

complaints of headache pain; and (4) the hypothetical questions posed to the vocational expert at hearing did not reflect the evidence in the record.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' ' 404.1594(f), 416.994(b)(5); *cf. Goodermote v. Secretary of Health & Human Services*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff was disabled within the meaning of the Social Security Act beginning August 19, 1983 and has not engaged in substantial gainful activity since that date, Finding 1, Record p. 18; that the plaintiff currently suffers from ``diminished visual acuity, ocular [sic] irritation of the left eye, and a left-sided hearing loss," but that no impairment or combination of impairments meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Findings 2-3, Record p. 18; that the impairments present as of October, 1983 ``were a skull fracture and contusion of the right globe, sixth and seventh nerve paralysis, cerebrospinal fluid leak, and resolved intoxication," Finding 4, Record p. 18; that medical evidence establishes that the plaintiff's impairment(s) have improved since October, 1983, Finding 5, Record p. 18; that this improvement is related to the plaintiff's ability to work, Finding 6, Record p. 18; that the plaintiff's impairment or combination of impairments is severe, Finding 7, Record p. 18; that the plaintiff's allegations concerning the degree of his functional loss are not entirely credible, Finding 8, Record p. 18; that beginning in September, 1986 the plaintiff had the residual functional capacity to ``perform the nonexertional requirements of work except for performing tasks requiring binocular vision, working in exposure to dust, fumes, and blasts of air, and performing tasks requiring perfect or near perfect hearing," Finding 9, Record p. 18; that the plaintiff could not perform his past relevant work, Finding 10, Record p. 18; that the plaintiff meets the definition of a ``younger individual," has a ``limited" education and an unskilled work background, Findings 11-13, Record pp. 18-19; that the plaintiff's ``capacity to perform work at all exertional levels is significantly compromised," Finding 14,

Record p. 19; that, considering his age, education and work experience, the plaintiff can be expected to make a vocational adjustment to other work which exists in significant numbers in the national economy, Findings 15, Record p. 18; and that the plaintiff's disability ceased on September 30, 1986. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final decision of the Secretary. 20 C.F.R. ' ' 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Services*, 869 F.2d 622, 623 (1st Cir. 1989).

In reviewing the decision of the Secretary, the standard is whether the determination made is supported by substantial evidence. 42 U.S.C. ' ' 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Services*, 654 F.2d 127, 128 (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 Services*, 647 F.2d 218, 222 (1st Cir. 1981).

Termination of benefits is governed by 42 U.S.C. ' 423(f).² That section provides that benefits may be discontinued only if there is substantial evidence to support a finding: (a) of medical

² 42 U.S.C. ' 423(f) states in relevant part:

A recipient of benefits under this subchapter . . . based on the disability of any individual may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by --

(1) substantial evidence which demonstrates that --

(A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and

improvement related to an individual's ability to work; and (b) that the individual is now able to engage in substantial gainful activity. *Id.*, see also 20 C.F.R. ' ' 404.1594(b)(3), (4) and (5), 416.994(b)(1)(iii), (iv), and (v). The Secretary must first demonstrate medical improvement before he determines whether the plaintiff is still disabled. *Lively v. Bowen*, 858 F.2d 177, 181 n.2 (4th Cir. 1988) (principles of *res judicata* direct the conclusion that the Secretary bears the burden of demonstrating medical improvement); 20 C.F.R. ' ' 404.1594(f)(3), 416.994(b)(5)(iii).

(B)(i) the individual is now able to engage in substantial gainful activity,

. . . .

Any determination under this section shall be made on the basis of all the evidence available in the individual's case file, including new evidence concerning the individual's prior or current condition which is presented by the individual or secured by the Secretary. Any determination made under this section shall be made on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled

The plaintiff argues that the Secretary's finding of medical improvement is not supported by substantial evidence in the record. He contends that the Secretary erred when he found that the plaintiff's eyesight had improved in his left eye. The plaintiff alleges that in the initial disability determination the visual acuity in his left eye was characterized as excellent, Record p. 245, and that the medical advisor testified that the record does not reveal any significant change in the plaintiff's visual symptoms since the original injury, Record pp. 94-95.

