

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

**RICHARD LEMELIN,** )  
 )  
 *Plaintiff* )  
 )  
 **v.** )  
 )  
 **KENNETH S. APFEL,** )  
 *Commissioner of Social Security,* )  
 )  
 *Defendant* )

**Docket No. 98-282-P-H**

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

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, a former accountant who suffers from diabetes mellitus, visual impairments and a manic-depressive disorder, is capable of making a successful vocational adjustment to work existing in significant numbers in the national economy, including as a convenience store clerk, retail clerk and security guard. I recommend that the decision of the commissioner be vacated and remanded for further proceedings consistent herewith.

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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 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.

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 suffered from diabetes mellitus, visual disturbances and a manic-depressive disorder, 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 3, Record p. 341; that the plaintiff's statements 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 his assertions concerning his ability to work, Finding 4, Record p. 341; that the plaintiff had no restriction in his ability to walk, stand or sit, could occasionally and repetitively lift up to twenty-five pounds, could handle objects, had some visual problems but not close to the statutory blindness level, could relate to others, remember, understand and carry out simple instructions, respond appropriately to other people, supervisors, co-workers and customary work stressors, could perform simple, complex and repetitive tasks and had employed good judgment in past work situations, Finding 5, Record p. 342; that the plaintiff was able to perform his past relevant work in the accounting field, Finding 6, Record p. 342; that the plaintiff was an individual "closely approaching advanced age," Finding 7, Record p. 342; that considering the plaintiff's age (53), educational background (at least high school) and previous work experience (semi-skilled), he was able to make a successful vocational adjustment to work that exists in significant numbers in the national economy, such as convenience-store clerk, retail clerk, security guard and jobs of an accounting nature, Findings 7-10, Record p. 342; and that the plaintiff therefore had not been under a disability at any time through the date of the decision on June 13, 1996, Finding 11, Record p. 342.

By notice dated March 2, 1998 the Appeals Council granted the plaintiff's request for review of the administrative law judge's decision on grounds that the administrative law judge failed to include a Psychiatric Review Technique Form ("PRTF") in evaluating the plaintiff's mental impairment as required by 20 C.F.R. §§ 404.1520a and 416.920a. Record p. 344. The Appeals Council enclosed a PRTF that it proposed to issue "[a]bsent new and material evidence or pertinent legal arguments." *Id.* The proposed PRTF concluded that the plaintiff had only slight restrictions of activities of daily living and slight difficulties in maintaining social functioning, seldom to often suffered from deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere) and never experienced episodes of deterioration or decompensation in work or work-like settings. *Id.* at 348. The Appeals Council permitted the plaintiff thirty days in which to submit new evidence. *Id.* at 344. The plaintiff did so, submitting evidence that included a PRTF approved by a treating physician.<sup>2</sup> *Id.* at 389-90. By letter dated May 8, 1998 the plaintiff submitted additional new evidence. *Id.* at 18.

On May 28, 1998 the Appeals Council issued a decision unfavorable to the plaintiff. *Id.* at 9-17. The Appeals Council noted that the plaintiff on July 30, 1997 and August 6, 1997 had filed subsequent applications for SSD and SSI benefits alleging dates of onset of January 1, 1996 and prior to July 1, 1997, respectively. *Id.* at 9-10. Because the plaintiff's original application was pending review at the Appeals Council, the subsequent applications were "escalated" to the Appeals Council level and "associated" with the record on the original applications. *Id.* at 10. The Appeals Council concurred with the administrative law judge's findings and conclusions on disability and

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<sup>2</sup> The plaintiff previously had submitted new evidence in the context of seeking Appeals Council review. *See, e.g., id.* at 29.

the basis for those findings. *Id.* It adopted a PRTF with the same assessment of the plaintiff's restrictions as that originally proposed in its notice of March 2, 1998. *Id.* at 16. In affirming the June 13, 1996 decision of the administrative law judge, the Appeals Council concluded that based on the applications filed on June 28, 1995, July 30, 1997 and August 6, 1997 the plaintiff was not entitled to a period of disability or to disability insurance benefits. *Id.* at 13.

