

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM C. GEHRING, SR.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 93-1-P-DMC
)	
DONNA E. SHALALA,)	
Secretary of Health)	
and Human Services,)	
)	
Defendant)	

MEMORANDUM OF DECISION ¹

This Social Security Disability appeal raises the question whether substantial evidence supports the Secretary's determination that the plaintiff is able to perform his past relevant work. The plaintiff asserts that the Secretary failed to give appropriate consideration to the opinion of his treating physician and, further, that the Administrative Law Judge's hypothetical questions to the vocational expert were flawed in that they did not reflect all of his limitations.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity

¹ Pursuant to 28 U.S.C. 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all the proceedings in this case and to order the entry of judgment.

This action is properly brought under 42 U.S.C. 405(g). The Secretary 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 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held on July 19, 1993 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

since his alleged onset date of January 13, 1991 and met disability insured status requirements as of that date, Finding 1, Record p. 16; that he suffers a "severe musculoskeletal impairment due to the residuals of multiple lumbosacral spine surgery and degenerative joint disease," but that his impairment does not meet or equal any of those listed in Appendix 1, Subpart P, Social Security Regulations No. 4 (the "Listings"), Finding 2, Record p. 16; that he does not have a severe mental impairment, Finding 3, Record p. 16; that he retains the residual functional capacity to perform his past relevant work as a general manager for car and truck sales and a truck sales manager, Finding 4, Record p. 16; and that, therefore, he was not disabled at any time through the date of decision, Finding 5, Record p. 16.

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 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 Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The Administrative Law Judge determined that the plaintiff could return to his past relevant work. At Step Four of the evaluative process the burden is on the plaintiff to show that he cannot perform his past relevant work. *Goodermote*, 690 F.2d at 7; 20 C.F.R. 404.1520(e). In determining this issue, the Secretary must make a finding of the plaintiff's residual functional capacity, a finding of the physical and mental demands of past work and a finding as to whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. 1520(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service*, at 813 (1983).

In his testimony, the plaintiff described a back problem that was exacerbated when he slipped on ice while cleaning off cars in the course of his duties as a sales manager and truck

manager at a vehicle dealership. Record p. 22. He had had surgery in 1969 and 1971 consisting of a spinal fusion and a laminectomy. *Id.* p. 23. He now suffers back pain every day, which he rates as a five and one-half to six, in the cervical area, lower left back and mid-back. *Id.* pp. 23-24. Most days he walks with a limp and can only walk about one-half mile before the limp becomes more severe and his back "flares up." *Id.* pp. 24-25. He applies ice during the day when the pain becomes "real severe" and after his stretching exercises. *Id.* p. 24. He must lie down during the day, particularly when he applies the ice and afterwards if he still feels discomfort. *Id.* pp. 38-39. He can only sit for 15 to 20 minutes at a time before he has to stand and change position, but he can only stand for 10 to 15 minutes at a time. *Id.* pp. 25, 38. He has also been told by his treating physician that he is limited to lifting 25 to 30 pounds. *Id.* p. 27. He stated that although he is unable to work as a truck salesman because of his standing and walking impairments and his difficulty sitting, *id.* p. 26, he believes that there are other sales jobs that he could do "in the near future," *id.* p. 27. He is seeing Dr. Niler, a psychologist, for anxiety and depression and stated that, with Dr. Niler's help, "we're getting out of [these feelings]." *Id.* pp. 40-41. He attends AA meetings three to four times a week and has not consumed alcohol since 1980. *Id.* p. 30.

The plaintiff asserts that, in determining he is able to do his past work, the Administrative Law Judge rejected or ignored the treating physician's uncontradicted opinion that he had "no usable work capacity." *Id.* p. 124. Dr. Hepner, an orthopedic surgeon, treated the plaintiff beginning in January 1991. *Id.* p. 128. He stated that the plaintiff has "documented 2-level degenerative disc disease above a 2-level spine fusion." *Id.* p. 124. X-rays revealed that the plaintiff had had an "L-5 laminectomy and what appears to be a solid L4-S1 posterior spine fusion" and that there is degenerative disc disease above the fusion site and "certainly abnormal motion at the L2-3 level in particular." *Id.* p. 127. Dr. Hepner also noted multilevel lumbar disc disease. *Id.* He opined that a functional capacity assessment of the plaintiff demonstrated "very significant limitations, particularly with respect to sitting and standing." *Id.* p. 124. In his view, the plaintiff

had reached "maximal medical improvement with respect to his low back." *Id.* pp. 124, 154. Dr. Hepner stated that the plaintiff was not a candidate for further surgery and that he had "very little else to offer" him. *Id.* p. 154. He referred the plaintiff to Dr. Niler for instruction in relaxation techniques, which he believed might be beneficial. *Id.* He stated that the plaintiff had no usable work capacity, *id.* p. 125, and issued a series of disability certificates which indicate that the plaintiff was "totally incapacitated" for an indefinite time, *id.* pp. 122-23.

