

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WAYNE A. RITCHIE,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 98-226-B
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income (“SSI”) appeal raises the questions whether the commissioner was required to seek the assistance of a medical advisor in determining the plaintiff’s residual functional capacity (“RFC”), failed to evaluate the collective effect of the plaintiff’s claimed disabilities, improperly disregarded the reports of the plaintiff’s treating physician, erred in discounting the plaintiff’s reports of pain, and misapplied the Grid. I recommend that the court remand the case for payment of benefits.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. § 416.920;

¹ This action is properly brought under 42 U.S.C. § 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 November 17, 1999, 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.

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 suffered from alcoholism with related emotional problems, asthma, and moderate obesity, impairments that were severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (“Listings”), Finding 2, Record p. 21; that his statements concerning his impairments and their impact on his ability to work were not entirely credible, Finding 3, Record p. 21; that he lacked the residual functional capacity to lift and carry more than 20 pounds or more than 10 pounds on a regular basis, to follow complex instructions, or to work where he would be exposed to excessive environmental pollutants, Finding 4, Record p. 21; that he was unable to perform his past relevant work as a laborer and a dishwasher, Finding 5, Record p. 21; that his capacity for the full range of light work was diminished by his inability to follow complex instructions or to work where exposed to excessive environmental pollutants, but that these factors did not significantly compromise his capacity for light work, Findings 6 & 10[b], Record pp. 21-22; that given his age (34), education (high school graduate) and work experience (unskilled), application of Section 416.969 and Rule 202.20, Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (“the Grid”), directed a conclusion that the plaintiff was not disabled as defined in the Social Security Act at any time through the date of the decision, Findings 7-10[a], 11, Record pp. 21-22. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final decision of the commissioner, 20 C.F.R. § 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. § 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).

Discussion

At oral argument, counsel for the plaintiff clarified his narrative Statement of Errors (Docket No. 13), contending that the administrative law judge (i) improperly used the Grid in evaluating the plaintiff's claim, (ii) was required to consult a medical advisor under the circumstances of this case, and (iii) failed to develop the record adequately.

A. Use of the Grid

First, there is no evidence in the record in this case to support the plaintiff's argument that his "loose ankles" should have been found to be a severe impairment or even an impairment that caused a significant vocational limitation, requiring consideration at Step 5 of the evaluation process. The only mention of the term "loose ankles" in the record that is cited by the plaintiff occurs at page 206, where a physician notes that the plaintiff reported to him that a different, unidentified physician had told the plaintiff that he had "loose ankles." The term is enclosed in quotation marks in the physician's report, suggesting that it is not an accepted medical term or diagnosis. There is no explanation of the term in the record, let alone any indication of what effect such a condition might have on the plaintiff's physical capacity for work. The only other cited mentions of the plaintiff's ankles in the medical records are instances of ankle sprains, one in June 1991, Record at 210 (right ankle), and one in July 1990, *id.* at 216 (left ankle). There is no medical evidence of any lingering impairment due to these sprains; x-rays taken after the sprains showed no significant findings. *Id.*

at 211, 213. The administrative law judge did not err in concluding that the plaintiff's ankle problem was neither a severe impairment nor the cause of a vocational impairment significant enough to be considered at Step 5.

Next, the plaintiff misrepresents the record when arguing that the administrative law judge violated the treating physician rule. That rule is set forth at 20 C.F.R. § 416.927(d)(2):²

Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.

The plaintiff contends repeatedly that Dr. Smith, a treating physician, "said [the plaintiff] was disabled by the asthma and chronic pain." Statement of Errors at 5, 11, 16. Of course, the determination that a claimant is disabled is reserved to the commissioner; a statement by a physician that a claimant is "disabled" is not determinative. 20 C.F.R. § 416.927(e). Even if that were not the case, Dr. Smith did not find the plaintiff to be disabled. Record at 244-50. The entry upon which the plaintiff must be basing this argument is found at page 246 of the record where, under the heading "S[ocial] H[istory]," and the subheading "Occupation," someone has entered the words "Disabled, due to his asthma and his back." This is clearly a record of the plaintiff's report to Dr. Smith or someone on Dr. Smith's staff; it appears on a page with "P[ast] M[edical] H[istory],"

² The plaintiff's statement of errors refers throughout to regulations found in part 404 of 20 C.F.R. The regulations applicable to this SSI claim are found in part 416 of 20 C.F.R.

