

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

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|----------------------------|---|----------------------------|
| <b>LINDA L. JINES,</b>     | ) |                            |
|                            | ) |                            |
| <b>Plaintiff</b>           | ) |                            |
|                            | ) |                            |
| <b>v.</b>                  | ) | <b>Civil No. 93-53-P-H</b> |
|                            | ) |                            |
| <b>DONNA E. SHALALA,</b>   | ) |                            |
| <b>Secretary of Health</b> | ) |                            |
| <b>and Human Services,</b> | ) |                            |
|                            | ) |                            |
| <b>Defendant</b>           | ) |                            |

**REPORT AND RECOMMENDED DECISION <sup>1</sup>**

This Social Security Supplemental Security Income and Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff is capable of performing a wide range of sedentary work available in the national economy. The plaintiff claims the Secretary erred in determining that she is not disabled because there are a significant number of jobs in the national economy within the sedentary range with a sit-stand option that the plaintiff can perform.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520, 416.920; *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 has not engaged in substantial gainful activity since April 10, 1989 and met disability insured status requirements as of that date,

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<sup>1</sup> This action is properly brought under 42 U.S.C. 405(g) and 1383(c)(3). The Secretary 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 26, which requires the plaintiff to file an itemized statement of the specific errors upon which she 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 before me on October 22, 1993 pursuant to Local Rule 26(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.

Findings 1-2, Record p. 20; that she has a severe back impairment but that she does not have an impairment or combination of impairments which meets or equals any listed in Appendix 1 to Subpart P, 20 C.F.R. 404 (the "Listings"), Finding 3, Record p. 20; that her "assertions concerning her impairment and its impact on her ability to work are not entirely credible in light of [her] own description of her activities and lifestyle," Finding 4, Record 20; that she "has the residual functional capacity to perform the physical exertional and non-exertional requirements of work except for lifting and carrying objects weighing more than [sic] eight pounds and performing tasks requiring prolonged periods of sitting and standing," Finding 5, Record 20; that she "is unable to perform her past relevant work as a department store clerk and cashier, waitress, nursing home cook, tree worker, and clothing store owner," Finding 6, Record p. 20; that her "residual functional capacity for the full range of sedentary work is reduced by her inability to lift more than eight pounds and sit for prolonged periods," Finding 7, Record p. 20; that considering her exertional capacity for sedentary work, her age (35) and education (high school equivalence), application of Rules 201.28 and 201.29 of Appendix 2, Subpart P, 20 C.F.R. 404 (the "Grid"), would direct a finding that she is not disabled, Findings 8-11, Record p. 20-21; and that, although her "additional non-exertional limitations do not allow her to perform the full range of sedentary work, using [the Grid] as a framework for decision making, there are a significant number of jobs in the national economy with a sit-stand option which she could perform," and therefore she is not disabled, Findings 12-13, Record p. 21. 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, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

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), 1383(c)(3); *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).

Because the Secretary determined that the plaintiff is not capable of performing her past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. 404.1520(f), 416.920(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 Secretary'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 and Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

At the administrative hearing, the plaintiff testified to significant functional limitations resulting from a back impairment. Record pp. 47-49. She stated that because of back pain she can sit continuously for periods of only half an hour. *Id.* at 48. She estimated that she might be able to sit for four hours during a workday. *Id.* She also testified that she can only lift seven or eight pounds on an occasional basis. *Id.* at 49. In her disability report, the plaintiff reported that her back condition prohibits her from sitting or standing "for long periods of time." *Id.* at 122. She also reported that she cannot drive a car for periods longer than half an hour. *Id.* at 125.

