

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PETER L. TOLMAN,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 99-141-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 suffers from degenerative joint disease and degenerative disc disease of the lumbar spine with chronic low back pain, is capable of performing sedentary work. I recommend that the decision of the commissioner be vacated and the cause remanded with directions to award the plaintiff benefits.

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

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.

administrative law judge found, in relevant part, that the plaintiff's statements regarding his symptoms and limitations were not fully credible, Finding 3, Record p. 15; that he had severe impairments, degenerative joint disease and degenerative disc disease of the lumbar spine with chronic low back pain, but did not have an impairment or combination of impairments that met or equaled any of the criteria listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 4, Record p. 16; that he retained the residual functional capacity to perform sedentary work, Finding 5, Record p. 16; that he could not return to his past relevant work, Finding 6, Record p. 16; and that, given his age (39), education (high school equivalency) and vocational background, application of Rule 201.27 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") directed a conclusion that the plaintiff was not disabled, Findings 7-9, Record p. 16. The Appeals Council declined to review the decision, Record pp. 4-5, 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 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. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 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 administrative law judge erred in (i) improperly evaluating his assertions of pain, (ii) assessing his residual functional capacity and the severity of his condition without a medical advisor, (iii) relying on the Grid despite the presence of significant nonexertional impairments, and (iv) failing to develop the record properly. Statement of Errors (Docket No. 7) at 3-15. The plaintiff seeks a grant of benefits. *Id.* at 15-16. In this case, the Grid was sufficiently mismatched to the evidence of record that the commissioner erred in relying upon it to meet his Step 5 burden. Remand with instructions to award benefits therefore is warranted. *See, e.g., Field v. Chater*, 920 F. Supp. 240, 243 (D. Me. 1995) (“When the Commissioner had a full and fair opportunity to develop the record and meet her burden at Step 5, there is no reason for the court to remand for further factfinding.”).²

I. Analysis

Use of the Grid is appropriate when a rule accurately describes an individual's capabilities and vocational profile. *Heckler v. Campbell*, 461 U.S. 458, 462 & n.5 (1983). When a claimant's impairments involve only limitations related to the exertional requirements of work, the Grid provides a “streamlined” method by which the commissioner can meet his burden of showing there is other work a claimant can perform. *Heggarty v. Sullivan*, 947 F.2d 990, 995 (1st Cir. 1991). However, in cases in which the claimant suffers from nonexertional as well as exertional

²The plaintiff clarified at oral argument that he also challenges the administrative law judge's Step 3 finding that his condition failed to meet or equal Listing 1.05(C). I need not address this admittedly secondary contention.

impairments, the Grid may not accurately reflect the availability of other work he or she can do. *Id.* at 996; *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). Whether the commissioner may rely on the Grid in these circumstances depends on whether a nonexertional impairment “significantly affects [a] claimant's ability to perform the full range of jobs” at the appropriate exertional level. *Ortiz*, 890 F.2d at 524 (citation and internal quotation marks omitted). If a nonexertional impairment is significant, the commissioner generally may not rely on the Grid to meet his Step 5 burden but must rely on other means, typically a vocational expert. *Id.* Even in cases in which a nonexertional impairment is determined to be significant, however, the commissioner may yet rely exclusively upon the Grid if “a non-strength impairment . . . has the effect only of reducing that occupational base marginally.” *Id.* “[S]uch a shorthand approach is permissible, so long as the factual predicate . . . is amply supportable.” *Id.* at 526.

The plaintiff’s back began to bother him in December 1996. Record pp. 26-27. He filed for SSD and SSI benefits in February 1997. *Id.* at 63-65, 178-79. In what the record reveals to have been his first visit to a medical professional after the onset of his condition, the plaintiff was examined in May 1997 by Disability Determination Services consulting physician Charles Kriegel, D.O. *Id.* at 158-60. After examining the plaintiff and ordering and studying x-rays of his back, Dr. Kriegel diagnosed him as suffering from degenerative joint disease, degenerative disc disease, possible herniated disc and hematuria. *Id.* at 159; *see also id.* at 163-64 (x-ray findings). Dr. Kriegel further determined that the plaintiff’s complaints were “consistent with both the physical exam and the x-ray findings.” *Id.* at 160.³ He opined that the plaintiff “currently . . . would require a job that

³The plaintiff’s complaints, as recorded by Dr. Kriegel, were “chronic low back pain occurring since December of 1996 . . . at times stabbing and at other times throbbing. This area
(continued...) ”

would most likely avoid lifting, avoid repetitive bending and . . . allow frequent positional changes.”

Id. He concluded that the plaintiff would “require further work-up.” *Id.*

In June and August 1997 two non-examining medical consultants, Gary A. Weaver, M.D. and Charles E. Burden, M.D., prepared residual functional capacity (“RFC”) assessments that relied heavily upon the Kriegel report and associated x-ray findings. *Id.* at 142-57. Both consultants found the plaintiff capable, *inter alia*, of standing and/or walking with normal breaks for a total of about six hours in an eight-hour workday and sitting with normal breaks for a total of about six hours in an eight-hour workday. *Id.* at 143, 151. Both also noted certain restrictions, including the proscription by Dr. Kriegel against repetitive bending and lifting. *Id.* at 144, 148, 156. Neither expressly adopted Dr. Kriegel’s finding that the plaintiff required frequent positional changes, yet — inexplicably — both checked a box indicating that there were no “treating/examining source conclusions about the claimant’s limitations or restrictions which are significantly different from your findings.”⁴ *Id.* at 148, 156.