Dr. Leschey, a neurologist acting as medical adviser, testified that a comprehensive evaluation done in April 1991, which included a myelogram, CT scan and discography, suggested that the plaintiff's spinal fusion was intact and that there were no other surgically remediable conditions. *Id.* p. 34. He noted that the studies showed degenerative disc disease at the upper levels of the spine that had not been fused and that, although there was no objective evidence of nerve root impairment needed to meet the Listings, the degenerative disc disease "certainly is a factor to his ongoing back pain." *Id.* p. 35. He stated that the restrictions on sitting and standing found by Dr. Hepner were consistent with the medical evidence. *Id.* When asked about the patient's use of ice, he stated that this treatment is "a bit unusual for this type of problem" in that "[i]t's a non-pharmacological treatment," but that "[i]n patients with past history of substance abuse, somatic nonpharmacological treatments are preferred." *Id.* p. 39.

The residual functional capacity provided by Dr. Yindra, a nonexamining nontestifying physician, indicated that the plaintiff can stand and walk about six out of eight hours in a workday and sit about six of eight hours in a workday and was limited to occasionally lifting and carrying up to 20 pounds and frequently lifting and carrying up to 10 pounds. *Id.* p. 90. He noted, however, that the plaintiff must periodically alternate sitting and standing because of chronic low back pain. *Id.* Dr. Johnson, another nonexamining, nontestifying physician, rendered a similar residual functional capacity but without the need to alternately sit and stand. *Id.* p. 98. He stated that although the discography had shown degenerative disc disease, there were no objective findings on

physical examination and that the plaintiff's statement that he had no usable work capacity was not supported. *Id.* p. 104.

At oral argument, the plaintiff asserted that an administrative law judge cannot disregard a treating physician's statements, especially when there is nothing in the record to contradict them. It is well established that the Secretary is not free to disregard uncontroverted medical evidence. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Suarez v. Secretary of Health & Human Servs.*, 740 F.2d 1 (1st Cir. 1984). Even when evidence is slight, the administrative law judge is required at least to consider it and supply a rationale if he decides to reject it so that a reviewing court will know that the claim was not ignored. *Figueroa v. Secretary of Health & Human Servs.*, 585 F.2d 551, 554 (1st Cir. 1978).

Dr. Hepner's statements that the plaintiff had no usable work capacity and that, based on a functional capacity assessment, he had very significant limitations particularly with respect to sitting and standing are not accurately described as "uncontroverted" because the residual functional capacity assessments provided by Drs. Yindra and Johnson indicate that he has a greater functional capacity than that. However, the evidence provided by Dr. Hepner is certainly more than "slight," especially when it is supported by Dr. Leschey's testimony. Still, the Administrative Law Judge's discussion does not even mention Dr. Hepner's specific and repeated statements concerning the plaintiff's work capacity or particular restrictions (except as related by the plaintiff in his own testimony). Because the rationale is not fully set forth, I am unable to determine whether the Administrative Law Judge considered any of the Dr. Hepner's conclusions as to the extent of the plaintiff's impairment or, if he did, why they were rejected.

At oral argument the Secretary asserted that the treating physician's statements concerning the plaintiff's "usable work capacity" were not simply a medical opinion as to residual functional capacity but, rather, a conclusory opinion that the plaintiff is "disabled" and therefore should be disregarded. The judgment as to whether a claimant is "disabled" is reserved to the Secretary. 20

C.F.R. 404.1527(e). A statement by a medical source that an individual is "disabled" or "unable to work" does not mean that the Secretary will determine that he is disabled. *Id.*

Here, the treating physician stated that the plaintiff had "no usable work capacity." He based this opinion on a functional capacity assessment. Although he could have used the word "disabled," he did not do so. The fact that he issued "certificates of disability" does not change the meaning of the phrase "no usable work capacity." In the context of this case, "usable work capacity" is equivalent in meaning to "residual functional capacity." Therefore, Dr. Hepner's statements represent a medical opinion and not a conclusory statement that the plaintiff is disabled.

The matter is more accurately characterized as a question of the weight to be given various medical opinions. In the First Circuit, an administrative law judge is not necessarily required to give more weight to a treating physician's report than to others. *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 275 (1st Cir. 1988); *see also Barrientos v. Secretary of Health & Human Servs.*, 820 F.2d 1, 2-3 (1st Cir. 1987); *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987). While the reports of nonexamining, nontestifying physicians are relevant, the weight to which they are entitled varies with the circumstances of each case, including the nature of the illness and the information provided to the expert. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 328 (1st Cir. 1990); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 223 (1st Cir. 1981). In addition, the report of a specialist may be entitled to greater weight than that of a general practitioner. *Alvarado v. Weinberger*, 511 F.2d 1046, 1049 (1st Cir. 1975); 20 C.F.R. 404.1527(d)(5).