The plaintiff's treating and examining physicians have also noted exertional limitations, though not to the degree to which she complains. Record pp. 192, 195. Bruce Chaffee, M.D., a non-testifying, examining physician, noted that the plaintiff has a limited capacity for prolonged sitting or standing. *Id.* at 195. He also reported that the plaintiff's capacity to perform heavy lifting on a sustained basis is limited. *Id.* Dr. Chaffee concluded, however, that the plaintiff "does have a work capacity . . . in an area that would not require stressful physical activity." *Id.* The plaintiff's regular treating physician, John Stedman, D.O., also opined that despite her limitations the plaintiff was capable of performing "light-duty type work." *Id.* at 192. During a consultative physical

examination, Jane Glass, D.O., a non-testifying, independent medical examiner, detected "[n]o objective findings whatsoever regarding her low back." *Id.* at 190. Dr. Glass commented that the plaintiff "does not fit the picture of a chronic pain patient" and, by her own descriptions, "leads a very active life-style." *Id.* Dr. Glass determined that the plaintiff could return to her usual job as a grounds person on a part-time basis "without any restrictions whatsoever," and recommended that she be returned to full-time employment "fairly rapidly," perhaps no more than six to eight weeks after starting part-time. *Id.*

A work fitness assessment of the plaintiff conducted in May 1990 revealed limitations on her sitting, standing and lifting abilities. Record pp. 177-84. In the evaluation, the plaintiff demonstrated an ability to stand continuously for 45 minutes. *Id.* at 184. The evaluation determined that she "can stand, sit or walk on a frequent basis" but should avoid "prolonged continuous sitting activities" and "frequent squatting or lifting from floor to knuckle height." *Id.* at 181. ("Frequent" is defined as twenty to forty minutes per hour. *Id.* at 178.) The plaintiff also demonstrated the ability to lift eight pounds on an occasional basis from floor to knuckle, ten pounds on an occasional basis from knuckle to shoulder and five pounds on an occasional basis from shoulder to overhead. *Id.* at 177. ("Occasional" is defined as up to twenty minutes per hour. *Id.* at 178.) In light of the plaintiff's displayed limitations, the work fitness assessment concluded that "her abilities place her in the sedentary-light work category" according to Department of Labor standards.<sup>2</sup> *Id.* at 180.

Based upon the plaintiff's apparent limitations in her sitting, standing and lifting abilities, the Administrative Law Judge posed a hypothetical question to the vocational expert, Diane Herrle, about the type of work the plaintiff could perform given her alleged limitations. Notably, the Administrative Law Judge adopted the plaintiff's account of the extent of her limitations as the

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<sup>2</sup> The report noted that at the time of the evaluation the plaintiff demonstrated only a 4 hour per day, 5 day per week work capacity. Record p. 179. However, the report attributed this to her cardiovascular deconditioning and indicated that her work capacity could be increased gradually as her fitness increases. *Id.* at 180.

variables for the hypothetical question.

Q Now, assuming that I find on the basis of the credible record before me that the claimant has the following work-related limitations of function: that she can lift only 7 to 8 pounds, that she can stand only 20 minutes at a time, that she can sit for only 20 minutes at a time, and that basically, she's required to have a sit-stand option in any work that she performs. . . . [G]iven the functional restrictions that I described in my hypothetical question, were there any jobs in the national economy that she could perform?

Record pp. 74, 75. In response to this hypothetical, the vocational expert testified that there are jobs in the national and regional economy that would accommodate the plaintiff's need to have a continuous sit-stand option and a less than ten pound lifting limit. *Id.* at 75-76, 81-82. Specifically, the vocational expert submitted a written statement as part of the record listing ten unskilled sedentary-type job categories in the national and regional markets that "would allow Ms. Jines a sit, stand, walk option and would not require lifting of more than 8 lbs." *Id.* at 230. From statistics obtained from the Department of Labor, the vocational expert reported that there are at least 1,510 jobs within the Portland labor market and 1,636,450 in the national labor market that would accommodate a sit-stand option and would not require lifting of more than eight pounds. *Id.* Based upon the vocational expert's testimony and submissions, the Administrative Law Judge determined that although the plaintiff could not perform the full range of sedentary work there are still a significant number of jobs within the national economy that would accommodate her limitations which she could perform. Finding 12, Record p. 21.

