

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

<b>EDWARD G. ESTES,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 97-397-P-H</i></b>
	)	
<b>KENNETH S. APFEL,</b>	)	
<b><i>Commissioner of Social Security,</i></b>	)	
	)	
<b><i>Defendant</i></b>	)	

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

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal requires the court to determine whether there is substantial evidence in the record to support the Commissioner’s assessment of the plaintiff’s residual functional capacity for work. I recommend that the court affirm the Commissioner’s decision.

In accordance with the Commissioner’s sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5. 6 (1st Cir. 1982), the Administrative Law Judge found that the plaintiff had not engaged in substantial gainful activity since November 30, 1993, Finding 2, Record p.18; that he experienced a status post fracture and resection of the left patella during the 1960s and also has essential hypertension without end

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<sup>1</sup> This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner 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 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on June 12, 1998, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

organ damage, impairments which were severe but which did not meet or equal any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 3, Record p.18; that he was unable to perform his past relevant work as a press operator, machine operator, custodian and flagman, Finding 6, Record p. 18; and that, based on an exertional capacity for light work as well as the plaintiff's age (50), education (high school) and work experience (unskilled), application of the Medical Vocational Guidelines, 20 C.F.R. Part 404, Subpart B, Appendix 2 (the "Grid"), directed the Administrative Law Judge to conclude that the plaintiff was not disabled, Findings 9-12, Record pp. 18-19. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the Commissioner, 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 Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir.1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion 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 plaintiff contends that the determination made at Step 5 of the sequential evaluation process, that he had the capacity to perform the full range of light work, is unsupported by substantial evidence. Specifically, the plaintiff complains that the determination is inconsistent with both the medical evidence and his hearing testimony. He contends that the Administrative Law Judge should have consulted a medical expert. And he further asserts that the Administrative Law Judge failed to follow the officially stated policies of the Social Security Administration relating to the analysis

of residual functional capacity and the assessment of a claimant's credibility when testifying about potentially disabling symptoms. All of these contentions lack merit.

On the issue of medical evidence, the plaintiff directs the court's attention to the written report of Paul Stucki, M.D., who examined the plaintiff on April 19, 1995. *See* Record p. 114. Stucki described the plaintiff as "quite cooperative and apparently quite honest about what he can do and cannot do." *Id.* at 116. In a section of his report entitled "Work Capacity," Stucki recorded the following:

The claimant states he can sit easily for a couple of hours in an easy chair, not as long in a hard chair. Standing, however, is done only for brief periods, his low back causing him some aches. He states he walks up to a half hour before his lower back and especially his left leg become a bit achy. He bends satisfactorily, but with some effort and moderate shortness of breath, as noted (probably related both to his weight and to his probable emphysema); lifts 30 pounds. . . . [He] states he could probably sit in a car for "[a c]ouple of hours."

*Id.* at 118-19. According to the plaintiff, this data from Stucki's report is consistent with the plaintiff's hearing testimony that he could only walk for ten minutes before requiring a break and could only stand for brief periods, *id.* at 30, 33, and, therefore, the Administrative Law Judge should not have determined he could perform the full range of light work.

There are several flaws in the plaintiff's position. Although the Administrative Law Judge was not free to reject uncontroverted medical opinion, *Suarez v. Secretary of Health & Human Servs.*, 740 F.2d 1, 1 (1st Cir. 1984), a physician's observation that a patient seemed cooperative and honest during an examination is not medical opinion.<sup>2</sup> Nor does fact that Stucki found the plaintiff

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<sup>2</sup> According to the applicable regulations,

[m]edical opinions are statements from physicians or psychologists or other acceptable medical sources that reflect judgments about the nature and severity of  
(continued...)

to have been honest and cooperative necessarily mean that the physician adopted as medical opinion all of the statements the plaintiff made concerning his work ability as recounted by the doctor in his narrative labeled “Work Capacity.” In these circumstances, the examining physician’s assessment of the plaintiff’s credibility is not binding on the Administrative Law Judge.

Secondly, and notwithstanding the Administrative Law Judge’s determination that the plaintiff’s statements concerning his impairments were “not entirely credible,” Finding 4, Record p. 18, the Administrative Law Judge took note of the plaintiff’s statements that he could “walk and stand for a half hour,” *id.* at p. 16. Indeed, just after testifying at the hearing that he could only stand for brief periods, the plaintiff went on to state that he could stand for as much as 40 or 45 minutes without requiring a break. *Id.* at 34. As for walking, although the plaintiff’s position at the hearing was that ten minutes was his limit, *id.*, the Administrative Law Judge was obviously crediting the 30-minute figure the plaintiff had reported to Stucki. Thus, the existence of Stucki’s report in the record supports rather than undermines the Administrative Law Judge’s assessment of the plaintiff’s residual functional capacity.

Reying on *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15 (1st Cir. 1996), the plaintiff next contends that the Administrative Law Judge erred by failing to elicit testimony from a medical advisor at the hearing. I disagree. The First Circuit in *Manzo-Pizarro* did not hold that the the testimony of a medical advisor is essential whenever a claimant’s residual functional capacity

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<sup>2</sup>(...continued)

[the claimant’s] impairments, including [the] symptoms, diagnosis and prognosis, what [the claimant] can still do despite impairment(s), and [the claimant’s] physical or mental restrictions.