In this case, the only evidence indicating that the plaintiff retains the residual functional capacity to perform his past work comes from the nonexamining, nontestifying physicians. Drs. Hepner and Leschey are specialists in fields relevant to the plaintiff's condition, orthopedic surgery and neurology, respectively, while Dr. Yindra is a generalist and Dr. Johnson's qualifications are not apparent from the record. In the absence of specific findings justifying the adoption of Yindra's

and Johnson's assessments over those of Hepner and Leschey, I agree that the Administrative Law Judge inappropriately weighted the various medical opinions.

The plaintiff also asserts that the hypothetical question to the vocational expert was flawed in that it did not assume his need to lie down periodically during the day or take into consideration his statement that his past work did not include an option of sitting and standing. The question was based on

a hypothetical that the individual is 49 years of age with a high school education and the work history [as a pipefitter and construction foreman (heavy exertional level) and vehicle general manager and sales manager (sedentary exertional level)]. And I would find that he has residual functional capacity to walk for half a mile, stand 10 or 15 minutes, sit 15 minutes -- I think I would have to give him a sit/stand option, 15 minutes standing, and ability to lift 20 to 30 pounds. . . . [L]et's add to that that he does have a complaint of pain in his back to which he applies ice at various intervals. But he also has a functional overlay . . . some degree [of] anxiety

Record p. 42. The vocational expert opined that the plaintiff could return to his job as a sales manager or a general manager selling trucks. *Id.* p. 43.

Hypothetical questions must accurately reflect evidence in the record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). Specifically, "in order for a vocational expert's answer to a hypothetical question to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities." *Id.*

The only evidence of the need to lie down during the day comes from the plaintiff. However, at Step Four an administrative law judge is allowed to rely on the claimant's own statements of functional limitation and on his own description of duties involved in his former job. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). The claimant only has the burden of making some reasonable showing that he cannot return to his former employment

because of his alleged disability by laying a foundation as to what activities his former work entailed and how his functional incapacity leaves him unable to perform his past work. Once he has done so, the administrative law judge must make "every effort . . . to secure evidence that resolves the issue as clearly and explicitly as circumstances permit," considering the claimant's statements, medical evidence and, if necessary, corroborative information such as the *Dictionary of Occupational Titles*. *May v. Bowen*, 663 F. Supp. 388, 390 (D. Me. 1987) (quoting Social Security Ruling 82-62). Here, the need to lie down is described in the context of applying ice to his back. This need is supported by medical authority, particularly Dr. Leschey's statement that such non-pharmacological treatments are preferred for patients who have had a history of substance abuse. *See Record* p. 39. Thus it is appropriate to conclude that there is a need to lie down during the day which should have been included in the hypothetical question directed to the vocational expert.

The plaintiff also contends that the hypothetical question should have taken into consideration a need to sit and stand at his option. The plaintiff stated that in his job as a salesman/truck manager his primary income was derived from the selling of trucks, which "requires a lot of being on my feet, . . . walking the lot, finding the car, demonstrating a car, the features, which requires a lot of bending and moving around, things like that." *Id.* p. 44. The question, however, was not limited to the sales position. The exchange occurred as follows:

ALJ: All right. May I ask you, is he able to return to his job as, as a sales manager or a general manager and selling trucks?

VE: I believe he could.

ALJ: Doesn't that require a good deal of standing?

VE: It, it allows for the option. The person can stand, sit, move around, and this is a, a supervisory, management level position.

Claimant: The salesman, truck manager isn't.

ALJ: So it's your testimony he could return?

VE: I believe so, yes, sir.

ALJ: Are there any other --

VE: Actually the sales manager or the general manager.

Record p. 43. The vocational expert's response that the plaintiff can perform a management level job which allows the option of standing, sitting or moving around reflects the plaintiff's asserted need.

The plaintiff contended at oral argument that the Administrative Law Judge erroneously concluded that he was able to perform his past work despite the vocational expert's testimony that he could do only the managerial component of his former general manager and truck salesman job. He stated that the ability to do only one part of the job precludes him from engaging in substantial gainful activity and, further, that an administrative law judge cannot chop up a job into various parts and then find a claimant not disabled because he can still do one component.

A review of the plaintiff's work indicates that he held combined manager/salesman jobs during the periods June 1980 to January 1988 and April 1990 to January 1991. *Id.* p. 77. He worked as a general manager only during the period February 1988 to March 1989 and as a general sales manager only during the period March 1989 to February 1990. *Id.* In his testimony, he stated that before his last job as a "salesman truck manager" he was a sales manager and general sales manager, which required more sitting and not as much standing. *Id.* p. 44. Because the plaintiff has performed discrete jobs as a general and sales manager, the Administrative Law Judge's conclusion that he can return to his past relevant work would have been reasonable were the hypothetical not otherwise flawed by the failure to include the need to lie down.

For the foregoing reasons, the Secretary's decision is **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

Dated at Portland, Maine this 5th day of August, 1993.

David M. Cohen
United States Magistrate Judge