

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICKY MACDONALD,)	
)	
Plaintiff)	
)	
v.)	Docket No. 01-40-B
)	
LARRY G. MASSANARI,)	
Acting Commissioner of Social Security,¹)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION²

This Supplemental Security Income (“SSI”) appeal raises the issue whether substantial evidence supports the commissioner’s determination that the plaintiff, who suffers from borderline intellectual functioning, a depressive disorder, cervical degenerative disc disease, a lumbar spine disorder and a knee disorder, is capable of performing substantially the full range of light work. I recommend that the decision of the commissioner be affirmed.

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 had severe impairments – borderline intellectual

¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

² 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 August 9, 2001, 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.

functioning, a depressive disorder, cervical degenerative disc disease, a lumbar spine disorder and a knee disorder – but that those conditions did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 2, Record at 19; that the plaintiff retained the residual functional capacity (“RFC”) to perform light work within the limits of the mental RFC found by Disability Determination Services (“DDS”) (*i.e.*, moderate difficulty with complex tasks, ability to handle at least routine concentration and persistence duties, need to work alone rather than with the public and normal adaptation skills), Finding 3, *id.*; that based on his RFC the plaintiff could not return to his past relevant work, Finding 4, *id.* at 20; and that considering his age (“younger individual”), education (eighth grade) and vocational background, he was able to perform work existing in significant numbers in the national economy, Findings 5-7, *id.*³ The Appeals Council declined to review the decision, *id.* at 5-6, making it the final determination 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 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 reached Step 5 of the sequential 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. § 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

³ In the body of his opinion, the administrative law judge explains that he applied Rule 202.17 of Table 2, Appendix 2 to Subpart P, 20 (*continued on next page*)

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 complains that the administrative law judge (i) made an RFC finding (of capacity to perform limited light work) unsupported by substantial evidence and erred in determining that the full range of such work was not too eroded to permit use of the Grid, (ii) failed to obtain an examination, use a medical adviser or otherwise adequately develop the record, ultimately rendering a decision unsupported by substantial evidence, (iii) made credibility and pain determinations unsupported by substantial evidence,⁴ and (iv) failed to use a medical adviser to assist in determining, or otherwise adequately consider, whether the plaintiff met a Listing. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 6) at 2-19. On any of these bases the plaintiff seeks reversal and remand, *id.* at 1, 19, which the plaintiff's counsel clarified at oral argument would be for purposes of a new hearing. I find the plaintiff's assertions of error to be without merit and accordingly recommend that the decision of the commissioner be affirmed.

I. Discussion

A. RFC Finding; Use of Grid

The plaintiff at the outset challenges the RFC findings of the administrative law judge on the basis that "his physical RFC is severely compromised by his lack of ability to sit and stand for extended periods and his mental RFC is also compromised." *Id.* at 2. He underscores (i) the existence of well-documented, multiple physical and mental problems, *id.* at 3, (ii) his own testimony at hearing regarding his functional limitations, *id.* at 3-4, (iv) an RFC assessment by John Kazilionis, D.O, *id.* at 3, 6 n.2, and (iv) comments by A. J. Butler, Ed.D., a DDS consulting psychologist who

C.F.R. § 404 (the "Grid") to reach this conclusion. Record at 19.

⁴ The subheading of the plaintiff's third statement of error notes that, among other things, it concerns misinterpretation of the results of an MRI. *See* Statement of Errors at 12. In fact, no MRI report is discussed in that section. *See id.* at 12-18.

examined the plaintiff, *id.* at 4. However, as the plaintiff acknowledges, this is not the whole story told by the record, which also contains the reports of four non-examining DDS consultants. *See, e.g., id.* at 4-5; *see also* Record at 324-36 (Psychiatric Review Technique Form (“PRTF”), Mental RFC Assessment completed by Ake Akerberg, M.D.), 337-44 (Physical RFC Assessment completed by Peter L. Lodge, M.D.⁵), 345-52 (Physical RFC Assessment completed by Gary Weaver, M.D.), 353-65 (PRTF, Mental RFC Assessment completed by Peter G. Allen, Ph.D.).