The Secretary based his finding of medical improvement on two factors: (1) improvement in the condition of the plaintiff's left eye; and (2) the plaintiff's improved mobility and balance, demonstrated by his ability to walk without a cane.³ Record p. 15. In support of his finding of visual improvement the Secretary cites the increased visual acuity in the plaintiff's left eye, from 20/40 at the time of the initial disability determination to 20/25 (one line from normal vision) in the most recent eye examination. Record pp. 14, 247, 250, 277-78. Although the medical evidence and testimony in this respect is inconsistent, "conflicts and contradictions in the evidence are to be resolved by the Secretary, not the court." *Sitar v. Secretary of Health & Human Services*, 671 F.2d 19, 22 (1st Cir. 1982).

The Secretary also found that the plaintiff's secondary impairment -- irritation of the left eye due to a failure of the lid to fully close -- has shown limited improvement. Record p. 14. He states that "current eye examinations show measurable improvement since September of 1983, when the claimant had a 'totally [sic] paralysis' of lateral gaze as well [as] weakness of a lid closure." *Id.* Although the plaintiff exhibits some corneal irritation and must use artificial tears and lubricants to lubricate his eye, Record pp. 247, 250, 277-78, he has undergone a tarsorrhaphy, or partial sewing

³ At the time of his initial disability determination the plaintiff required the use of a cane to walk. Record p. 248. The plaintiff does not dispute the finding that his mobility has improved and that he is

together of the eyelids, to protect his left eye from damage, Record pp. 277-78. In June, 1986 optometrist Steven P. Lary reported that the plaintiff "was doing quite well with no complaints of discomfort." Record p. 250. Furthermore the medical advisor, E. Charles Kunkle, M.D., testified that as a result of the tarsorrhaphy and a muscle operation the plaintiff's eye condition improved. Record pp. 58-59. Therefore, substantial evidence supports the Secretary's finding that the plaintiff's vision and mobility impairments have improved since the initial disability determination and those improvements are related to the plaintiff's ability to do basic work activities.⁴

The plaintiff's second argument is that the Secretary erred when he did not require that the plaintiff undergo an auditory test. He contends that in a termination of benefits determination it is the Secretary's burden to establish that the plaintiff's impairment does not prevent him from working.

now able to walk without a cane.

⁴ A determination by this court that insufficient evidence supports the Administrative Law Judge's finding of improvement in the plaintiff's eye impairment would not change the outcome. The Administrative Law Judge's determination of improvement in the plaintiff's mobility impairment is clearly supported by the evidence and was not challenged. The Administrative Law Judge is not required to find medical improvement in all of the plaintiff's impairments, only that "there has been *any* medical improvement in the individual's impairment or combination of impairments." 42 U.S.C. § 423(f)(1)(A) (emphasis added).

The plaintiff mistakenly assumes that the Secretary must bear the burden of proving disability in termination proceedings.⁵ 42 U.S.C. § 423(f) states that the determination of whether the plaintiff is "now able to engage in substantial gainful activity" is to be made "on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled." *Id.* Thus, the disability determination in a medical improvement case is made on the same basis as in the initial disability determination. *Rhoten v. Bowen*, 854 F.2d 667, 669 (4th Cir. 1988).

The regulations state that the plaintiff bears the burden of providing the Secretary with medical evidence establishing his impairment. 20 C.F.R. §§ 404.1514, 416.914. If the plaintiff fails to submit medical evidence the Secretary will base his decision on the information available to him. 20 C.F.R. §§ 404.1516, 416.916. If the Secretary is doubtful as to the severity of the plaintiff's disorder, the Secretary should request the plaintiff to submit to additional medical testing. 20 C.F.R. §§ 404.1517, 416.917; *Carrillo Marin v. Secretary of Health & Human Services*, 758 F.2d 14, 17 (1st Cir. 1985). Apparently the Administrative Law Judge found that such a consultative examination was not needed here.

⁵ See Plaintiff's Statement of Errors at p. 9.

The Administrative Law Judge clearly considered the plaintiff's hearing impairment when he determined that the plaintiff's impairments were severe. Findings 2, 7, Record p. 18. However, no evidence other than the plaintiff's subjective complaints suggests that his hearing impairment unduly restricts his ability to function in the work situations described by the vocational expert. As the Administrative Law Judge noted, the plaintiff had no difficulty hearing at the social security hearing. Record p. 15. In addition, Dr. Kunkle testified that an audiogram performed in 1983 indicated that the plaintiff's hearing impairment was moderate. Record p. 60. Furthermore, the plaintiff has never sought treatment or rehabilitation for his hearing problem, *see Tsarelka v. Secretary of Health & Human Services*, 842 F.2d 529, 534 (1st Cir. 1988), nor is there any indication that the plaintiff comes close to meeting the listings.⁶ Thus the Secretary was fully justified in not requiring a hearing test for the plaintiff.