The sole issue raised on appeal is whether substantial evidence supports the Secretary's determination that the plaintiff is capable of performing a wide range of sedentary jobs that are available in the national economy. The plaintiff alleges that she does not have a residual functional capacity to perform any sedentary work because she cannot lift ten pounds or sit for prolonged periods of times. The Administrative Law Judge found that the plaintiff's residual functional capacity to perform the full range of sedentary work was reduced by her inability to lift more than

eight pounds and her inability to sit for prolonged periods. Record p. 16. Given this specific finding, the plaintiff contends that the Administrative Law Judge's determination that there are a significant number of sedentary-type jobs in the national economy with a sit-stand option which she could perform is inconsistent with the Secretary's definition of sedentary work.

The regulations promulgated by the Secretary define "sedentary work" as follows:

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. 404.1567(a), 416.967(a). In Social Security Ruling 83-10, the Secretary further refined the definition of sedentary work:

"Occasionally" means occurring from very little up to one-third of the time. Since being on one's feet is required "occasionally" at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday.

Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, at 29 (1992). In short, sedentary work requires an ability to sit for about six hours and to walk or stand for about 2 hours out of an eight hour workday. *Id.*

As the plaintiff has noted, several cases in the First Circuit have addressed the situation when a plaintiff must alternate sitting and standing. "[A] determination that a claimant is able to perform sedentary work must be predicated upon a finding that the claimant can sit most of the day, with occasional interruptions of short duration." *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293 (1st Cir. 1986) (citations omitted). Thus, someone who cannot remain seated "most of the day" and who must "often interrupt [her] sitting with standing for significant periods of time" is not capable of sedentary work as defined by the Secretary. *Thomas v. Secretary*

*of Health & Human Servs.*, 659 F.2d 8, 10-11 (1st Cir. 1981).

Contrary to the position asserted by the plaintiff, the above referenced cases do not stand for the broad proposition for which the plaintiff has cited them. Both *Rosado* and *Thomas* involved a determination by an administrative law judge that despite an inability to sit continuously the claimant was capable of performing the *full* range of sedentary work as defined by the Secretary. *See Rosado*, 807 F.2d at 292; *Thomas*, 659 F.2d at 10. Because the administrative law judges ruled that the claimants could perform the full range of sedentary work, the claimants' residual functional capacity coincided with one of the defined exertional ranges of work, and the Grid thus directed a finding of not disabled. In those cases, because the administrative law judges ruled that the Grid applied, no additional vocational evidence was necessary to determine whether or not the claimants were disabled. *See Social Security Ruling 83-12*, reprinted in *West's Social Security Reporting Service*, at 37 (1992). Rather, the administrative law judges relied solely upon an application of the Grid based upon a determination that the claimants retained the residual functional capacity for the full range of sedentary work. As the *Rosado* case indicates, however, where a claimant is unable to perform the full range of sedentary work, the Secretary must "obtain and consider additional evidence regarding [a] claimant's residual functional capacity to perform sedentary work." *Rosado*, 807 F.2d at 294.

Here, the Administrative Law Judge specifically determined that the plaintiff did not retain the exertional capacity to perform a full range of sedentary work. Appropriately, he utilized the services of a vocational expert to determine if a significant number of suitable jobs existed given the extent of the plaintiff's exertional restrictions. *See Gagnon v. Secretary Health & Human Servs.*, 666 F.2d 662, 666 n.9 (1st Cir. 1981); *Social Security Ruling 83-14*, reprinted in *West's Social Security Reporting Service*, at 44-45 (1992); *Social Security Ruling 83-12* at 37, 38. Contrary to the apparent tenor of the plaintiff's argument, a determination by an administrative law judge that a claimant cannot perform the full range of sedentary work does not mandate a finding of