20 C.F.R. §§ 404.1527(a)(2); 416.927(a)(2).

is at issue. Rather, the principle is that an Administrative Law Judge is a layperson “not qualified to interpret raw data in a medical record” and therefore must have some learned input — in the form of some “analysis of functional capacity by a physician or other expert.” *Id.* at 17 (citations omitted). The record before the Administrative Law Judge in this case included two written assessments of the plaintiff’s residual functional capacity — one dated May 1, 1995 by Paul Brinkman, M.D., *see* Record pp. 103-09, and the second by Lawrence Johnson, M.D. and dated August 4, 1995, *see id.* at pp. 95-101. Both physicians evaluated all of the relevant aspects of residual functional capacity and found, *inter alia*, that the plaintiff was capable of standing and/or walking, with normal breaks, for about six hours in an eight-hour workday. *See id.* at 96, 104. This is sufficient to meet the requirements of *Manso-Pizarro*.

Next, the plaintiff contends that the Administrative Law Judge ran afoul of Social Security Ruling 96-8p, *reprinted in West’s Social Security Reporting Service, Rulings 1983-91* (Supp. 1997) at 127, which establishes certain analytical requirements for the assessment of residual functional capacity. Social Security Rulings are “binding on all components of the Social Security Administration.” 20 C.F.R. § 402.35(b)(1). Ruling 96-8p provides the following guidance to the administrative decisionmakers:

At step 5 of the sequential evaluation process, RFC must be expressed in terms of, or related to, the exertional categories when the adjudicator determines whether there is other work the individual can do. However, in order for an individual to do a full range of work at a given exertional level . . . the individual must be able to perform substantially all of the exertional and nonexertional functions required in work at that level. Therefore, it is necessary to assess the individual’s capacity to perform each of these functions in order to decide which exertional level is appropriate and whether the individual is capable of doing the full range of work contemplated by the exertional level.

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Without a careful consideration of an individual's functional capacities to support an RFC assessment based on an exertional category, the adjudicator may either overlook limitations or restrictions that would narrow the ranges and types of work an individual may be able to do, or find that the individual has limitations or restrictions that he or she does not actually have.

SSR 96-8p at 129-30.

In my view, the Administrative Law Judge's opinion conforms to the requirements of Ruling 96-8p. The decision makes clear that, in making his residual functional capacity determination, the Administrative Law Judge considered the medical records (noting a "paucity" of reports from treating sources), the activities described by the plaintiff himself in his written submissions to the Social Security Administration, the plaintiff's comments to Stucki, and the fact that the plaintiff was not taking pain medication. Record p. 16. The decision then goes on to recapitulate the exertional demands of light work, as enumerated in the regulations: the lifting of no more than 20 pounds, with occasional lifting of 10 pounds, the possibility of having to stand and the fact that some light-work jobs involve mostly sitting while pushing or pulling hand or leg controls. *Id.*; *cf.* 20 C.F.R. §§ 404.1567(b), 416.967(b). The only reasonable inference from this discussion is that the Administrative Law Judge considered the plaintiff's abilities in each of these categories. The plaintiff confuses a residual functional capacity assessment he does not like with one that is insufficiently specific under Ruling 96-8p.

Finally, the plaintiff challenges the Administrative Law Judge's unsympathetic assessment of his credibility in light of Social Security Ruling 96-7p, *reprinted in West's Social Security Reporting Service*, Rulings 1983-91 (Supp. 1997) at 119. According to the plaintiff, the Administrative Law Judge's assessment of his hearing testimony as not entirely credible amounts

to an improper “boilerplate finding.” Itemized Statement of Errors (Docket No. 3) at 7. Under Ruling 96-7p,

The finding on the credibility of the individual’s statements cannot be based on an intangible or intuitive notion about an individual’s credibility. The reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision. It is not sufficient to make a conclusory statement that “the individual’s allegations have been considered” or that “the allegations are (or are not) credible.” It is also not enough for the adjudicator simply to recite the factors that are described in the regulations for evaluating symptoms. The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and the reasons for that weight.

SSR 96-7p at 122.

The Administrative Law Judge’s credibility determination comports with these requirements. It is clear from the decision that the Administrative Law Judge disbelieved some of the plaintiff’s hearing testimony because it was inconsistent with these other items of record: that the plaintiff was engaging in extensive household activities, that he could lift up to 30 pounds, that he could walk and stand for up to a half hour, that he had sought no medical treatment for his impairments prior to seeking Social Security benefits, and that he had sought no pain medication beyond the occasional over-the-counter remedy. Record p. 16. Evaluating and partially rejecting the plaintiff’s testimony in light of these matters is hardly a boilerplate finding. It is well-established that a credibility determination supported by specific findings is entitled to deference by the court. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987). Such deference is appropriate here.

A recurrent theme in the plaintiff’s Itemized Statement of Errors merits a valedictory comment. The hearing transcript includes testimony from a vocational expert, who opined that the

plaintiff would still be capable of performing jobs that exist in the national economy even if he were limited to standing for 45 minutes before taking a break. Record p. 37. Subsequent to the hearing, the plaintiff took the position that the jobs identified by the vocational expert were unavailable to him given his lack of transferable skills. *See id.* at pp. 146-47. The implication here is that the Administrative Law Judge knew the vocational expert's testimony was flawed and therefore crafted a decision that finds the plaintiff not disabled without relying on the vocational expert. Review by the court is limited to whether the Administrative Law Judge's decision is supported by substantial evidence in the record. As long as the court is satisfied that such support exists, it would be inappropriate to speculate about why the Administrative Law Judge narrowed the inquiry as he did.

For the foregoing reasons, I recommend that the Commissioner'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.*

*Dated this 22nd day of June, 1998.*

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