Counsel for the plaintiff confirmed at oral argument that, with respect to physical RFC, the plaintiff does not dispute that the two DDS reports in issue support the findings of the administrative law judge. *See also* Statement of Errors at 4-6. He asserts instead that these reports cannot alone constitute substantial evidence. *Id.* In so arguing, he relies on *Rose v. Shalala*, 34 F.3d 13 (1st Cir. 1994), for the proposition that when (as here) a claimant alleges severe pain stemming from documented medical problems, “actual evaluation and assessment” of the degree of functional limitation, rather than speculation based on review of a cold record, is required. Statement of Errors at 5-6. He derives this principle from the following language in *Rose*: “Such an inquiry – into the functional implications of a claimant’s subjective symptoms – is the kind of inquiry for which on-the-spot examination and observation of claimant might ordinarily be thought important. The subjective severity of a claimant’s fatigue associated with CFS [chronic fatigue syndrome] is not something readily evaluated on an algid administrative record.” *Rose*, 34 F.3d at 19 (citation and internal quotation marks omitted).

The plaintiff reads this language far too broadly. Were his interpretation correct, the commissioner would be precluded from relying solely on the reports of non-examining physicians to establish RFC in any case in which pain was alleged. To the contrary, *Rose* stands for the basic

⁵ At oral argument counsel for the commissioner verified the identity of this medical consultant, whose name is illegible.

proposition that “the amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert.” *Id.* at 18 (citations and internal quotation marks omitted). “In some cases, written reports submitted by non-testifying, non-examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule.” *Id.* (citations omitted).

The “deciding factor” in *Rose* was “the nature of the illness.” *Id.* at 18-19 (citation and internal quotation marks omitted). There, the non-examining physicians wrongly “relied on what they discerned as a lack of objective findings sufficient to prove the existence of significant fatigue” despite the fact that the medical evidence established that Rose had CFS – a condition that reasonably could be expected to produce that symptom. *Id.* at 19. Here, unlike in *Rose*, the two physical RFC reports in issue acknowledge that the plaintiff’s symptoms are attributable to medically determinable impairments, with his back, knee and stomach complaints having been taken into consideration. Record at 338, 342, 344 (Lodge report), 346, 350, 352 (Weaver report).

In addition, *Rose* cites an earlier First Circuit case that leaves no doubt that a report of a non-examining physician can constitute substantial evidence despite a claimant’s subjective allegations of pain. *See Rose*, 34 F.3d at 19 (citing *Berrios Lopez v. Secretary of Health & Human Servs.*, 951 F.2d 427, 432 (1st Cir. 1991)); *Berrios Lopez*, 951 F.2d at 432 (“[T]he ALJ’s well-supported doubt about the intensity of claimant’s alleged pain is yet another factor making it reasonable for the Secretary to credit the exertional functional conclusions of non-examining physicians – including their implicit finding that claimant’s pain does not preclude an exertional level of light work – over the contrary findings of claimant’s treating physician.”). For reasons discussed below, the administrative law judge in this case supportably discounted the magnitude of subjective pain claimed by the plaintiff.

At oral argument the plaintiff's counsel voiced an additional complaint concerning physical RFC – that a restriction on ability to push/pull with lower extremities found by both Drs. Lodge and Weaver, *see* Record at 338, 346, precluded reliance on the Grid.⁶ I am not persuaded. The commissioner may continue to rely exclusively on the Grid if “a non-strength impairment . . . has the effect only of reducing [the relevant] occupational base marginally[.]” *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). Jobs are classified as “light” if they require “a good deal of walking or standing – the primary difference between sedentary and most light jobs.” Social Security Regulation 83-10, reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 29. “A job is also in this [light] category when it involves sitting most of the time but with some pushing and pulling of arm-hand or leg-foot controls[.]” *Id.* However, inasmuch as “[r]elatively few unskilled light jobs are performed in a seated position,” *id.*, a limitation in leg-foot push-pull ability cannot be said to reduce the occupational base for light work more than marginally.

