



This Social Security Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff's back impairment does not restrict him from performing a limited range of light work and the full range of sedentary work and that, applying the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the ``Grid"), as a framework for decisionmaking, the plaintiff is not disabled. The plaintiff alleges that the Secretary failed to develop an adequate record on which to base his opinion because he did not provide the examining physician with the films from a myelogram<sup>2</sup> after the physician stated that such films might influence his opinion. The plaintiff seeks to have the case remanded so that the physician can examine the films and produce a supplemental report.<sup>3</sup>

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<sup>2</sup> A myelogram is an ``x-ray picture of the spinal cord, especially one made after the injection of a contrast substance in the spine." *Schmidt's Attorneys' Dictionary of Medicine and Word Finder* 529 (1965).

<sup>3</sup> Although the plaintiff seeks to remand this case to the Secretary for the taking of additional evidence, I do not treat the plaintiff's argument as a motion to remand on the basis of new and material evidence pursuant to 42 U.S.C. ' 405(g). This section provides that the reviewing court may ``at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such

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evidence into the record in a prior proceeding." The plaintiff has not argued that he has evidence that is either new or material or that he had good cause for failing to have such evidence incorporated in the record. *See Evangelista v. Secretary of Health & Human Services*, 826 F.2d 136, 139 (1st Cir. 1987). Section 405(g), however, also provides that "[t]he court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, *with or without remanding the cause for a rehearing*." 42 U.S.C. § 405(g) (emphasis added). I therefore treat this appeal as a substantial evidence challenge based solely on the Secretary's alleged failure to provide a complete record on which to base his determination. *Miranda v. Secretary of Health, Education & Welfare*, 514 F.2d 996, 998 (1st Cir. 1975).

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 404.1520; *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 has not engaged in substantial gainful activity since July 14, 1985, Finding 2, Record p. 18; that the medical evidence establishes that he ``has severe herniated cervical disc and obesity, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P [20 C.F.R. ' 404]," Finding 3, Record p. 18; that the plaintiff's allegations concerning the degree of limitation imposed by his impairments are not entirely credible ``in light of the degree of treatment required [and his] refusal to undergo the recommended treatment," as well as the discrepancy between the plaintiff's ``allegations concerning his limitations, [his] own description of his activities, and the findings made on objective examination," Finding 4, Record p. 19; that the plaintiff is unable to perform his past relevant work, Finding 6, Record p. 19; that the plaintiff's ``residual functional capacity for the full range of light work is reduced by his inability to lift objects weighing in excess of 10 pounds," but that he ``retains the residual functional capacity to perform the full range of sedentary work," Finding 7, Record p. 19; that, given the plaintiff's age (38), education (high school graduate with vocational training in automotive repair and one year of college), his lack of transferable work skills and his residual functional capacity for the full range of sedentary work, the Grid would direct a conclusion that the plaintiff is not disabled, Findings 8-11, Record p. 19; that, using the Grid ``as a framework for decisionmaking," there are a significant number of jobs, such as those of cashier, clerk, inspector, shoe cements and computer operator, that the plaintiff can perform and that such jobs ``exist in significant numbers in the national and local economy," Finding 12, Record p. 19; and that therefore the plaintiff is not disabled, Finding 13, Record p. 19. The Appeals Council declined to review the decision,

Record pp. 4-5, making it the final determination of the Secretary. 20 C.F.R. ' 404.981; *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); *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).

Since the Secretary has determined that the plaintiff is not capable of performing his past relevant work, and thus proceeded to Step Five of the sequential evaluation process, the burden of proof is on the Secretary to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. ' 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. This means that the record must contain positive evidence in support of the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant 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 and Human Services*, 794 F.2d 14, 16 (1st Cir. 1986).

The only issue on appeal is whether this case should be remanded to the Secretary for the taking of additional evidence.<sup>4</sup> The plaintiff claims that the Secretary should have sought a

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<sup>4</sup> At oral argument the plaintiff raised the additional issue of whether substantial evidence supports the Secretary's determination that the plaintiff does not have an impairment or combination of impairments equal to the Listings. This issue was not raised in the plaintiff's Itemized Statement of Specific Error in accordance with Local Rule 12. Moreover, the plaintiff appeared to have abandoned this argument after the Secretary cited to that portion of the record which contains the medical advisor's testimony that the plaintiff does not meet or equal the Listings. *See Record pp. 55-56.* In any

supplemental report (based on an analysis of myelogram films) from Dr. Trembly, an examining physician, who intimated in his report that such films might influence his opinion. Record p. 183. The plaintiff contends that without such a supplemental report the record is incomplete and therefore cannot constitute substantial evidence on which the Secretary may base his decision.

