

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES E. DOLAN,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 97-267-B
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income (“SSI”) and Social Security Disability (“SSD”) appeal raises the issues whether the commissioner erred by failing to consider the plaintiff’s non-exertional impairments and in the formulation of the hypothetical question posed to the vocational expert at the hearing held on the plaintiff’s claim. I recommend that the court vacate the commissioner’s decision and remand for further proceedings.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. §§ 404.1520,

¹This 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 May 7, 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.

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 September 1, 1994, the date upon which the plaintiff stated he became unable to work, and had acquired sufficient quarters of coverage to remain insured through at least September 30, 1996, Finding 1, Record p. 21; that the plaintiff had not engaged in substantial gainful activity since September 1, 1994, Finding 2, Record p. 21; that the plaintiff suffered from a seizure disorder and alcoholism, impairments that are severe but do 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. 21; that the plaintiff's testimony concerning his impairments and their impact on his ability to work were not entirely credible in light of his own description of his activities and life style and discrepancies between his assertions and information in the reports of the treating and examining practitioners and their findings made on examination, Finding 4, Record p. 22; that the plaintiff lacked the residual functional capacity to lift and carry more than 20 pounds or more than 10 pounds on a regular basis, Finding 5, Record p. 22; that the plaintiff was unable to perform his past relevant work as a carpenter, assembly worker, sealer, painter, molder and landscaper, Finding 6, Record p. 22; that the plaintiff had no significant non-exertional limitations which narrow the range of work he was capable of performing, Finding 7, Record p. 22; and that, based on an exertional capacity for light work, his age of 39 years, his limited educational background, and his unskilled work experience, application of sections 202.17, 404.1569 and 416.969 of Appendix 2, Table 2, to Subpart P, 20 C.F.R. § 404 ("the Grid"), directed a conclusion that the plaintiff was not disabled, Findings 8-11, Record p. 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. §§ 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).

I. Discussion

A. Non-Exertional Impairments

The plaintiff contends that the administrative law judge erred in relying on the Grid to determine whether he was disabled because he had documented non-exertional impairments of major depression, seizure disorder, back pain and high blood pressure. He relies on *Burgos Lopez v. Secretary of Health & Human Servs.*, 747 F.2d 37 (1st Cir. 1984), to support his position. In that case, the First Circuit overturned a decision of the Appeals Council that rejected the administrative law judge's finding that the claimant suffered from a severe mental impairment that significantly affected her residual functional capacity and remanded the case for further agency proceedings, based on the conclusion that some weight must be given to the administrative law judge's ability to see and evaluate the claimant. *Id.* at 40-42. A challenge to the use of the Grid involves Step 5 of the sequential review process, where the burden is on the commissioner. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987).

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 that 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).

The plaintiff emphasizes the findings of Dr. A. J. Butler, a consulting psychologist, as evidence of his "major depression." [Itemized Statement of Errors] ("Itemized Statement") (Docket No. 4) at 2. Dr. Butler's report is found at pages 198-206 of the record. Dr. Butler made an Axis I diagnosis of "Major Depression" and "Alcohol Abuse" dated September 29, 1995, Record p. 205, and opined that

within a work situation the claimant would need tasks of a concrete nature and is apt to have significant attention and concentration difficulties. The claimant is apt to have significant difficulty relating to co-workers and supervisors. Under increased perceived stress, the claimant is apt to have difficulty sustaining effective performance.

Id. p. 206. The administrative law judge noted that the onset of the plaintiff's difficulty in concentration followed the onset of his seizures and that the mental confusion reported by the plaintiff resulted from medication that he was taking in an attempt to control the seizures. *Id.* pp. 17, 200, 202, 204-05. The administrative law judge concluded that

[b]ecause Dr. Butler formed his [sic] opinion during a time when the claimant was still attempting to get the seizures under control by adjustment of his medication and the seizures were related to the claimant's mental state, his [sic] opinion is discounted by the undersigned as not indicative of a long term condition.