Turning next to the issue of mental RFC, the plaintiff contends that:

1. The PRTF finding of both Drs. Akerberg and Allen that the plaintiff “often” had “deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere),” *see* Record at 331, 360, in itself precluded reliance on the Grid, Statement of Errors at 7-8.

2. The failure of the administrative law judge to complete a PRTF in itself warrants remand. Statement of Errors at 6 n.3, 8 & n.5.

3. Despite examining identical evidence, Drs. Akerberg and Allen arrived at significantly different conclusions on the extent to which the plaintiff's mental impairments affected his functioning,

⁶ The administrative law judge implicitly adopted the Lodge and Weaver physical RFC findings. *See* Record at 18 (“[T]he undersigned agrees with the opinions of the DDS reconsideration assessment and finds that Mr. MacDonald retains the physical residual functional capacity to perform ‘light work as described above[.]’”); *see also id.* at 16-17 (summarizing Lodge and Weaver physical RFC (*continued on next page*))

with Dr. Akerberg recording findings that in the plaintiff's view undermine reliance on the Grid. *Id.* at 7. According to the plaintiff, these differences underscore the "speculative" nature of non-examining consultants' reports and should have precluded the administrative law judge from validly choosing between them, necessitating further examination or use of a vocational expert instead of the Grid. *Id.* at 7-8.

For the following reasons, none of these points is persuasive:

1. As the plaintiff suggests, *id.* at 6, determination whether a claimant possesses the mental capacity to perform unskilled work entails two components: "(1) whether a claimant can perform close to the full range of unskilled work, and (2) whether he can conform to the demands of a work setting, regardless of the skill level involved," *Ortiz*, 890 F.2d at 526. "As to the former, the Secretary has outlined the mental capabilities required for unskilled work as follows: 'The basic demands of competitive remunerative unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting.'" *Id.* (quoting Social Security Ruling 85-15, since reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 347). "The related inquiry, rather than involving skill level, concerns a claimant's ability to accommodate the demands of a work setting per se. The Secretary has indicated that the mentally impaired 'may cease to function effectively when facing such demands as getting to work regularly . . . and remaining in the workplace for a full day[.]'" *Id.* at 527 (quoting SSR 85-15, at 349).

The plaintiff pins his hopes on one finding by Drs. Akerberg and Allen on the PRTF. However, that form is employed at Steps 2 and 3 of the sequential-evaluation process to assess

findings).

whether a mental condition is severe and, if so, whether it meets or equals the Listings. *See, e.g.*, Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (Supp. 2001), at 147 (“The psychiatric review technique . . . summarized on the [PRTF] requires adjudicators to assess an individual’s limitations and restrictions from a mental impairment(s) in categories identified in the ‘paragraph B’ and ‘paragraph C’ criteria of the adult mental disorders listings. The adjudicator must remember that the limitations identified in the ‘paragraph B’ and ‘paragraph C’ criteria [of a PRTF] are not an RFC assessment but are used to rate the severity of mental impairment(s) at steps 2 and 3 of the sequential evaluation process. The mental RFC assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment[.]”); *see also* 20 C.F.R. § 416.920a(c)(3). A separate mental RFC form (also completed by both Drs. Akerberg and Allen) is used at Steps 4 and 5 to assess in significantly greater detail the extent to which a mental impairment affects RFC. *See, e.g., id.*

In any event, as counsel for the plaintiff acknowledged at oral argument, the layout of the PRTF suggests that a finding that a person “often” has persistence and pace difficulties equates with a “moderate” degree of limitation, whereas a finding of “frequent” equates with “marked” and “constant” equates with “extreme.” *See also, e.g.*, Record at 331. Indeed, consistent with this observation, on the separate mental RFC form both Drs. Akerberg and Allen found the plaintiff either “not significantly limited” or “moderately limited” in all RFC categories relevant both to the skill and conformity demands of unskilled work, including ability to understand, remember and carry out very short and simple instructions; maintain attention and concentration for extended periods; perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; sustain ordinary routine without special supervision; accept instructions and respond appropriately to

criticism from supervisors; get along with coworkers or peers; and respond appropriately to changes in the work setting. *Id.* at 333-34, 362-63.⁷

