

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM ALBRECHT,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 99-85-P-H</i>
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

The plaintiff in this Supplemental Security Income (“SSI”) appeal contends that the question posed to the vocational expert by the administrative law judge at Step 5 of the commissioner’s sequential evaluation process was fatally deficient. I recommend that the court affirm the commissioner’s decision.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. § 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 degenerative disc disease, low back

¹ This action is properly brought under 42 U.S.C. § 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, case authority and page references to the administrative record.

pain, the residuals of carpal tunnel release and depression, impairments that were severe but which did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 2, Record pp. 20-21; that his testimony concerning his impairments and their impact on his ability to work were not entirely credible in light of his description of his activities and lifestyle, the degree of medical treatment required, discrepancies between his assertions and information contained in the documentary reports, the reports of the treating and examining practitioners, and his medical history, Finding 3, Record p. 21; that he lacked the residual functional capacity to lift and carry more than 20 pounds or more than 10 pounds on a regular basis, or to stoop, crouch or kneel more than occasionally, or to perform constant, rapid and repetitive arm and hand motions, Finding 4, Record p. 21; that he was unable to perform his past relevant work as a painter, cook and roofer, Finding 5, Record p. 21; that his capacity for the full range of light work was diminished by his inability to stoop, crouch or kneel more than occasionally and to perform constant, rapid and repetitive arm and hand motions, Finding 6, Record p. 21; that given his age (47), education (high school), lack of transferable work skills, semi-skilled work experience and exertional capacity for light work, application of section 202.21 of Appendix 2, Table 2, to Subpart P, 20 C.F.R. § 404 (“the Grid”), along with 20 C.F.R. § 416.969, directed a conclusion that the plaintiff was not disabled, Findings 7-10[a], Record p. 21; that, although the plaintiff was unable to perform the full range of light work, when the Grid was used as a framework for decisionmaking he was capable of making the adjustment to work that exists in significant numbers in the national economy, specifically the jobs of security guard, receptionist and information clerk, Finding 10[b], Record p. 21; and that the plaintiff therefore was not under a disability as defined in the Social Security Act at any time through the date of the decision, Finding 11, Record p. 21. The Appeals Council

declined to review the decision, Record pp. 5-6, making it the final decision of the commissioner, 20 C.F.R. § 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. § 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 asked the vocational expert who testified at the plaintiff's hearing the following hypothetical question:

Be a person who has a light exertional capacity lifting the 10 lbs. regularly, 20 lbs occasionally; can stand and sit about six hours in an eight-hour work day with a stand/sit option, sit/stand option; and that stooping, kneeling and crawling, crouching occasionally; no constant rapid, repetitive use of hands[,] alternating use of hands; obviously no constant rapid, repetitive use of hands. Could such a person return to any of the past relevant work indicated here?

Record at 59. The plaintiff's attorney asked the vocational expert, "using the same hypothetical," to add the fact that the plaintiff would be unable to concentrate on the same task for "a two-hour period at a time" and whether any of the jobs the vocational expert had identified as ones which the plaintiff could perform under the terms of the administrative law judge's hypothetical question would be affected by vibrations of machinery. *Id.* at 67-68.

At oral argument, the plaintiff's attorney clarified the assertion in the plaintiff's statement of errors that the administrative law judge's hypothetical question was flawed because it failed to

refer to his depression. Itemized Statement of Errors Pursuant to Rule 16.3 Submitted by Plaintiff (Docket No. 5) at 5. Specifically, the plaintiff contends that the hypothetical question should have included slight difficulties in maintaining social functioning and seldom-occurring deficiencies of concentration, as found by one state-agency consulting examiner. Record at 238. He points to the vocational expert's answer when the question was modified to include inability to concentrate on the same task for two hours — that “that would create a problem.” *Id.* at 67. The vocational expert also testified that the jobs she had identified would not be available to the plaintiff if he “had deficiencies in concentration.” *Id.*

Here, the deficiency in the hypothetical question identified by the plaintiff was remedied by his attorney's modification of the question. Accordingly, the issue before the court is whether the evidence required the administrative law judge to ask the question in the modified form. If so, given the answer of the vocational expert, it would appear that the plaintiff is entitled to a remand for an award of benefits, the error having occurred at Step 5 of the evaluative process, where the burden of proof rests with the commissioner. *Field v. Chater*, 920 F. Supp. 240, 244-45 (D. Me. 1995).

There are several problems with the plaintiff's position, however. There is no support in the record for the purported inability to concentrate on the same task for two hours. The plaintiff's attorney admitted at oral argument that his use of a two-hour period in the question was arbitrary. The evidence of inability to concentrate is the plaintiff's own testimony, Record at 48 (“Q. You've talked a little bit about problems with concentration. . . . Is that something that you have had a problem with? A. Yes.”), and report, *id.* at 204 (“can't concentrate”), and the report of a friend, *id.* at 197 (“loses concentration at times”). This nonspecific evidence, uncorroborated by medical evidence, cannot support a claim that the vocational expert should have been asked about an inability

to concentrate on the same task for two hours and that her answer to such a question must be adopted. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (“[T]he inputs into [a] hypothetical [question] must correspond to conclusions that are supported by the outputs from the medical authorities.”). This evidence might support the more general question concerning inability to concentrate posed to the vocational expert by the plaintiff’s attorney² but that question itself is not supported by the medical evidence in the record. The only report of a psychological examination of the plaintiff in the record is that of Mary Alyce Burkhart, Ph.D., who saw the plaintiff on July 28, 1997 and reported that “[h]is concentration did not appear impaired,” *id.* at 309, and that “[h]e appeared capable of sustaining his concentration and persisting at tasks,” *id.* at 312. The limitation that the plaintiff contends was required to be included in the hypothetical question was in fact not supported by medical authority and therefore the administrative law judge did not err, either in omitting it from the hypothetical or in choosing not to rely on the response of the vocational expert to the question when it was modified to include such a limitation. *Berrios Lopez v. Secretary of Health & Human Servs.*, 951 F.2d 427, 429 (1st Cir. 1991) (administrative law judge entitled to credit vocational expert’s testimony “as long as there was substantial evidence in the record to support the description of claimant’s impairments given in the ALJ’s hypothetical to the vocational expert”).

In addition, the administrative law judge is not required to include in the hypothetical question to a vocational expert any functional limitations listed on a psychiatric review technique

² When the plaintiff’s attorney modified the hypothetical question to the vocational expert in this more general manner, the administrative law judge asked him to “quantify the deficiencies in concentration because just deficiency in concentration is too vague and ambiguous.” Record at 67.

form, whether that form has been completed by the administrative law judge or by a treating or consulting medical expert, as “slight” or as occurring “seldom.” *See Barton v. Apfel*, 187 F.3d 640 (table), 1999 WL 314127 (8th Cir. May 17, 1999), at **2.

Accordingly, 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.

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 22nd day of November, 1999.

*David M. Cohen
United States Magistrate Judge*