By letter dated October 20, 1998 the commissioner notified the plaintiff that the new evidence submitted by letter dated May 8, 1998 was not "associated with the files" until after the Appeals Council issued its decision on May 29, 1998. *Id.* at 6. However, the Appeals Council subsequently reviewed the new evidence and found no basis upon which to alter its decision, *id.*, making that decision the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481.

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.<sup>3</sup> 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*,

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<sup>3</sup> Although the administrative law judge found that the plaintiff could perform past relevant work as an accountant, he proceeded to determine that the plaintiff could perform other work in the national economy. *Id.* at p. 342. The commissioner conceded at oral argument that the plaintiff was not capable of returning to past relevant work as an accountant and that this accordingly was strictly  
(continued...)

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 asserts that the commissioner, through Appeals Council affirmance of the administrative law judge’s decision, erred in: (i) not curing the failure to provide a PRTF at the administrative law judge level and failing to provide substantial evidence in support of his decision that the plaintiff did not prevail at Step 3, (ii) relying upon a flawed hypothetical to a vocational expert, (iii) failing to weigh treating-source medical opinions appropriately and (iv) improperly dismissing the two subsequently filed applications without opportunity for full development of the record. Itemized Statement of Specific Errors (“Statement of Errors”) (Docket No. 6). I find that the commissioner, in contravention of Social Security Ruling 96-5p, failed to recontact a treating source for clarification of his opinion, warranting remand on that basis.

### **1. Statements of Error (i) and (iii): Disregard of Treating Physician’s Opinion**

Among new materials the plaintiff submitted to the Appeals Council was a PRTF completed by Julia E. Barrett, PA-C on March 24, 1998 and approved by Will Bredenberg, M.D., the following day. Record pp. 362-70. Barrett and Dr. Bredenberg had been treating the plaintiff for his manic-depressive disorder through Tri-County Mental Health Services of Lewiston, Maine (“Tri-County”) since at least August 12, 1997 in the case of Barrett and June 27, 1988 in the case of Dr. Bredenberg. *Id.* at 235, 239, 243, 323, 357-77. The record reveals that the plaintiff had received ongoing

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<sup>3</sup> (...continued)  
a Step 5 case.

treatment and monitoring from various professionals since at least 1988 through Tri-County, where he had first been seen in 1977. *Id.* at 228 (emergency contact, May 17, 1977), 231-43 (progress notes from January 4, 1988 through April 28, 1992), 245-50 (progress notes from May 26, 1992 to October 26, 1993), 259-62 (progress notes from March 9, 1994 to July 5, 1994), 275-77 (progress notes from November 8, 1994 to March 20, 1995).

Dr. Bredenberg indicated in his PRTF that the plaintiff met Listing 12.04 (Affective Disorders) and that the plaintiff suffered from slight restriction of activities of daily living, marked difficulty in maintaining social functioning, frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner and repeated episodes of deterioration or decompensation in work or work-like settings. *Id.* at 362, 369. Dr. Bredenberg noted that “[o]ver the course of his treatments at Tri-County Mental Health Services, we have observed distinct episodes of both full prolonged mania and depression. He is currently feeling depressed, with loss of interest in pleasurable activities, decreased energy, difficulty concentrating, psychomotor retardation, social withdrawal, and blunted affect.” *Id.* at 363.

