

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

EDWARD L. DALEY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 98-250-P-H</i>
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the issue of whether substantial evidence supports the commissioner’s determination that the plaintiff, who suffers from scoliosis, is capable of performing the full range of sedentary work. I recommend that the decision of the commissioner be affirmed.

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, in relevant part, that the plaintiff had not engaged in substantial

¹ 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 December 18, 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.

gainful activity since June 1996, Finding 2, Record p. 17; that he suffered from scoliosis of the back, an impairment that is severe but does not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 17; that the plaintiff's statements concerning his impairment and its impact on his ability to work were not entirely credible in light of the reports of the treating and examining practitioners, Finding 4, Record p. 17; that the plaintiff lacked the residual functional capacity to lift and carry more than twenty pounds or stand for prolonged periods, Finding 5, Record p. 17; that he was unable to perform his past relevant work in electronic sales or customer service for a catalog and a copying company or as an orthopedic laboratory technician, Finding 6, Record p. 17; that based on an exertional capacity for sedentary work and the plaintiff's age, educational background and work experience, Rule 201.29 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404, directed a conclusion that he was not disabled, Finding 9, Record p. 17; and that, therefore, the plaintiff was not under a disability at any time prior to the administrative law judge's decision on April 24, 1997, Finding 10, Record p. 17. The Appeals Council declined to review the decision, Record pp. 4-5, 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 administrative law judge in this case reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 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 in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff first contends that the opinion of the administrative law judge is internally inconsistent. Within the body of the opinion, the plaintiff notes, the administrative law judge determined that “[t]he evidence supports a finding that [the plaintiff] is not able to lift and carry more than twenty pounds, sit for only twenty minutes and stand or walk for an hour.” Record p. 15. Despite the judge's jumbled syntax, the plaintiff argues, he clearly meant to say that he found the plaintiff unable to sit for more than twenty minutes. Yet the judge then went on, in Findings 5 and 9, inexplicably to omit any reference to the plaintiff's sitting restriction and to find him capable of performing the full range of sedentary work. This would be impossible, the plaintiff points out, inasmuch as the full range of sedentary work requires the capacity “to remain in a seated position for approximately 6 hours of an 8-hour workday, with a morning break, a lunch period, and an afternoon break at approximately 2-hour intervals.” Social Security Ruling 96-9p, *reprinted in West's Social Security Reporting Service*, Rulings 1983-1991 (Supp. 1997-98), at 138.

In any event, the plaintiff next asserts, the sitting limitation is well supported by evidence of record, including his own testimony, Record p. 139, a note from his treating physician, Robert N. Phelps, Jr., M.D., stating that “[s]ymptoms are aggravated by prolonged sitting and walking,” *id.* at

p. 118, and a consultative evaluation by Paul Stucki, M.D., reciting the plaintiff's statement that he could sit for a half hour, *id.* at p. 117.

Thus, the plaintiff concludes, remand is warranted regardless which way one interprets the administrative law judge's decision — particularly in view of the fact that at Step 5 the commissioner bears the burden of proof. If the judge found the plaintiff incapable of sitting for more than twenty minutes, his findings are at odds with that conclusion, necessitating remand as a matter of law. If the judge discredited the plaintiff's assertion that he was incapable of sitting for more than twenty minutes, his determination that the plaintiff was capable of performing the full range of sedentary work is not supported by substantial evidence of record.

Despite the cleverness and facial appeal of these arguments, a careful reading of the record as a whole discloses both that (i) the administrative law judge intended to discredit the plaintiff's claim that he was incapable of sitting for more than twenty minutes at a time, and that (ii) his finding that the plaintiff was capable of performing the full range of sedentary work is supported by substantial evidence of record.

Turning first to the wording of the key sentence at issue, the phrase "is not able to" most sensibly is read to apply to each of the subsequent activities listed in the sentence; otherwise, the sentence is completely unintelligible. Construed in this way, the sentence reads in relevant part: "The evidence supports a finding that [the plaintiff] is not able to . . . sit for only twenty minutes . . ." Record p. 15. The administrative law judge thus appears to state, albeit awkwardly, that the plaintiff is not able to sit for only twenty minutes; in other words, that his sitting capacity exceeds twenty minutes. This interpretation is consistent with:

- (i) the administrative law judge's express statement in the previous sentence that

“the claimant retains the residual functional capacity to perform the exertional demands of sedentary work, or work which is generally performed while sitting” *Id.*;

(ii) the administrative law judge’s finding that “[t]he claimant’s statements concerning his impairment and its impact on his ability to work are not entirely credible in light of the reports of the treating and examining practitioners.” *Id.*; and

(iii) Finding 5, which describes functional limitations only with respect to lifting, carrying and standing, and Finding 9, which reiterates the finding of capacity for sedentary work. *Id.* at p. 17.

The administrative law judge thus clearly discredited the plaintiff’s assertion that he could sit for only twenty minutes at a time, affirmatively finding that the plaintiff could meet the demands of the full range of sedentary work, *e.g.*, sit for six hours in an eight-hour workday, with three breaks in the morning, at noon and in the afternoon at roughly two-hour intervals.

This finding, moreover, was supported by substantial evidence of record. The plaintiff’s treating physician, Dr. Phelps, appears to have been reporting the plaintiff’s own subjective assessment in noting that his condition was aggravated by “prolonged” sitting or walking.² *Id.* at p. 118. In addition, Dr. Phelps expressly noted only two “[a]ctivity [r]estrictions”: “minimize weight bearing left hip and excessive use of the left hip.” *Id.* Two consulting physicians, Paul Brinkman, M.D., and Lawrence P. Johnson, M.D., completed residual functional capacity assessments concluding that the plaintiff could sit for six of the eight hours in a workday.³ *Id.* at pp. 55, 63.

² In addition, it is possible that taking a break every two hours, as contemplated by the commissioner’s definition of the full range of sedentary work, could be consistent with the avoidance of “prolonged” periods of sitting.

³ At oral argument, the plaintiff contended that the administrative law judge rejected the opinions of Drs. Brinkman and Johnson because they did not have the benefit of the plaintiff’s testimony in determining residual functional capacity. Although the administrative law judge did reject the conclusion of Drs. Brinkman and Johnson that the plaintiff was capable of light work, *see* (continued...)

Another consultant, Paul Stucki, M.D., noted that the plaintiff had stated that he could not sit for more than thirty minutes at a time, but made no independent assessment whether this was so. *Id.* at pp. 116-17. James R. McKendry, M.D., a medical expert who reviewed the plaintiff's medical records and sat through his hearing, concluded that the plaintiff did not appear to qualify for disability benefits. *Id.* at pp. 142-46. Finally, in response to the request, "[e]xplain how your condition now keeps you from working," the plaintiff in his initial disability report omitted any mention of a problem with his sitting capacity. *Id.* at p. 70. In his later reconsideration disability report, he likewise omitted to list any such problem when asked to enumerate any new mental or physical limitations. *Id.* at p. 84.

Inasmuch as appears, the only evidence of record that the plaintiff could sit for no more than twenty minutes, apart from his statements duly recorded by Drs. Phelps and Stucki, was his testimony at the hearing. This the administrative law judge found not entirely credible in view of the objective medical evidence. A credibility determination by an administrative law judge who has observed the claimant, evaluated his demeanor and considered how his testimony fits with the evidence is entitled to deference, especially when that determination is supported by specific findings. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

³ (...continued)

Record p. 15, it is not clear that he discredited their findings with regard to sitting capacity.

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 24th day of December, 1998.

*David M. Cohen
United States Magistrate Judge*