“F[amily] H[istory],” “Habits,” “Immunizations,” and “Skin Test.” No entries in Dr. Smith’s handwriting appear on this page, and, even if the entries were made by Dr. Smith, they are clearly not diagnostic or evaluative observations. The plaintiff has not shown any violation of the treating physician rule in this case.

The plaintiff also contends that the administrative law judge “essentially disregarded the issue of environmental restrictions based on breathing difficulties in the step five analysis.” Statement of Errors at 4. To the contrary, the administrative law judge specifically found that the plaintiff’s capacity for light work was diminished “by his inability to . . . work in exposure to excessive environmental pollutants.” Finding 6, Record at 21. Similarly, the plaintiff asserts that the administrative law judge “failed to reduce the occupational base in any way to account for [the] limitations” that he noted on the Psychiatric Review Technique Form. Statement of Errors at 10. In fact, the administrative law judge found that the plaintiff’s work capacity was diminished by “his inability to follow complex instructions,” Record at 21, one factor in the analysis of mental functional limitations.

The plaintiff further argues that the administrative law judge was required to consider all of the possible side effects listed in the *Physician’s Desk Reference* of the medications he was taking as restrictions on his residual functional capacity. Statement of Errors at 14 n.9. This position is without merit. The plaintiff himself testified, when asked whether he “[had] any side effects” from the medications, that “[he] had a problem going to the bathroom there for a while.” Record at 35. It remains the plaintiff’s burden to provide some evidence concerning ongoing medication side effects that might in themselves constitute an impairment before the commissioner has any duty to consider such side effects. *See Figueroa v. Secretary of Health & Human Servs.*, 585 F.2d 551, 553-

54 (1st Cir. 1978). The administrative law judge need not consider potential side effects from medication when there is no evidence that the claimant actually suffers any of those side effects.

That being said, the fact remains that the administrative law judge reached his decision at Step 5 of the sequential evaluation process in this case by applying the Grid, despite the fact that he found limitations on the plaintiff's capacity for the full range of light work. The administrative law judge also found that the plaintiff's "capacity for light work has not been significantly compromised" by these limitations, Record at 22, but that finding is not supported by the evidence nor even by the administrative law judge's other factual findings. The administrative law judge in fact found at least two non-exertional impairments, the plaintiff's inability to work in exposure to "excessive" environmental pollutants and his inability to follow complex instructions, both of which cannot be said to affect the occupational base for light work only marginally or so slightly that a lack of significant impairment may be assumed.³ See *Smith v. Bowen*, 826 F.2d 1120, 1122 (D.C.Cir. 1987)

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Where a person cannot be found disabled based on strength limitations alone, the rule(s) which corresponds to the person's vocational profile and maximum sustained exertional work capability . . . will be the starting point to evaluate what the person can still do functionally. The rules will also be used to determine how the totality of limitations or restrictions reduces the occupational base of administratively noticed unskilled sedentary, light, or medium jobs.

A particular additional exertional or nonexertional limitation may have very little effect on the range of work remaining that an individual can perform. The person, therefore, comes very close to meeting a table rule which directs a conclusion of "Not disabled." On the other hand, an additional exertional or nonexertional limitation may substantially reduce a range of work to the extent that an individual is very close to meeting a table rule which directs a conclusion of "Disabled."

Use of a vocational resource may be helpful in the evaluation of what appear to be "obvious" types of cases. In more complex situations, the assistance of a vocational resource may be necessary.

(continued...)

(“To the extent that the claimant’s nonexertional limitations reduce [his] ability to perform jobs of which [he] is exertionally capable, the [commissioner] may not rely solely on the grids.”)