Dr. Bredenberg further observed that, without assistance from the plaintiff’s wife, the plaintiff would have had significant impairments in activities of daily living. *Id.* He noted that “Mr. Lemelin maintains minimal employment delivering newspapers, but often has difficulty keeping up with this low level of activity. For example, he might be able to deliver the papers, but is unable to accomplish collecting the subscription fees from customers. He is very uncomfortable in social settings and has marked impairment in interpersonal interaction. He has significant problems with concentration necessary for gainful work.” *Id.* Because the plaintiff had experienced two episodes of serious Lithium toxicity in the past two years, his treatment had been “problematic,” necessitating

a decrease in his dosage of Lithium with “an adverse effect on his level of functioning.” *Id.*

The Appeals Council declined to accord the Bredenberg PRTF any weight, observing initially that the PRTF failed to explain the absence in progress notes of the findings detailed in its narrative. *Id.* at 11. The Appeals Council pointed out that Dr. Bredenberg’s opinion on whether the plaintiff met the Listings could not be given controlling weight because that is an issue reserved to the commissioner; in any event, according to the Appeals Council, the opinion was “not supported by the progress notes from Dr. Bredenberg, Ms. Julia E. Barrett, nor any other treating or examining source in the record.” *Id.* at 12. Further, the Appeals Council noted that “[t]he restrictions and limitations reported in the section of the PRTF under the ‘B’ criteria, are likewise not supported by the clinical findings on mental status evaluations by any medical source, including Dr. Bredenberg.” *Id.* The Appeals Council found that the plaintiff’s mental-health treatment “since the crisis in 1996” (an apparent reference to the Lithium toxicity) had been “effective for most of the time, excluding the periods when there was a medication adjustment problem.” *Id.*

The plaintiff first argues that on the question whether his condition meets the Listings, he is entitled on the basis of the Bredenberg PRTF to a remand with instructions to award benefits or, at a minimum, to a remand with directions for a supplemental hearing with a consulting psychiatrist. Statement of Errors at 4. This is so, he posits, because the Appeals Council could not properly have resolved conflicts between the Bredenberg evidence and other evidence of record without the expert advice of a medical adviser. *Id.* at 3-4. The plaintiff next contends that to the extent the Bredenberg PRTF offered a treating physician’s medical opinion as to the nature and severity of his impairments, the Appeals Council misapplied Social Security Rulings 96-2p and 96-5p in rejecting it. *Id.* at 8-10. In the plaintiff’s view, the Appeals Council should either have awarded benefits at Step 3, sought

clarification directly from the treating source or engaged the services of a medical expert instead of “explain[ing] away” the evidence. *Id.* at 10.

As the Appeals Council correctly observed, the weight to which a treating physician’s opinion is entitled depends in part on the nature of the subject at issue. Record p. 12. A physician’s opinion as to whether a claimant’s impairments meet or equal the Listings may not be accorded controlling weight, for that ultimate question is reserved to the commissioner. 20 C.F.R. §§ 404.1527(e), 416.927(e). Neither, however, may such an opinion by the treating physician be ignored. It is entitled to consideration on the basis of six enumerated factors: (i) length of the treatment relationship and frequency of examination, (ii) nature and extent of the treatment relationship, (iii) the extent to which the opinion is supported by relevant evidence, (iv) consistency with the record as a whole, (v) whether the treating physician is offering an opinion on a medical issue related to his or her specialty, and (vi) other factors highlighted by the claimant or others. 20 C.F.R. §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6).

As regards the question of the “nature and severity” of a claimant’s impairments, on the other hand, the opinion of a treating physician controls to the extent it is determined to be “well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record.” 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

Regardless of the subject matter as to which the treating physician’s opinion is offered, the commissioner must “always give good reasons in our notice of determination or decision for the weight we give your treating source’s opinion.” *Id.*

The Appeals Council rejected the Bredenberg opinion on all counts for one key reason: that it was not well-supported by other evidence of record. Inasmuch as appears, the Appeals Council

had ample grounds upon which to find the Bredenberg PRTF unsupported by or inconsistent with other evidence of record, including Dr. Bredenberg's own progress notes. However, I am persuaded following oral argument that the commissioner should have sought clarification from Dr. Bredenberg as to how his PRTF could have seemed so wholly inconsistent with the record evidence — a clarification that may or may not have led the Appeals Council to change its mind. Social Security Ruling 96-5p states in relevant part:

Because treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to recontact the source for clarification of the reasons for the opinion.

Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service Rulings 1983-1991 (Supp. 1997-98)*, at 112. The commissioner at oral argument suggested that this provision is implicated when there is a conflict in the evidence. He reasoned that because in this case none of the evidence supported the Bredenberg PRTF, no clarification was required. The plaintiff, in rebuttal, characterized the Bredenberg PRTF as itself introducing a conflict in the evidence. Hence, under the commissioner's own interpretation of SSR 96-5p as expressed at oral argument, the conflict necessitated clarification.

I find the plaintiff's view persuasive. Precisely because the Bredenberg PRTF appears unmoored from any substantial evidence of record and because the opinions of treating physicians are important, the Appeals Council pursuant to SSR 96-5p should have delved deeper before deciding to dismiss the Bredenberg PRTF wholesale. The Bredenberg PRTF appears unsupported in myriad ways although, as the plaintiff pointed out at oral argument, lay persons (such as the Appeals Council) are not qualified to judge the meaning of the word "stable," for example, in

mental-health treatment notes.<sup>4</sup> Dr. Bredenberg made the following major points in his PRTF:

1. That the plaintiff, as of the date of the PRTF on March 24, 1998, was feeling depressed, with loss of interest in pleasurable activities, decreased energy, difficulty concentrating, psychomotor retardation, social withdrawal, and blunted affect. Record p. 363. The most recent Tri-County progress note in the record, dated March 10, 1998, observed that the plaintiff acknowledged he had been feeling down lately and that he was quiet with some blunting of affect noted. *Id.* at 357. It did not document loss of interest in pleasurable activities, decreased energy, difficulty concentrating, psychomotor retardation or social withdrawal. The prior progress note, dated January 13, 1998, indicated the plaintiff was then doing well, with normal affect. *Id.* at 358.

2. That the plaintiff maintained minimal employment delivering newspapers but often had difficulty keeping up with this low level of activity; for example, he might be able to deliver the papers but would be unable to accomplish collecting the subscription fees from customers. *Id.* at 363. This is supported by the progress note of March 10, 1998 stating: “He continues to work at his paper route, but is often not able to bring himself to collect the money.” *Id.* at 357. The contemporaneous note does not, however, document why that might be so or whether the difficulty was related to his mental illness.

3. That the plaintiff is very uncomfortable in social settings and has marked impairment in interpersonal interaction. *Id.* at 363, 369. The evidence amply demonstrates that the plaintiff’s mood regularly swings from low to high/normal. *See, e.g.*, Tri-County progress notes, *id.* at 357

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<sup>4</sup> As the plaintiff suggested in his Statement of Errors and at oral argument, the Appeals Council could have called upon the services of a medical advisor instead of (or perhaps in addition to) seeking clarification from Dr. Bredenberg to help it determine whether and to what extent the Bredenberg PRTF clashed with the other medical evidence of record. *See, e.g.*, Statement of Errors at 10.

(March 10, 1998 - low), 358 (January 13, 1998 - pleasant, appropriate), 361 (August 12, 1997 - low), 375 (May 14, 1997 - productive, anticipating with pleasure acquisition of word processor). When low, the plaintiff is not sociable or conversational and has a quick temper. *See, e.g., id.* at 357 (Tri-County progress note of March 10, 1998 - plaintiff quiet, with some blunting of affect noted); 137-38 (report from wife's daughter dated July 25, 1994 that "[w]hile he is down, you can't get a reply from him much less a conversation"; when down, has quick temper and negative attitude). The plaintiff's wife has contacted Tri-County with concerns about his behavior. *See, e.g., id.* at 373 (Tri-County progress notes of February 3 and 5, 1997). However, the plaintiff himself reported that he visits with friends or relatives once a week for an hour and talks, goes out socially with family or friends and has no problem getting along with family, friends, neighbors, store employees, etc. *Id.* at 135; *see also id.* at 292-94. The Tri-County progress notes, while observing that the plaintiff has a blunt affect when low, do not detail particular concerns about his interpersonal interactions. Psychology consultants found no significant impairment in the plaintiff's social functioning. *See, e.g., id.* at 99 (slight difficulties in maintaining social functioning noted in PRTF by S. Hoch, Ph.D., dated October 22, 1994), 189 (accord, PRTF by Peter G. Allen, Ph.D., dated October 20, 1995), 206 (accord, PRTF by David R. Houston, Ph.D., dated January 17, 1996), 274 (psychological evaluation by Kenneth M. Dendato, Ph.D., on October 12, 1994, noting that plaintiff "exhibits an adequate range of social skills necessary to respond appropriately to supervisors and co-workers, and he appears able to tolerate work pressures.").

