

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SCOTT GRIVOIS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 99-114-B
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the question whether the commissioner erred in concluding that the plaintiff, who claims to be afflicted by back, knee and vision problems as well as depression, had no severe impairment. 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, 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 back pain and

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 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 and case authority and page references to the administrative record.

depression, Finding 3, Record p. 22; that he did not have any impairment that significantly limited his ability to perform basic work-related functions and therefore did not suffer from a severe impairment, Finding 5, Record p. 22; and that he had not been under a disability at any time through the date his insured status expired or through the date of decision, Finding 6, Record p. 23. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination 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 administrative law judge in this case reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *McDonald*, 795 F.2d at 1124 (quoting Social Security Ruling 85-28).

The plaintiff asserts that the administrative law judge erred in concluding that he had no severe visual impairment. *See generally* Statement of Specific Errors (Docket No. 3).² I agree.

I. Analysis

The plaintiff focuses on two alleged flaws in the administrative law judge's decision: (i) that the decision was at odds with previous initial and reconsideration determinations in which the commissioner reached Step 5 of the sequential evaluation process, acknowledging that the plaintiff's conditions were severe, and (ii) that the decision ignored state agency physicians' findings of limitations on the plaintiff's vision. *Id.* at 2-3. The latter contention has merit.

The administrative law judge determined that the plaintiff's vision was normal (or, at least correctable), stating:

Dr. Bajpai tested Mr. Grivois's visual acuity. His right eye was 20/70 and his left eye 20/70. Both eyes were 20/50. Mr. Bajpai characterized the claimant's visual acuity as normal. (Exhibit 6F). At hearing, Mr. Grivois testified that he could not drive without his glasses, indicating that, with correction, he had sufficient visual acuity to allow him to drive an automobile.

Record p. 21.

The administrative law judge misstated Dr. Bajpai's findings; in fact, Dr. Bajpai characterized the plaintiff's vision as "abnormal." *Id.* at 170. The plaintiff did testify at hearing that he was restricted to driving with glasses, *id.* at 42, from which one could indeed draw a permissible inference that with correction he had sufficient visual acuity to drive an automobile. Nonetheless, as the plaintiff's counsel pointed out at oral argument, the fact that one can drive with glasses does not necessarily support the proposition that one's visual problems would have no more than a

²The plaintiff clarified at oral argument that his challenge was confined to his vision problems.

minimal impact on one's ability to work. A person might, for example, be able to drive with glasses but be unable — even with glasses — to perform fine handwork. The record is devoid of evidence concerning the results of the plaintiff's eye exam for his driver's license, the parameters of such exams or the level of visual acuity required to pass them. There thus is no basis for concluding that award of a driver's license translates into an absence of visual limitations on a person's ability to work.

Nor is there any other evidence supporting a finding that the plaintiff's vision problems were correctable to the point that they would have no more than a minimal impact on work. All of the medical evidence of record touching on the subject indicates that the plaintiff's vision was abnormal. *See id.* at 125 (report of James H. Hall, M.D., that plaintiff had limited near and far acuity); 133 (same finding by Lawrence P. Johnson, M.D.), 170 (report of Dr. Bajpai that vision "abnormal"). Dr. Bajpai, the examining physician, never noted whether he tested the plaintiff with or without corrective lenses or whether the plaintiff's vision was correctable. *See id.* at 168-70. Dr. Hall noted that he had given the plaintiff the "benefit of [the] doubt" inasmuch as with correction "his vision likely would improve." *Id.* at 129. In so saying, Dr. Hall essentially conceded that he lacked sufficient evidence to conclude that the plaintiff's vision would in fact improve with correction.³

In sum, the administrative law judge's finding that the plaintiff's visual problem was non-severe is not supported by substantial evidence of record. Remand accordingly is warranted.⁴

³In addition, the plaintiff testified at hearing that "my doctor said my eyes get to the point where glasses ain't going to help me no more. They're never going to get better and they can't make a strong enough prescription where I can see good." Record p. 42.

⁴I do not find the plaintiff's first statement of error — that the administrative law judge impermissibly ignored previous agency findings that his visual problems were severe — persuasive. (continued...)

II. Conclusion

For the foregoing reasons, 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 19th day of November, 1999.

*David M. Cohen
United States Magistrate Judge*

⁴(...continued)

An administrative law judge may consider a "new issue," including a prior decision in the claimant's favor, provided that the claimant is notified that the issue will be considered at the hearing. 20 C.F.R. §§ 404.946, 416.1446. The Notice of Hearing in this case advised that the administrative law judge would consider, among other things, "the severity of your impairment(s)." Record p. 69. The notice further warned: "If you object to the issues I have stated, you must tell me in writing why you object. You must do this as soon as possible before the hearing." *Id.* at 70. There is no indication that the plaintiff lodged any such objection. The administrative law judge therefore properly revisited the Step 2 issue whether the plaintiff's impairments were severe. *See, e.g., Chico v. Schweiker*, 710 F.2d 947, 955 n. 11 (2d Cir. 1983) ("Intermediate determinations of the disability examiner favorable to Chico were put in issue by the ALJ, by means of the notice of hearing, pursuant to 20 C.F.R. § 404.946.").