Subsequent to preparation of the two RFC reports the plaintiff sought additional medical treatment. On October 17, 1997 he was seen as a new patient by Searsport Family Practice, which referred him to a chiropractor, Cindy Danchak, D.C. *Id.* at 166. In an office note dated October 22,

³(...continued)

extends from the lower thoracic area to the lumbar area. Occasionally, the pain shoots down the legs. . . . His pain is better with rest and Ibuprofen. He requires frequent position changes.” *Id.* at 158.

⁴Dr. Weaver noted Dr. Kriegel’s finding that the plaintiff needed frequent positional changes but did not indicate his disagreement or agreement. *Id.* at 148. One can only conclude that both consultants either disagreed with or overlooked this particular Kriegel finding, inasmuch as neither checked the box on the RFC assessment form stating, “must periodically alternate sitting and standing to relieve pain or discomfort.” *Id.* at 143, 151.

1997 Dr. Danchak made findings that included a ten percent restriction of lumbar motion; moderate thoracic and lumbar muscle spasms with trigger points; pelvic unleveling, shoulder unleveling, subluxation and fixation. *Id.* at 175. She planned to treat the plaintiff with manipulation two times a week for four weeks with adjustment therapy and therapeutic exercises. *Id.* at 176. On November 5, 1997 the plaintiff returned to Searsport Family Practice, reporting that Dr. Danchak had “helped him some.” *Id.* at 166. The plaintiff visited Dr. Kriegel on December 8, 1997, complaining that despite “some improvement” from visits to the chiropractor “he’s still having a great deal of symptoms w/ low back pain and radiating leg pain down the lateral aspect of the legs.” *Id.* at 174. On examination Dr. Kriegel found straight-leg raising positive for back pain but no radiating symptoms. *Id.* Dr. Kriegel ordered an MRI of the plaintiff’s lumbar spine, which was performed in December 1997 and revealed a “small central to right paracentral disc herniation with associated high signal annular tear identified.” *Id.* at 167. “This minimally contacts (just, adjacent to) the right S1 nerve root. It does not cause displacement. Clinical significance is unclear. Recommend clinical correlation.” *Id.*

The administrative law judge in his decision did not mention the RFC reports of the non-examining consultants. *Id.* at 11-16. He recited Dr. Kriegel’s findings (including that concerning the need for positional changes) without comment, never discussing the extent to which he concurred with any of them. *Id.* at 14. He concluded that the plaintiff suffered from “significant, intermittent low back pain at levels of physical exertion greater than sedentary.” *Id.* at 13. This finding, in turn, apparently served as the springboard from which the administrative law judge could rely on the Grid, implicitly determining that the plaintiff’s impairments did not significantly erode the full range of sedentary work.

Critically, the administrative law judge’s central finding — that the plaintiff suffered back pain only at levels of physical exertion greater than sedentary — is unsupported by any evidence of record. The administrative law judge seems to have drawn this conclusion in part based on the plaintiff’s report to Dr. Kriegel that his condition was better with rest and Ibuprofen. *Id.* at 13. By “rest,” however, the plaintiff apparently did not mean sitting. He testified at hearing that he could only sit for up to an hour and that his back was most comfortable when he was either standing or lying down. *Id.* at 33.

Inasmuch as appears, the administrative law judge also relied heavily on selective quotation of the raw medical data generated by the plaintiff’s visits to Searsport Family Medicine, Dr. Danchak and Dr. Kriegel from October to December 1997. *Id.* at 14-15. None of this newer data was translated by either the treating medical professionals or any other medical advisor into an RFC assessment. Nor is it clear to a layperson that any of it would support a finding that at sedentary levels of exertion the plaintiff’s back pain would cease. *See Manso-Pizarro*, 76 F.3d at 17 (“With a few exceptions (not relevant here), an ALJ, as a lay person, is not qualified to interpret raw data in a medical record.”).

Equally troubling is the administrative law judge’s treatment of Dr. Kriegel’s finding that the plaintiff’s condition necessitated frequent positional changes. The administrative law judge fails even to cite the only evidence of record that arguably contradicts this limitation: the two RFC assessments by non-examining consultants. This error might be forgiven as harmless were it not that those RFC assessments themselves are internally inconsistent, with both consultants professing that the Kriegel findings did not differ significantly from their own. As the plaintiff points out — and as the commissioner conceded at oral argument — a need for frequent positional changes in a case

in which a claimant's vocational history reflects unskilled work undermines reliance on the Grid.⁵ Statement of Errors at 5-6; *see also* Social Security Ruling 83-12, reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 40 ("Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a VS should be consulted to clarify the implications for the occupational base."); *Scott v. Shalala*, 30 F.3d 33, 34 (5th Cir. 1994) (because claimant had to alternate between sitting and standing as needed, his capabilities did not fit within definition of sedentary work); *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293 (1st Cir. 1986) ("a determination that a claimant is able to perform sedentary work must be predicated upon a finding that the claimant can sit most of the day, with occasional interruptions of short duration.") (citations and internal quotation marks omitted).

At bottom, there was in this case no "amply supportable" factual predicate underpinning the "shorthand approach" of the Grid. *See Ortiz*, 890 F.2d at 526. The commissioner accordingly failed to meet his Step 5 burden. In such situations he is not afforded a second chance.

II. Conclusion

For the foregoing reasons, I recommend that the that the commissioner's decision be **VACATED** and the cause **REMANDED** with instructions to award the plaintiff benefits.

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,

⁵The administrative law judge relied upon a section of the Grid relating to claimants with unskilled, or no, previous work experience. Record p. 16; Rule 201.27 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404.

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*