The plaintiff's third argument is that the Secretary failed to evaluate his subjective complaints of pain and its effect on his residual functional capacity. He alleges that the Secretary's determination that his pain is alleviated by non-prescription medicine is not supported by the record and contends that the Secretary erred when he found that his headaches are of minimal significance and do not affect his ability to work.

Following the first step of the procedure for evaluating pain set forth in *Avery v. Secretary of Health & Human Services*, 797 F.2d 19 (1st Cir. 1986) (construing instructions for the Secretary's Program Operations Manual System (POMS) DI T00401.570) and Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 737 (Supp. 1989) the medical evidence in this

⁶ It is undisputed that the plaintiff's hearing in his right ear is normal. The listings require that there be a threshold sensitivity of 90 decibels or greater in the better ear. Listing 2.08.

case clearly shows that the plaintiff has an impairment that can reasonably be expected to result in pain. Record pp. 61, 251-52. Therefore, under the second step of the *Avery* rule, the Secretary must carefully consider the plaintiff's subjective complaints of pain. *Avery*, 797 F.2d at 23. *See also* Social Security Ruling 88-13 (in cases where pain is alleged, the Secretary must provide a thorough discussion of the medical and nonmedical evidence including the claimant's subjective complaints of pain and must resolve inconsistencies in the evidence).

Here the Secretary fully discussed the plaintiff's subjective complaints of pain and determined that his pain does not severely limit his ability to work. He found that the plaintiff's complaints of pain are not credible in light of his daily activities. The plaintiff testified that he is able to cook, clean, drive a car, fish, go to the movies and take care of his dogs. Record pp. 32, 35, 37-39. In addition, the plaintiff stated that he takes Tylenol or some other pain reliever to relieve the pain. Record pp. 28-29, 42. He also stated that he has not sought any medical help to relieve the pain. Record p. 42. Finally, Richard L. Sullivan, M.D. stated that the plaintiff's pain is usually relieved by simple analgesics. Record p. 251. Thus, substantial evidence supports the Secretary's findings that the plaintiff's subjective complaints of pain do not significantly affect his residual functional capacity.

Finally, the plaintiff argues that the Secretary erred when he found that the plaintiff could perform a number of jobs available in both the regional and national economies. He argues that the Secretary posed hypothetical questions to the vocational expert which understated the extent of his impairments.

Since the Secretary determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Secretary at this stage to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. ' ' 404.1594(f)(8), 416.994(b)(5)(viii); *cf. Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. This burden applies to an

assessment of a claimant's residual functional capacity and vocational factors affecting his ability to perform other work. *See Rosado v. Secretary of Health & Human Services*, 807 F.2d 292, 294 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Services*, 794 F.2d 14 (1st Cir. 1986).

The plaintiff's contention that the Administrative Law Judge understated the extent of the plaintiff's impairments in his hypothetical questions is without merit. The Administrative Law Judge, at the plaintiff's request, asked the vocational expert if the plaintiff's hearing restriction and visual problems would affect the occupations he had suggested. Record p. 109. The vocational expert stated that they would create problems in some jobs, but that other positions remained within the plaintiff's residual functional capacity. *Id.* Furthermore, the plaintiff was able to clarify the hypothetical questions to the vocational expert. Record p. 109-13. Thus, the restrictions of concern to the plaintiff were posed to the expert. *See Arocho v. Secretary of Health & Human Services*, 670 F.2d 374, 375 (1st Cir. 1982) (hypothetical question must accurately reflect the evidence in the record); *Torres v. Secretary of Health & Human Services*, 870 F.2d 742, 746 (1st Cir. 1989) (if a plaintiff finds the Administrative Law Judge's hypothetical question inadequate he should pose his own).

I conclude that substantial evidence supports the Secretary's decision that the plaintiff's medical condition improved and that he has the residual functional capacity to perform several jobs available within the national and regional economies. Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate'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 5th day of February, 1990.

*David M. Cohen
United States Magistrate*