disabled.<sup>3</sup> Rather, where a claimant is unable to perform the full range of defined sedentary work, the Secretary is required to produce evidence of specific jobs that a claimant can perform through the testimony of a vocational expert. In such a situation, the vocational expert should assess the effect of the claimant's limitations on the range of sedentary work; advise whether the claimant's residual functional capacity permits her to perform substantial numbers of occupations within the sedentary range; identify jobs that are within the claimant's residual functional capacity; and provide a statement of the incidence of such jobs in the regional and national economies. Social Security Ruling 83-12 at 38-39. After considering such vocational evidence, the administrative law judge must determine whether the occupational base is "significantly compromised" by the claimant's exertional limitations. *Id.* at 38

This is exactly what happened in this case. The Administrative Law Judge consulted vocational expert Diane Herrle. He posed a hypothetical question to her to determine if the plaintiff could perform other work existing in significant numbers in the national economy in light of her sitting, standing and lifting limitations. As required, this hypothetical question accurately reflected evidence in the record, as it was based on the plaintiff's own description of her limitations. *See Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982); Record pp. 48-49. The medical and physical evidence also supported the Administrative Law Judge's hypothetical question. *See id.* at 177-78, 192, 195. In response, through both her testimony and answer to a special interrogatory, the vocational expert testified to a significant number of jobs both in the regional and national labor markets that would accommodate the plaintiff's asserted limitations in sitting, standing and lifting ability.<sup>4</sup> As the written submission indicates, the vocational expert

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<sup>3</sup> At oral argument, the plaintiff argued that there is no "halfway house" between sedentary work and disabled.

<sup>4</sup> At oral argument, the plaintiff's counsel voiced his concerns about the special interrogatory process through which the vocational expert's testimony was placed in the record. Specifically, counsel claimed that he had no ability to cross examine the vocational expert on the information presented in her written submission. However, counsel never objected to the process of the special interrogatory at the hearing and never questioned it after it was submitted. Moreover, the plaintiff did not raise this issue in her statement of errors filed with this court. As such, this issue is waived. *Commonwealth of Mass., Dept. of Pub. Welfare v.*

specifically considered the effect the plaintiff's exertional limitations would have on the occupational base at the sedentary level. Based upon this evidence, the Administrative Law Judge concluded that the plaintiff was not disabled because there were a significant number of jobs in the national economy which she could perform. As the plaintiff conceded at oral argument, evidence that there are 1,636,450 jobs within the national labor market that the plaintiff can perform certainly amounts to a "significant" number of jobs.<sup>5</sup> Thus, given the uncontroverted evidence of the vocational expert concerning sedentary jobs with sit-stand options, I conclude that there is substantial evidence to support the Secretary's determination that numerous jobs accommodating the plaintiff's physical limitations exist in the national and regional economy. *See, e.g., Stracciolini v. Heckler*, 639 F. Supp. 548, 554 (E.D. Pa. 1986) (vocational evidence that available jobs would permit claimant to change his position from sitting to standing every thirty minutes supported Secretary's finding of not disabled); Social Security Ruling 83-12 at 39-40 (discussing need for vocational testimony on sit-stand option). Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

#### **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.**

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*Secretary of Agric.*, 984 F.2d 514, 523 (1st Cir.), *cert. denied*, 62 U.S.L.W. 3209 (Oct. 4, 1993); *Piazza v. Aponte Roque*, 909 F.2d 35, 37 (1st Cir. 1990).

<sup>5</sup> At oral argument, the plaintiff's counsel objected to the level of specificity of the vocational expert's testimony on the types of jobs the plaintiff could perform. This issue was not raised in the plaintiff's statement of errors, however, and is therefore waived. *See Piazza*, 909 F.2d at 37. Regardless, the detailed nature of the vocational expert's written submission reveals that her testimony was sufficiently specific for the Administrative Law Judge to rely on it.

**Dated at Portland, Maine this 28th day of October, 1993.**

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