

United States Court of Appeals
For the First Circuit

No. 83-1776

EMMA MANFREDONIA,
Plaintiff, Appellant,

v.

MARGARET HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. W. Arthur Garrity, Jr., U.S. District Judge]

Before
Campbell, Chief Judge,
Coffin and Breyer, Circuit Judges.

Allan G. Zelman, and Zelman & Zelman on brief for
appellant.
William F. Weld, United States Attorney, Ralph A. Child,
Assistant United States Attorney, and Robert J. Triba, Assistant
Regional Attorney, Department of Health and Human Services, on
brief for appellee.

May 9, 1984

CAMPBELL, Chief Judge. The claimant, Emma Manfredonia, applied for Social Security disability benefits on December 16, 1980. She alleged that she had been disabled by a mental disorder since August 29, 1980. After a hearing, an administrative law judge (ALJ) denied her claim, and the Appeals Council denied review, making the decision of the ALJ that of the Secretary of Health and Human Services. The claimant sought review in the district court which affirmed the decision, and she appeals.

The district court considered this to be a "close case." We too regard it as close, but, as we do not find that substantial evidence supports the Secretary's decision that the claimant could return to her former job as a bank teller, we remand.

First, we consider the claimant's argument that she had an impairment listed in Appendix 1. A finding that the claimant has an impairment listed in Appendix 1 would entitle her to benefits regardless of the nature of her past work. See 20 C.F.R. § 404.1520; Goodermote v. Secretary of Health and Human Services, 690 F.2d 5, 6-7 (1st Cir. 1982). The claimant argued in the district court that she met the criteria for "[f]unctional nonpsychotic disorders" listed in Appendix 1, § 12.04, a provision describing behavior of the type the ALJ found claimant to have lacked. On appeal the claimant now argues that she met the criteria for "[f]unctional [p]sychotic disorders" listed in Appendix 1, § 12.03. Thus, claimant abandons the claim made

before the district court, see Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 1, 3 (1st Cir. 1983), and instead presents a new theory of illness which the district court had no opportunity to consider. Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979). We need not reach either claim. We note, however, that substantial evidence supports the Secretary's decision under either of these sections of Appendix 1. A letter jointly signed by a psychiatrist, Dr. Abraham Fineman, and a social worker, John Berlin, viewed § 12.04, not § 12.03, as the relevant provision. The district court correctly pointed to the evidence which supports a determination that the claimant's personal habits had not deteriorated as required by § 12.04 B.¹

Next we consider whether there was substantial evidence to support the Secretary's finding that the claimant could return to her former work as a bank teller.² The medical evidence consists of several medical reports from the Mystic Valley Comprehensive Community Mental Health Center, a letter

1. It appears that the district court considered the failure of the claimant to show that she had an impairment listed in Appendix 1 to be sufficient to show that she could return to her former work. But the latter determination involves additional considerations. See 20 C.F.R. § 404.1520; Goodermote, 690 F.2d at 6-7.

2. The ALJ did not find that the claimant could return to her most recently held position as an "assistant accounts payable supervisor."

obtained at the instance of the claimant that was signed jointly by Dr. Fineman and John Berlin, both of the Mystic Valley Center, an examination report by Dr. Lance Dodes, who acted as a consultant for the Secretary, a "Report of Contact" by J. Schnee, apparently an employee of the Secretary who is not otherwise identified, and two "Psychiatric Opinion Sheets," one signed by Dr. Albert and one signed by Dr. Cohen. The Mystic Valley reports, covering a period from September 15, 1980, to January 1, 1982, generally describe the claimant as suffering from depression, paranoia, ruminative thinking and poor concentration. They additionally describe her as socially isolated and nonfunctional at home. Although her thought disorders have responded to medication, the depressive component of the claimant's illness has not. These descriptions were generally echoed in the letter by John Berlin and Dr. Fineman, dated June 10, 1982. The Report of Contact by J. Schnee, dated December 26, 1981, generally describes the claimant as having poor memory, unable to concentrate, and unable to cope with many daily chores. The examination report by Dr. Dodes, dated March 16, 1982, states that her history is "suggestive" of a "psychotic depressive reaction." He recommends hospitalization for the illness because it has not responded to past treatment. Dr. Dodes's report concluded with a form which describes as "limited" the claimant's ability to relate with co-workers, to respond to supervision, to respond appropriately to ordinary

work pressure, to work without direction or assistance, and to work around machinery. A form signed by Dr. Cohen, dated May 18, 1981, contains check marks indicating that the claimant has a "[s]ignificant restriction of basic work-related functions" which consists of restrictions in "[r]elating to public, fellow workers, supervisor, subordinates" and in "[h]andling work stress(s)."