Id. p. 17.

The administrative law judge chose to rely on the report of Dr. John Hale, a consulting

psychologist who interviewed the plaintiff on January 29, 1996, *id.* p. 334, whose report was offered as an exhibit by the plaintiff, *id.* p. 26. According to the administrative law judge,

[Dr. Hale] stated that the most significant finding relates [to] the claimant's chronic alcoholism, a problem since preadolescence. He found that the claimant's anger is a dimension of his addictive process and felt that even some of his physical problems are related to or are complicated by alcoholism. Dr. Hale noted no limitations in the claimant's ability to perform activities of daily living or to complete tasks timely. He implied that limitations in social functioning and withdrawal from work-like settings are attributable to alcoholism. He noted no other limitations in the claimant's ability to perform basic work tasks.

Id. p. 17. While the administrative law judge accurately reflects Dr. Hale's report in the first two sentences quoted above, I find no mention in the report of the plaintiff's ability to perform activities of daily living, complete tasks in a timely manner, or perform basic work tasks. I cannot agree that Dr. Hale "implied that limitations in social functioning and withdrawal from work-like settings are attributable to alcoholism," although Dr. Hale did not attribute these limitations to depression either. The administrative law judge concluded "that the claimant suffers from no severe psychological impairment from any disorder other than those related to alcoholism." *Id.* Specifically with respect to the plaintiff's residual functional capacity, the administrative law judge found that "[a]ny medical evidence or opinion in the record that he has any work limitations are either attributable to alcoholism or to his condition before seizures and blood pressure were under control." *Id.* p. 20.

The administrative law judge's attribution of any work limitations to alcoholism, or to previously-existing conditions presently under control, is significant because 42 U.S.C. § 423(d)(2)(C) provides:

An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's

determination that the individual is disabled.

Any non-exertional impairments resulting from alcoholism could accordingly be excluded from consideration by the commissioner at Step 5. Conflicts in the evidence are to be resolved by the commissioner, not the court. *Irlanda-Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). However, the commissioner may not disregard uncontroverted medical evidence. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986).

Dr. Hale's report simply cannot be stretched to contradict Dr. Butler's diagnosis of depression and her very specific findings concerning the work-limiting effects of that depression. Similarly, the record does not contain substantial evidence to support the conclusion that Dr. Butler's findings may be attributed solely to side effects of medications that were being used in an attempt to control the plaintiff's seizures. Based on the record, the plaintiff's depression should have been considered a non-exertional impairment causing limitations that are not *de minimus* in their effect on the plaintiff's ability to perform light work. Accordingly, reliance solely on the Grid was inappropriate. *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994). The administrative law judge in this case chose also to consult a vocational expert, which is required when reliance on the Grid is inappropriate, so it is necessary to reach the second issue raised by the plaintiff.

Before doing so, however, I note that consideration of the remaining non-exertional impairments identified by the plaintiff as requiring consideration at Step 5 would not have the same outcome as the depression discussed above. With respect to the plaintiff's seizures, there is substantial evidence in the record to support the administrative law judge's conclusion, Record p. 19, that the seizures are under control when the plaintiff abstains from heavy alcohol consumption, e.g., *id.* at 38 (plaintiff's testimony that seizures were controlled by medication a month before

hearing (May 1996)), 209, 289-90. Similarly, the record supports the administrative law judge's conclusion, *id.* at 15, that the plaintiff's high blood pressure was well controlled at the time of the hearing and did not cause any significant vocationally-relevant limitations, *id.* at 290, 295. The plaintiff's claim that back pain is a significant non-exertional impairment is based primarily on his own testimony. Itemized Statement at 2. The administrative law judge appropriately analyzed the plaintiff's credibility in this regard, *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 194-95 (1st Cir. 1987), supported his conclusions with specific findings, and reviewed the medical evidence, Record p. 16. There is substantial evidentiary support for the conclusion that there is a lack of objective medical evidence to support the plaintiff's claim of back pain, e.g., *id.* at 183, 288. *Frustaglia*, 829 F.2d at 194-95. The conclusions of the administrative law judge with respect to back pain have sufficient support in the record.