4. That the plaintiff has significant problems with the concentration necessary for gainful work, and frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. *Id.* at 363, 369. The Appeals Council found that the plaintiff "seldom"

to “often” suffered from deficiencies of concentration, while the Bredenberg PRTF termed such deficiencies “frequent.” *Compare id.* at 348 *with id.* at 369. There is some evidence of record that the plaintiff suffered deficiencies of concentration attributable to his mental illness; however, it emanates from lay sources. *See, e.g., id.* at 62 (plaintiff testifies that when he is low his ability to focus and concentrate is not good at all); 113 (plaintiff reports that when he is depressed he does a lot less); 137 (plaintiff’s wife’s daughter describes him as “pretty much useless” during downtime from manic illness); *but see id.* at 286 (plaintiff reports that he does not get distracted easily). Medical assessments of record do not reveal a basis for finding a frequent deficiency of concentration. *See id.* at 99 (Hoch PRTF finding plaintiff seldom deficient in concentration), 189, (accord, Allen PRTF), 206 (accord, Houston PRTF), 273 (Dendato assessment, noting after plaintiff’s completion of memory tests that his “intellectual abilities appear intact and there are no obvious indications of any memory problems”).

5. That the plaintiff had repeated episodes of deterioration or decompensation in work or work-like settings. *Id.* at 369. The plaintiff struggles to identify portions of the record indicating that he may have had episodes of decompensation at work. Statement of Errors at 7. The cited materials indicate that while he was employed as a full-time accountant, the plaintiff suffered job-related stress and clashed with his boss, Record pp. 233-35, 240, 242, and that after losing his full-time job the plaintiff had difficulty finding work and was fired from several jobs, in one instance because he did not understand the mechanics of computers and in another because of low productivity, *id.* at 56-60, 249-50, 259, 262, 372. These do not bear out a claim of episodes of deterioration or decompensation at work.

6. That as a result of two episodes of serious Lithium toxicity, the plaintiff’s dose of

Lithium was decreased, with an adverse effect on his level of functioning. *Id.* at 363. There is no question that the plaintiff suffered Lithium toxicity in early 1996 as a result of which his dosage was adjusted. *See, e.g., id.* at 323. However, I find evidence only of transient impact on his functioning. At his hearing, the plaintiff mentioned that his dosage had been moderated but gave no testimony concerning any impact on his level of functioning. *Id.* at 66-67. In February 1997 the plaintiff exhibited strange behaviors linked to high Lithium levels in his blood; however, these levels were brought under control. *Id.* at 373-74. Some thought was given to further adjustment of his Lithium when he complained of depression on August 12, 1997. *Id.* at 361. However, at his next visit on August 28, 1997 the plaintiff reported that his mood had improved and the medications were working well. *Id.* at 360. His Lithium dosage was not changed, and he was assessed thereafter as stable on 900 mgs. per day. *Id.* at 357-60.

## **2. Statement of Error (ii): Flawed Use of Vocational Expert**

The plaintiff next contends that the administrative law judge erred in rejecting hypothetical questions posed to a vocational expert that incorporated the following limitations: inability to work more than two to two-and-a-quarter hours without needing rest (naps of between two to three hours a day), deficiencies in focus or concentration, occasional lapses or deficits in short-term memory and prolonged deficiencies in energy. Statement of Errors at 4-8; Record pp. 70-72.

The responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). “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.” *Id.* Absent any change flowing from a reevaluation by the commissioner of the Bredenberg opinion, the record substantially supports the commissioner’s use of the vocational expert’s testimony.

The plaintiff identifies portions of the record that he asserts support the proposition that he suffers from (i) problems with short-term memory, (ii) distractibility in the sense of problems with disorientation and memory and (iii) fatigue and low energy. Statement of Errors at 6. These cited materials support claims of the first two conditions but not of the third.

The plaintiff’s problems with short-term memory were diagnosed in February 1998 by Phuong-Mai Pham, M.D., as attributable to a B12 deficiency. Record p. 21. Dr. Pham described a plan to place the plaintiff on a regime of B12 shots, *id.*; however, there are no further progress notes to indicate whether the treatment was successful. Dr. Pham also traced a problem with disorientation to diabetes-related hypoglycemia. *Id.* She altered the plaintiff’s dosage of insulin and, as of the date of the most recent progress note of record, the problem appeared to have resolved. *Id.* Dr. Pham was unsure of the etiology of the plaintiff’s claimed fatigue, noting that it was possibly caused by a change in occupation (early-morning delivery of newspapers). *Id.* at 24, 26. The plaintiff points to lay evidence, *id.* at 139, 297, and Tri-County progress notes documenting his reports of tiredness, *id.* at 235, 239, 361. These fall short of evidencing a medical basis for the reported fatigue. Tri-County in August 1997 documented its intention to obtain lab work to determine whether the plaintiff’s tiredness had a physiological basis; however, lab work reported on March 10, 1998 was basically within normal limits, with slightly low hemoglobin and hematocrit. *Id.* at 361, 357.

On the record before him — and absent any change flowing from clarification of the

Bredenberg PRTF — the commissioner correctly disregarded asserted problems with disorientation and fatigue inasmuch as the disorientation problem appeared to have been successfully corrected and there was insufficient evidence of the etiology of the claimed fatigue. The commissioner should have taken into account the plaintiff’s short-term memory loss, which cannot be assumed to have been corrected. His failure to do so nonetheless was harmless. The vocational expert testified that deficiencies in focus or concentration and occasional lapses in short-term memory would have a more significant impact in the accounting business but that in the other jobs discussed, particularly the cashier-type positions, “it might not be that big a deal.” *Id.* at 71. “There just simply isn’t that much to concentrate on.” *Id.* Therefore, factoring in the short-term memory loss would not have undermined the determination that the plaintiff was capable of performing other work such as cashiering.

The commissioner accordingly did not, absent any change flowing from reexamination of the Bredenberg PRTF, commit reversible error with respect to use of a vocational expert.

### **3. Statement of Error (iv): Improper Dismissal of Later-Filed Applications**

The plaintiff clarified that his final statement of error, concerning denial of his 1997 reapplications for benefits, would need to be reached only if the court denied remand. Statement of Errors at 12-13. Inasmuch as I recommend remand, I do not reach this issue.

### **4. Conclusion**

Because the commissioner failed to follow SSR 96-5p in evaluating the PRTF supplied by Dr. Bredenberg, I recommend that the commissioner’s decision be **VACATED** and the cause

**REMANDED** for proceedings consistent herewith.<sup>5</sup>

**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 17th day of May, 1999.*

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

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<sup>5</sup> Although the plaintiff alternatively sought remand with instructions to award benefits and although this is a Step 5 case, I do not find such a grant appropriate. Absent any change that may result from reexamining the Bredenberg PRTF (and possibly none will), the commissioner's decision in this case was supported by substantial evidence of record. *Compare, e.g., Field v. Chater*, 920 F. Supp. 240, 244 (D. Me. 1995) (commissioner should not be afforded second bite at apple when she fails to meet her burden at Step 5).