

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

<b>RONALD J. BRANN,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 98-57-P-C</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 Supplemental Security Income (“SSI”) and Social Security Disability (“SSD”) appeal raises the issues whether the commissioner erred in determining that the plaintiff did not meet the or equal any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (“the Listings”) and in his use of Appendix 2, Table 2, to Subpart P, 20 C.F.R. § 404 (“the Grid”) to find that the plaintiff was capable of making an adjustment to work that exists in significant numbers in the national economy. I recommend that the court vacate the commissioner’s decision and remand the cause with directions to award benefits to the plaintiff.

---

<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 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.

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 met the disability insured status requirements of the Social Security Act on December 30, 1995, the date on which he stated he became unable to work, and had acquired sufficient quarters of coverage to remain insured through at least December 31, 2000, Finding 1, Record p. 17; that he had not engaged in substantial gainful activity since December 30, 1995, Finding 2, Record p. 17; that he suffered from asthma, chronic obstructive pulmonary disease, borderline intellectual functioning and alcoholism, impairments which were severe but did not meet or equal the criteria of any of the impairments listed in Appendix I to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 17; that he lacked the residual functional capacity to lift and carry more than 50 pounds or more than 25 pounds on a regular basis, work where exposed to environmental irritants, or perform more than simple, routine job tasks, Finding 5, Record p. 17; that he was unable to perform his past relevant work as a janitor, poultry worker, mill worker and farm worker, Finding 6, Record p. 17; that, based on his age (45), marginal education, unskilled work experience and exertional capacity for medium work, application of Rule 203.25 of the Grid would direct a conclusion that he was not disabled, Findings 7-11, Record pp. 17-18; and that, although he was unable to perform the full range of medium work, he was capable of making an adjustment to work that exists in the national economy in significant numbers, Finding 12, Record p. 18. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final decision 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 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 first issue raised by the plaintiff involves Step 3 of the sequential evaluation process as to which the claimant carries the burden of proof. 20 C.F.R. §§ 404.1520(d), 416.920(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). In light of the finding unfavorable to the plaintiff at Step 3, and because the commissioner also determined that the plaintiff was not capable of performing his past relevant work, the burden of proof shifted to the commissioner at Step 5 to show the plaintiff's ability to perform 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 commissioner's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting his 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 & Human Servs.*, 794 F.2d 114, 16 (1st Cir. 1986).

### **Discussion**

The plaintiff contends that the commissioner erred by failing to find that he met or equaled the criteria of section 12.05(C) of the Listings. Section 12.05 provides, in relevant part:

Mental retardation refers to a significantly subaverage general intellectual

functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22)<sup>2</sup>. . . .

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

\* \* \*

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function.

The plaintiff argues that he has met this listing through the report of Dr. Kevin Polk, a consulting psychologist, who found that his verbal IQ was 69, and a physical impairment that has more than a slight effect on his ability to perform work, specifically the limitations found by the administrative law judge that he cannot do heavy work or work in areas where he would be exposed to environmental irritants. Itemized Statement of Errors Pursuant to Rule 16.3 (Docket No. 4) at 2. The administrative law judge addressed the functional restrictions listed as an additional requirement under section 12.05(D), finding that the plaintiff's restrictions of activities of daily living were slight, his difficulties in maintaining social functioning were slight, his deficiencies of concentration occurred often, and he had had repeated episodes of deterioration or decompensation. Psychiatric Review Technique Form ("PRTF"), Record pp. 19-21, at 21. This analysis would not meet section 12.05(D), because it meets the required level of severity in only one of the four categories, while section 12.05(D) requires a certain level to be met in at least two of the categories.

---

<sup>2</sup> The administrative law judge's remarks at the hearing on the plaintiff's claim suggest that she might require the plaintiff to present direct evidence that his mental retardation was manifest before he reached the age of 22. Record at 26-28. Onset of mental retardation meeting the listing may be inferred from other evidence; evidence of difficulties with reading, writing or school may suffice. *Turner v. Bowen*, 856 F.2d 695, 698-99 (4th Cir. 1988). Here, the plaintiff testified that he dropped out of school in the sixth grade, at the age of 14 or 15, because he "had a real bad struggle of doing math, science, spelling, all the educational stuff." Record at 29, 32. *See also Luckey v. U. S. Dep't of Health & Human Servs.*, 890 F.2d 666, 668 (4th Cir. 1989) (in absence of change in claimant's intelligence functioning, it must be assumed that his IQ has remained relatively constant).

The plaintiff relies on case law from the Fourth and Eighth Circuits which have held that a finding that a claimant cannot return to his prior relevant work establishes *per se* satisfaction of the second prong of section 12.05(C). *Sird v. Chater*, 105 F.3d 401, 403 (8th Cir. 1997); *Flowers v. U. S. Dep't of Health & Human Servs.*, 904 F.2d 211, 214 (4th Cir. 1990). The Commissioner has issued acquiescence rulings indicating that he will abide by these holdings only in the states making up these circuits. Social Security Acquiescence Ruling 98-2(8), 63 Fed. Reg. 9279 (1998); Social Security Acquiescence Ruling 93-1(4), 58 Fed. Reg. 25996 (1993). The Tenth Circuit in *Hinkle v. Apfel*, 132 F.3d 1349, 1351 (10th Cir. 1997), rejected the formulation adopted by the Fourth and Eighth Circuits. Instead, it requires that the second prong of section 12.05(C) be evaluated in a manner “closely parallel” to “the step two standard . . . made without consideration of whether the claimant can perform any gainful activity beyond the analysis made at step two.” *Id.* at 1352-53.

Of course, this court’s analysis must be informed by First Circuit case law whenever it is available. The First Circuit dealt with a claim under section 12.05(C) in *Nieves v. Secretary of Health & Human Servs.*, 775 F.2d 12 (1st Cir. 1985), and there held that, once a claimant has provided uncontroverted medical evidence of an IQ within the parameters of the first prong of section 12.05(C), he need only show an impairment the effect of which on his ability to perform basic work activities is more than slight or minimal. *Id.* at 14. Thus, the plaintiff’s inability to perform heavy work or the finding that he cannot return to his former work do not, standing alone, meet the second prong of section 12.05(C). However, a claimant satisfies the second prong of section 12.05(C) if the administrative law judge finds that another impairment is severe, a finding made at Step 2 of the process. *Id.* See also *Baneyk v. Apfel*, 997 F. Supp. 543, 546 (S.D.N.Y. 1998) (discussing tests adopted by various circuits). Here, the administrative law judge specifically found

at Step 2 that the plaintiff's asthma and chronic obstructive pulmonary disease were severe. Finding 3, Record p. 17. Under *Nieves*, therefore, the plaintiff has met the listing set forth in section 12.05(C) and must be found disabled and awarded benefits. See *Suarez v. Secretary of Health & Human Servs.*, 740 F.2d 1, 2 (1st Cir. 1984).

This result makes it unnecessary to consider the Step 5 issue raised by the plaintiff.

### **Conclusion**

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff.

### **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 December, 1998.*

---

*David M. Cohen  
United States Magistrate Judge*