The Court of Appeals for the First Circuit has determined that, while the claimant `` bears the burden of proof on the issue of disability, . . . the Secretary nonetheless retains a certain obligation to develop an adequate record from which a reasonable conclusion can be drawn." *Marin v. Secretary of Health & Human Services*, 758 F.2d 14, 17 (1st Cir. 1985) (citations omitted). This obligation has been found most compelling when the claimant is unrepresented by counsel at the hearing. *Deblois v. Secretary of Health & Human Services*, 686 F.2d 76, 80-81 (1st Cir. 1982) (where the claimant, who was obviously suffering from a severe mental disorder appeared at a Social Security proceeding without counsel, the administrative law judge's failure to protect the claimant's interests at the hearing justified a remand for the taking of additional evidence); *Currier v. Secretary of Health, Education and Welfare*, 612 F.2d 594, 598 (1st Cir. 1980) (the Secretary's responsibility to develop evidence increases `` in cases where the [claimant] is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence necessary to a reasoned evaluation of the claim, and where it is within the power of the administrative law judge, without undue effort, to see that the gaps are somewhat filled"). Where the Secretary has failed to meet his obligation, the First Circuit has found that his decision is not supported by substantial evidence and has remanded the case for the taking of additional evidence. *Marin*, 758 F.2d at 16-17. *See also Miranda v. Secretary of Health Education and Welfare*, 514 F.2d 996, 998 (1st Cir. 1975) (the Secretary has a responsibility in a termination of

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event, I do not address this issue because it has not been properly raised.

benefits determination to "make an investigation that is not wholly inadequate under the circumstances" and his failure to investigate the disabling effects of the plaintiff's pain justified a remand for the taking of such evidence). Where the Secretary's efforts to develop the medical evidence on behalf of a represented claimant were considerable, however, the First Circuit concluded that his investigation was adequate to develop a full and fair record. *Raphael Rico v. Secretary of Health, Education & Welfare*, 593 F.2d 431, 433 (1st Cir.), cert. denied, 444 U.S. 858 (1979). In *Raphael Rico* the court determined that, where the Secretary supplemented the report of the claimant's treating physician by arranging for examinations by other doctors who submitted residual functional capacity reports, the Secretary was not responsible for obtaining a residual functional capacity from the claimant's treating physician or for arranging further examinations recommended by the reporting physicians. The court noted that, "[w]hile the Secretary must make a reasonable inquiry into a claim of disability, he has no duty to go to inordinate lengths to develop a claimant's case." *Id.* (citing *Thompson v. Califano*, 556 F.2d 616, 618 (1st Cir. 1977)).

In this case, the Administrative Law Judge made a reasonable inquiry into the plaintiff's claim of disability.<sup>5</sup> The record contains two written residual functional capacity assessments by nonexamining physicians. Both assessments concluded that the plaintiff can stand, walk and sit for about six hours and frequently lift and/or carry ten pounds. Record pp. 111, 115. The medical advisor, Dr. Kunkle, examined evidence from "clinical examination as well as X-rays, a myelogram, and a CT scan." Record p. 53. He testified that the plaintiff neither met nor equalled the Listings, Record pp. 55-56, and that, in his opinion, sedentary activity did not clearly represent a risk of

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<sup>5</sup> I note that the plaintiff in this case was represented by counsel and thus the Secretary was not under any increased burden to develop the evidence. *Currier*, 612 F.2d at 598.

accentuating the plaintiff's cervical cord compression resulting from his herniated disc, Record p. 56.<sup>6</sup>

Dr. Kunkle did state that ``any *heavy* exertion involving lifting, carrying, pushing or pulling would represent a potential risk to accentuation of the cord compression." Record p. 56 (emphasis added).

The plaintiff's treating physician, Dr. Chaffee, on the other hand, concluded:

Based on my knowledge of the severity of his spinal cord compression, I feel that active participation in any form of sustained stressful physical activity or any type of activity that would require repetitive motions of the neck, sustained extension or sustained flexion of the neck, etc. would all be potentially dangerous. As long as this condition exists, I feel there is substantial risks involved. Based on this, at the present time I would consider [the plaintiff] to be disabled. At the present time, under the above conditions, I believe that this would include sedentary type of work.

