

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

<b>ROY KEITH,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 98-342-P-H</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 Social Security Disability (“SSD”) appeal raises an issue concerning the obligation of the commissioner to develop the hearing record. I recommend that the court affirm the commissioner’s finding that the plaintiff is not eligible for benefits.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. § 404.1520; *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 requirements of the Social Security Act on August 18, 1995, the alleged date of onset of his disability, and continued to

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<sup>1</sup> This action is properly brought under 42 U.S.C. § 405(g). 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.

meet those requirements through September 30, 1995, but not thereafter, Findings 1 & 2, Record p. 20; that the plaintiff had not engaged in substantial gainful activity since August 18, 1995, Finding 1, Record p. 20; that the plaintiff suffered from alcohol abuse (in remission), chronic obstructive pulmonary disease and pulmonary tuberculosis, none of which, alone or in combination, fully met or equaled the criteria of any of the impairments listed in Appendix I to Subpart P, 20 C.F.R. § 404, Findings 3 & 4, Record p. 20; that as a result of his impairments the plaintiff was able to lift no more than 15 to 20 pounds at a time, to walk at a less than rapid pace and not uphill, to stand and walk for a total of only two to three hours per day and to stand continuously for only one-half hour at a time, and to balance and crouch only occasionally, while he could not climb, push or pull and would have to work in a well-ventilated area, free from fumes and dust, Finding 7, Record p. 21; that to the extent it was inconsistent with these limitations, the plaintiff's testimony was not fully credible and inconsistent with the objective medical data in the record, the statements of his treating physicians, and his own testimony concerning his daily living activities, Finding 8, Record p. 21; that he was unable to return to his past relevant work as a roofer, warehouse worker, and fishing laborer, Finding 9, Record p. 21; that given his age (47 at the onset of disability) and education (through eighth grade), and despite his lack of transferable skills, there existed in the national economy a significant number of jobs at the light or sedentary exertional level that the plaintiff could perform, including dispatcher, recreation attendant, and ticket seller, Findings 5, 6, 10 & 11, Record pp. 20-21; and that the plaintiff was therefore not under a disability as defined in the Social Security Act at any time prior to the date of the decision, Finding 12, Record p. 21. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final decision of the commissioner, 20 C.F.R. § 404.981; *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); *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 plaintiff contends that the commissioner erred at Step 5 of the sequential evaluation process when he failed to make further inquiry into the plaintiff's ability to spell. Plaintiff's Statement of Errors (Docket No. 3) at 1. At Step 5, the burden of proof to show the plaintiff's ability to perform other work in the national economy is on the commissioner. 20 C.F.R. § 404.1520(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, 116 (1st Cir. 1986).

At oral argument, the commissioner contended that the plaintiff had waived this issue by failing to present it to the Appeals Council. Failure to raise an issue before the Appeals Council ordinarily constitutes waiver of court review of that issue. *James v. Chater*, 96 F.3d 1341, 1343 (10th Cir. 1996); *Avol v. Secretary of Health & Human Servs.*, 883 F.2d 659, 661 (9th Cir. 1989). The plaintiff's attorney responded to this contention by pointing to the following sentence in his letter dated November 13, 1997 to the Appeals Council, referring to only one of the three jobs identified by the vocational expert as available to the plaintiff: "I would query whether the VE took

into account the Claimant’s limited educational skills and the particular demands of a dispatching job (is a computer required? how much writing?) . . . .” Record pp. 5, 7. I doubt that this sentence is adequate to inform the Appeals Council that the plaintiff contended, as he does here, that the administrative law judge was required to expand the record with respect to the plaintiff’s ability to spell, and the effect of the plaintiff’s claimed inability to do so on the jobs identified by the vocational expert. Even if this mention were sufficient to avoid waiver, however, the plaintiff’s claim fails on its merits.

The plaintiff presented no evidence to the administrative law judge concerning his ability to spell. He admits that the only mention of this issue occurs in his attorney’s following question to the vocational expert at the hearing before the administrative law judge:

In the case of Mr. Keith, where he finished — broke two collar bones and, technically, finished eighth grade and ever [sic] went back to school, in his situation, where he can’t spell, he can read and write, but can’t spell, would that be a . . . sticky point?

*Id.* at 48. This question was posed as to two of the three jobs that the vocational expert testified would be available for the plaintiff, ticket seller and dispatcher.<sup>2</sup> *Id.* The vocational expert testified that, for these jobs, “[s]pelling would be important,” and that “if spelling . . . is a restriction, those jobs would be . . . more difficult to do.” *Id.*

While the burden is on the commissioner at Step 5 of the evaluation process, the administrative law judge is entitled to rely on a claimant’s own statements of his functional

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<sup>2</sup> Counsel for the plaintiff stated at oral argument that the question need not have been presented concerning the third identified job, that of recreational facility attendant, because the residual functional capacity set forth by the administrative law judge — specifically, the plaintiff’s limitations on standing and walking — was inconsistent with that job. Given my conclusion with respect to the two jobs to which the question was addressed discussed below, it is not necessary for the court to reach any issue concerning the third job.

limitations. Thus, while an administrative law judge, “once alerted by the record to the presence of an issue,” must develop the record further on that point, *May v. Bowen*, 663 F. Supp. 388, 394 (D. Me. 1987), there must be evidence of record to raise the issue before this duty arises, *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5-6 (1st Cir. 1991). An attorney’s question is not evidence and cannot trigger the commissioner’s duty to develop a further record. Hearings before an administrative law judge on social security claims are admittedly informal proceedings, but witnesses are still sworn and documentary evidence submitted. *See generally Pitchard v. Schweiker*, 692 F.2d 198, 201 n.2 (1st Cir. 1982) (burden of presenting relevant evidence is on claimant). To elevate an attorney’s question to the level of sworn testimony or documentary evidence would create substantial problems for the administrative proceedings without concomitant benefits for claimants, whose attorneys need only present the evidence at issue through the testimony of the claimant, who is present at the hearing. *See Gray v. Heckler*, 760 F.2d 369, 372 (1st Cir. 1985).<sup>3</sup>

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

#### **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.***

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<sup>3</sup> While an unpublished opinion from another circuit may not serve as persuasive authority for this case, I note that the Tenth Circuit has held in an analogous situation that the administrative law judge need not rely on the response to a hypothetical question posed to the vocational expert by the claimant’s attorney when the claimant presented nothing to support the hypothetical question other than his own statements, which the administrative law judge found to be less than fully credible. *Gill v. Apfel*, 1999 WL 85094 (10th Cir. Feb. 22, 1999), at \*4.

*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 11th day of May, 1999.*

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