With respect to the category “Sustained Concentration and Persistence,” Dr. Akerberg commented: “His sustained concentration and persistence are hampered by anxiety and a sad mood but as far as his mental condition is concerned he is able to function adequately in a work setting. (He terminated his work because of physical problems with a knee, his back and stomach!), *id.* at 335, while Dr. Allen noted: “can handle at least routine . . . and function within his physical limits,” *id.* at 364.

The First Circuit has upheld use of the Grid in a similar situation, finding that even “moderate” restrictions in mental RFC categories did not significantly compromise a claimant’s capacity for the full range of unskilled work. *Ortiz*, 890 F.2d at 527-28; *also compare, e.g., SSR 85-15* at 347 (a “substantial loss” of the ability to meet any of the basic work-related mental activities for unskilled work would “severely limit the potential occupational base”).

2. The administrative law judge did complete a PRTF, although he checked boxes marked “insufficient evidence” as to all four categories of functional limitation. *See id.* at 21-23. Even assuming *arguendo* that the findings of “insufficient evidence” are unsupported by substantial evidence or otherwise represent a failure to complete the form, the error is harmless inasmuch as (i) this portion of the PRTF addresses the question whether a claimant’s mental impairment meets or equals a Listing, (ii) the plaintiff does not claim that his mental impairments meet or equal a Listing, *see generally* Statement of Errors, and (iii) with respect to mental RFC, the administrative law judge had the benefit of the Akerberg and Allen mental RFC assessments and adopted the findings of Dr. Allen, *compare* Record at 18 *with id.* at 364.

⁷ Both Drs. Akerberg and Allen found greater than moderate limitation only in the following mental RFC categories: (i) ability to (*continued on next page*)

3. The fact that Drs. Allen and Akerberg arrived at different conclusions based on the same medical evidence does not mean that their opinions were either “speculative” or that the administrative law judge had no basis for choosing between them. Indeed, it is the task of the administrative law judge to resolve precisely these kinds of conflicts in evidence. *See, e.g., Rodriguez*, 647 F.2d at 222 (“The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.”). Moreover, for the reasons discussed above, even had the administrative law judge chosen to credit the Akerberg rather than the Allen RFC findings, this still would not have precluded reliance on the Grid.

B. Development of Record

The plaintiff next argues that the record in this case should have been developed further, particularly inasmuch as the administrative law judge:

1. Erroneously relied on the DDS physical RFC reports in determining that the plaintiff was capable of sitting or standing for six hours out of an eight-hour workday, despite the presence of a 1996 MRI study reflecting disc herniation at L5/S-1 and records showing that the plaintiff had undergone knee surgery and therapy without improvement. *Statement of Errors* at 9.

2. Misconstrued the plaintiff’s testimony regarding odd jobs he had done and the cessation of his medications, paving the way for an erroneous credibility finding. *Id.* at 9-10.

As the First Circuit has explained:

In most instances, where appellant himself fails to establish a sufficient claim of disability, the Secretary need proceed no further. Due to the non-adversarial nature of disability determination proceedings, however, the Secretary has recognized that she has certain responsibilities with regard to the development of evidence and we believe this responsibility increases in cases where the appellant is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence

understand and remember detailed instructions and (ii) ability to carry out detailed instructions. *Record* at 333-34, 362-63.

necessary to a reasoned evaluation of the claim, and where it is within the power of the administrative law judge, without undue effort, to see that the gaps are somewhat filled ? as by ordering easily obtained further or more complete reports or requesting further assistance from a social worker or psychiatrist or key witness.

Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991) (citation and internal quotation marks omitted).