None of this evidence, without more, supports a finding that the claimant could return to her former work as a bank teller, work that not only involves some interaction with the public but which according to her vocational report involved using a computer and adding machine, opening savings and checking accounts, cashing checks, and making deposits and withdrawals.

Only the form signed by Dr. Albert tends to support a finding that claimant could return to her former work. That form, dated January 28, 1981, contains a single check mark indicating "[n]o significant restriction of basic work-related functions." There is nothing in the record to indicate that Dr. Albert personally examined the claimant or to show what records or reports he relied on to reach this conclusion. He did not testify at the hearing. We held in Rodriguez v. Secretary of Health and Human Services, 647 F.2d 218, 223-224 (1st Cir. 1981), that an advisory report by a nonexamining, nontestifying physician could be given some evidentiary weight, but there the nonexamining, nontestifying physicians "received extensive

documentation containing relevant information," and "confined themselves to expressing an opinion about 'equivalency' on the basis of the clinical reports before them." The record here does not indicate that any of these factors were present, nor does this report indicate that the physician gave any thought to the requirements of the job in question. Especially in light of the other medical evidence, we do not believe that the Secretary could reasonably find an ability to return to the bank teller's position simply on the basis of Dr. Albert's cryptic report. See Browne v. Richardson, 468 F.2d 1003, 1006 (1st Cir. 1972). We note that the ALJ made no reference to Dr. Albert's opinion, suggesting that he too gave it little or no weight. Thus, we hold that the Secretary's finding that the claimant could return to her former work as a bank teller was not supported by substantial evidence.

This does not end our inquiry, however, for a claim for disability benefits can be defeated under the provisions of 20 C.F.R. § 404.1530. "In order to get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work." 20 C.F.R. § 404.1530(a). Although the ALJ did not refer to this regulation, he did discuss the claimant's refusal to follow proposed treatment, and the Secretary here claims that this consideration supports the ALJ's decision. However, the ALJ only discussed the claimant's refusal to follow proposed treatment and did not indicate how this

affected his decision. He made no findings pertaining to this matter.

There is clearly evidence in the record to support the view that the claimant had rejected proposed treatment. Some of the Mystic Valley reports state that the claimant rejected a "recommendation of ECT" and that she refused to be hospitalized. We do not know, however, whether these proposed treatments amounted to "treatment prescribed by your physician," 20 C.F.R. § 404.1530(a)(emphasis added), nor can we determine whether the proposed treatment would "restore [her] ability to work." We note that the Mystic Valley report of February 19, 1981, states, "Depressive component of illness has not responded to various anti-depressant meds and client has encountered numerous side effects which prevent adequate (therapeutic) drug dosage." The report of Dr. Dodes states, "Whether or not she would require E.C.T. is not clear to me at this time, however," and he added, "She might benefit from anti-depressant medication" (Emphasis added.) These statements raise a doubt about denying benefits under § 404.1530. In addition, the Mystic Valley report of February 19, 1981, states that the claimant's non-compliance with treatment "may be inherent to suspicious paranoia." It could be unfair for the Secretary to refuse to give disability benefits under § 404.1530 if the claimant's mental impairment was the cause of her not taking medication. But we voice no opinion on the answers to the various questions

which are relevant if § 404.1530 applies. It is the duty of the Secretary, not that of the court, to make the appropriate findings. See Rodriguez v. Secretary of Health and Human Services, 647 F.2d at 222. Upon remand the Secretary should make explicit findings concerning the applicability of § 404.1530 and concerning the various questions to be answered if that provision is applicable. See Schena v. Secretary of Health and Human Services, 635 F.2d 15, 19 (1st Cir. 1980).

If the Secretary determines upon remand that the claimant cannot return to her former work (about which we voice no opinion), the Secretary must still determine whether the claimant can do any other work sufficiently available in the national economy. Goodermote, 690 F.2d at 7.

We vacate the judgment of the district court and remand with instructions to remand to the Secretary for further proceedings consistent with this opinion.

So ordered.