B. Questions Posed to Vocational Expert

The plaintiff contends that the administrative law judge erred in relying on the response of a vocational expert to his hypothetical question concerning the plaintiff that "exclude[d] all non-exertional impairments." Itemized Statement at 4. The administrative law judge first asked the vocational expert a hypothetical question that assumed an age of 38, a limited education, and the following:

[The claimant] has no capacity to sit for any length of time or stand for more than . . . 20 minutes, . . . [and] he could walk no more than a mile. He has no capacity to lift and he has no capacity to bend, from his testimony. He's suffering from high blood pressure, ulcers, hardening of the arteries and slipped disks all of which contribute to those functional limitations as well as to a pain level which he says reaches a [sic] eight on a scale of ten on a daily basis. And he also suffers from grand mall [sic] seizures which

average to be at least once a month and petit mall [sic] which average to be at least once a week.

Record p. 63. The vocational expert responded that the plaintiff could do no work under this set of conditions. *Id.*

The administrative law judge then varied the hypothetical question. Using the same age and limited education, he asked the vocational expert to assume

that [the claimant is] capable of performing to a level of sedentary through light . . . exertional level, and that he's not otherwise limited by pain or seizures from performing at sedentary and light exertional level.

Id. The vocational expert responded that "if there's not a lot of limitations" the plaintiff "could do guard, security guard work, cashier work, any of the light and sedentary jobs, assembly work." *Id.* at 64. "If there's no limitations . . . they would exist in sufficient numbers" in the regional national economy. *Id.* In essence, the only limitations posed by the administrative law judge in the second hypothetical question were the plaintiff's ninth-grade education and a residual functional capacity for sedentary through light work. The administrative law judge referred to this question and answer in his decision, although he relied only on the Grid in reaching the determination that the plaintiff was not disabled. *Id.* at 21.

The First Circuit has established a standard for questions posed to vocational experts in Social Security hearings.

[I]n order for a vocational expert's answer to a hypothetical question to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities. To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.

Arocho v. Secretary of Health & Human Servs., 670 F.2d 374, 375 (1st Cir. 1982). An administrative law judge may not rely on the response of a vocational expert to a hypothetical question that omits any mention of a significant limitation based on uncontroverted medical evidence. *Rose*, 34 F.3d at 19. The administrative law judge's error in failing to consider the plaintiff's depression as a significant non-exertional impairment is reprised in his question to the vocational expert, which therefore could not serve as the basis for a conclusion that the plaintiff is not entitled to benefits.

A claimant who finds the administrative law judge's hypothetical question inadequate should pose his own. *Torres v. Secretary of Health & Human Servs.*, 870 F.2d 742, 746 (1st Cir. 1989). The plaintiff, represented by counsel at the hearing, was invited to pose questions to the vocational expert and declined to do so. Record p. 65. That may well be due to the fact that the administrative judge's first hypothetical question included all of the non-exertional impairments upon which the plaintiff now seeks to rely, with the exception of the depression that is the one non-exertional impairment which I have found should have been included. Nonetheless, this is not a case where the problem is one of insufficient evidence on an issue concerning which the commissioner carries the burden of proof, but rather one where the administrative law judge has failed to give proper credit to uncontradicted evidence of record. *Field v. Chater*, 920 F. Supp. 240, 243 (D. Me. 1995) (distinguishing *Rose*, 34 F.3d 13).

II. Conclusion

Because the plaintiff has requested only a remand for further proceedings, *see Field*, 920 F. Supp. at 243, the remedy ordered in *Rose* under very similar circumstances, 34 F.3d at 19, and for

the reasons discussed above, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

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 12th day of May, 1999.

David M. Cohen
United States Magistrate Judge