The Grid “can only be applied when claimant’s non-exertional limitations do not significantly impair claimant’s ability to perform at a given exertional level.” *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994). “If a non-strength impairment, even though considered significant, has the effect only of reducing [the] occupational base marginally, the Grid remains highly relevant and can be relied on exclusively to yield a finding as to disability.” *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). When the Grid is used as a framework, and the reduction of the occupational base is more than marginal, the testimony of a vocational expert is required. *Burgos Lopez v. Secretary of Health & Human Servs.*, 747 F.2d 37, 42 (1st Cir. 1984). Here, the limitations found by the administrative law judge have more than a marginal effect. *E.g.*, *Ortiz*, 890 F.2d at 525-26 (ordinarily, a finding that a claimant’s significant mental impairment⁴ did not allow him to

³(...continued)

Social Security Ruling 83-14 (“SSR 83-14”), “Titles II and XVI: Capability to Do Other Work — The Medical-Vocational Rules as a Framework for Evaluating a Combination of Exertional and Nonexertional Impairments,” reprinted in *West’s Social Security Reporting Service Rulings 1983-1991*, at 44-45.

⁴ Counsel for the commissioner argued at the hearing that any psychiatric limitations found by the administrative law judge were “intrinsically related” to alcoholism, and, because alcoholism no longer provides a basis for the award of benefits, the administrative law judge did not need to make a specific finding in this regard. To the contrary, when the administrative law judge specifically finds that a claimant’s capacity for a full range of work at a certain exertional level is diminished by a psychiatric limitation, it is necessary that he or she specifically record a finding that such a limitation is caused by alcoholism before that finding may be ignored at Step 5. Such a causal link is not necessarily implied by the evidence in the record to which counsel for the commissioner referred the court at oral argument. In addition, the administrative law judge found that the plaintiff suffered from at least one affective disorder, dysthymia with a history of suicide attempts, that was not related to alcoholism or substance addiction. Psychiatric Review Technique Form, Record at 23-25.

perform a full range of light work renders the Grid inapplicable and requires the use of a vocational expert); *Damron v. Secretary of Health & Human Servs.*, 778 F.2d 279, 282 (6th Cir. 1985) (restriction from exposure to dust, gases, fumes, and marked changes in temperature and humidity requires testimony from vocational expert; use of Grid rejected). Accordingly, the testimony of a vocational expert was required.⁵ The commissioner did not provide a vocational expert at the hearing.

The non-exertional limitations found by the administrative law judge, by themselves, were sufficient to require the testimony of a vocational expert in this case. His conclusion that those limitations were not significant at Step 5 is not supported by substantial evidence or existing case law. At best, it is impossible to tell from this record whether the non-exertional limitations found by the administrative law judge did or did not have a significant effect on the plaintiff's capacity for a full range of light work; the commissioner's opinion does not discuss the matter. *See Sryock v. Heckler*, 764 F.2d 834, 837 (11th Cir. 1985). The administrative law judge's reliance on the Grid alone was erroneous. *See* SSR 83-14 at 42 ("PERTINENT HISTORY: No table rule applies to direct a conclusion of "Disabled" or "Not disabled" where an individual has a nonexertional limitation or restriction imposed by a medically determinable impairment.")

B. Other Issues

Because I have concluded that a remand for payment of benefits is necessary in this case, I do not reach the additional issues raised by the plaintiff.

⁵ *See also* SSR 83-14 at 48 ("Where the adjudicator does not have a clear understanding of the effects of additional limitations on the job base, the services of a VS will be necessary.")

Conclusion

In the absence of a vocational expert in this case, the commissioner has failed to carry his burden of proof. The commissioner is not entitled to remand to remedy his error; nothing in statute or regulation gives him sequential bites at the Step 5 apple until he gets everything right. “In circumstances where the claimant has made out a prima facie case for benefits and the Commissioner’s vocational expert does not present the required evidence of the claimant’s ability to perform work that exists in the national economy, the appropriate relief is an award of benefits absent some good cause for the evidentiary gap.” *Field v. Chater*, 920 F. Supp. 240, 245 (D. Me. 1995). The commissioner is not entitled to a more relaxed standard of review when he neglects altogether to provide any testimony from a vocational expert.

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 2nd day of December, 1999.

*David M. Cohen
United States Magistrate Judge*