Record p. 178. The plaintiff's other treating physician, Dr. Richardson, stated that the plaintiff should avoid lifting over 20 pounds, overhead work, heavy pulling/pushing or climbing. Record p. 141.

The Administrative Law Judge also arranged for a consultative examination by Dr. Trembly. Dr. Trembly questioned the restrictions recommended by the plaintiff's treating physicians because he felt ``the recommendations . . . were based upon the possibility of [the plaintiff] producing serious spinal cord injury by some inadvertent act, fall, or other injury." Record p. 183. Dr. Trembly further criticized a disability determination on the basis of such a risk:

I think if I were to restrict him on that basis alone I would also refuse to allow him to ride in a motor vehicle. He is as much at risk even from an automobile collision as he is from walking out in the woods and hunting or from doing light work. There appears to be excessive interest in preventing recrimination on the part of his physicians, possibly to the detriment of the patient's general well being.

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<sup>6</sup> See also Record p. 53 for Dr. Kunkle's testimony on the relationship of the plaintiff's herniated disc to his cervical spine compression.

Record pp. 183-84.

Dr. Trembly based his own residual functional capacity assessment on the plaintiff's "present examination, history and description of symptoms," but noted that he had not seen the films, which might cause him to change his mind. Record p. 183. Dr. Trembly determined that the plaintiff was restricted in standing and walking only insofar as he should avoid tripping and falling and that sitting was not affected by his impairment. Record pp. 185-86.

After examining the evidence, the Administrative Law Judge concluded that the plaintiff did have a lifting restriction but did not have any significant limitation "at least concerning the ability to remain on his feet or in a seated posture for vocationally meaningful periods of time." Record pp. 16-17. The Administrative Law Judge also noted that "[t]he claimant's own description of his activities suggests that he has no inordinate difficulty sitting, standing, or walking." Record p.17.<sup>7</sup> In addition he

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<sup>7</sup> The Administrative Law Judge cited inconsistencies in the plaintiff's testimony. For example, the plaintiff testified that he had no difficulty walking, standing or sitting, Record p. 28, but later testified that he had difficulty riding long distances in the car, Record pp. 31, 43, and that his ability to sit depended on the kind of chair he was sitting in, Record p. 43. When pressed on this issue by Dr. Kunkle, the plaintiff admitted that he could manage to sit in chairs other than recliners. *Id.* The Administrative Law Judge also noted that the plaintiff described a wide range of activities such as frequent visits, attending committee meetings, driving an automobile, fishing and hunting, Record pp. 26-27, 29-30, which suggest that the plaintiff "is not as limited as he contends." Record p. 15. These

found significant the plaintiff's failure to undergo surgery repeatedly recommended by Dr. Chaffee. Record pp. 15, 142, 144-45, 147, 150. See 20 C.F.R. ' 404.1530(a) (to get benefits the claimant must follow treatment prescribed by a physician if this treatment can restore the claimant's ability to work).<sup>8</sup>

I find, therefore, that the Secretary developed an adequate record on which to base his findings, notwithstanding Dr. Trembly's statement that he might change his assessment of the limiting effects of the plaintiff's impairment if he viewed the films. In resolving the conflicting evidence, the Secretary could have considered the fact that Dr. Trembly did not view the films. Resolutions of conflicts in the evidence, however, are for the Secretary, and the court `` must affirm the Secretary's resolution, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence." *Rodriguez Pagan v. Secretary of Health & Human Services*, 819 F.2d 1, 3 (1st Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988). The residual functional capacity assessments by the examining and nonexamining physicians, as well as the plaintiff's own testimony, provide ample support for the Secretary's resolution of the conflicting medical evidence. See *Ortiz v. Secretary of Health & Human Services*, 890 F.2d 520, 523 (1st Cir. 1989). Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

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factors can be considered in determining that the plaintiff's back pain does not preclude the performance of a limited range of light work and a full range of sedentary work. *Ortiz v. Secretary of Health & Human Services*, 890 F.2d 520, 523 (1st Cir. 1989).

<sup>8</sup> The plaintiff does not dispute this basis for the Secretary's determination.

**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 12th day of February, 1990.***

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***David M. Cohen  
United States Magistrate***