption in favor of the descriptions in the *DOT*, *Porch v. Chater*, 115 F.3d 567, 572 (8th Cir. 1997); *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995); *see also Tom v. Heckler*, 779 F.2d 1250, 1255-56 (7th Cir. 1985) (holding that *DOT* classifications control outright); *Mimms v. Heckler*, 750 F.2d 180, 186 (2d Cir. 1984) (same), and in citing jobs from that data source the vocational expert gave no indication that she was deviating from those job classifications. While an inability to make repetitive

[4] The Social Security Administration takes notice of the U.S. Department of Labor's *Dictionary of Occupational Titles* as a source of "reliable job information." 42 C.F.R. § 404.1566(d)(1).

use of the upper extremities is not a complete inability to use them, such a restriction is clearly incompatible with jobs requiring their use between a third and two-thirds of the time. Thus, there is not substantial evidentiary support for the finding at Step 5 that the plaintiff was capable of performing the jobs cited by the vocational expert and the Administrative Law Judge in reliance on the expert's testimony.

The plaintiff has requested remand with an order for payment of benefits. The Social Security Act authorizes the court to enter a judgment "affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The Commissioner had a full and fair opportunity to develop the record and meet his burden at Step 5. A remand for further administrative proceedings on the issue of disability would be unfair to the plaintiff, who has done all the Social Security Act requires of her to demonstrate her entitlement to disability benefits. *Field v. Chater*, 920 F.Supp. 240, 244 (D.Me. 1995).

Because the plaintiff is entitled to a remand with directions to award benefits, it is not necessary to consider her other contentions, which concern the Administrative Law Judge's not entirely crediting the plaintiff's hearing testimony concerning her limitations, his not listing the plaintiff's anxiety among her severe impairments, his not having enumerated in his decision the specific numbers of available jobs available to the plaintiff and the Appeals Council's apparent failure to include in the administrative record a brief submitted to that tribinal by the plaintiff.

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff.

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 at Portland, Maine this 22nd day of June, 1998.

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David M. Cohen
United States Magistrate Judge