While a record (including this one) always could be better developed, I conclude that this record was adequately developed as a matter of law. First and foremost, the plaintiff at all relevant times was represented by counsel, removing this case from the ambit of those in which the commissioner can be said to have a heightened duty of record development. Second, the MRI and knee-treatment records cited by the plaintiff do not raise serious questions about the DDS findings. The MRI report does not on its face definitively diagnose recurrent disc herniation; rather, it indicates that the abnormality in question more likely is a “focal epidural fibrosis.” Record at 307. In any event, there is no reason to believe the report, which was made in May 1996, *id.*, was not taken into account by the DDS consultants. The plaintiff did indeed undergo physical therapy commencing in May 1990 following surgery on his left knee (a tibial osteotomy), *see id.* at 157, and did have additional surgery on his left leg in December 1990 (an anterior fascial release) when his pain persisted, *see id.* at 148, 159. As of October 1, 1993 one of his treating physicians commented: “His knee is unchanged and as best I can tell he complains of an intermittent recurvatum and back knee sensation that is painful. I have suggested to Ricky that he is focusing too much on a magic solution to his knee problem and that he needs at this point to except [sic] some degree of knee symptoms.” *Id.* at 162 (note of William M. Strassberg, M.D.). Nonetheless, the plaintiff’s knee condition was factored into both DDS physical RFC findings, with Dr. Weaver noting complaints of continued pain. *See id.* at 338-39, 341 (5/13/98 report), 346-47, 349 (Weaver report).

Third and finally, the administrative law judge's credibility findings are sufficiently supported to be entitled to deference. *See Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) ("The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings."). With respect to credibility, the administrative law judge noted:

[The plaintiff's] daily activities while imprisoned, ability to work on his mother's sheep farm, ability to perform heavy lifting as a carpenter's assistant, lack of current medical treatment or current medications for his asserted pain, all indicate that the severity of pain and discomfort is not so great in actuality as he alleges. Statements from others to Social Security, a note written to Social Security, his statements of daily activities to clinicians indicate that he is not limited greatly in his mental abilities.

Record at 18.

The plaintiff complains that these findings are unwarranted inasmuch as (i) he testified that he stopped taking Percocet only upon being imprisoned and only because "I had a prescription but they [the jail authorities] wouldn't give it to me here," Statement of Errors at 10; Record at 38, 50; (ii) he testified with regard to odd jobs performed on his mother's sheep farm that all he did was to "help clean up around the barns and stuff," Statement of Errors at 10; Record at 48; (iii) his duties at the correctional center were minimal and did not approximate full-time work, Statement of Errors at 10; Record at 46-47; and (iv) there was no evidence that he did heavy work as a carpenter's helper for other than a brief period in July 1998, at which point he had ruptured another disc and needed to be excused from work, Statement of Errors at 10; Record at 275-78.

Nonetheless, it is uncontroverted that while jailed the plaintiff was not taking Percocet, Record at 38, and was managing to perform an assigned task monitoring gauges, sweeping and cleaning in the boiler room for three hours a day, *id.* at 46-47. The administrative law judge reasonably could find that these facts called into doubt the plaintiff's testimony that he could not "stand for a length of time"

– only forty-five minutes at a time in one place – and could only walk “probably for an hour” before needing to stop, rest and sit down. *Id.* at 32. Regarding heavy construction work, the EMMC Family Practice Center notes cited by the plaintiff merely state in relevant part: “Pt came to FPC. He needs a note from Dr Hintermeister to excuse him from work. He feels he[']s herniated another disc. Saw Dr Turner for last surgery and wants another referral to him,” *id.* at 277 (note of July 13, 1998), and “presents with worsening symptoms. [C]an’t sleep at night. [P]ercocet helps him rest. . . . [W]orks with carpenter lifting heavy objects, wants note for missing work last 3-4 days,” *id.* at 275 (note of July 18, 1998). These notes establish neither that the construction work was of short duration nor that the plaintiff in fact herniated another disc. The administrative law judge reasonably viewed the reported heavy construction work as cutting against the plaintiff’s subjective complaints of severe limitation.⁸

In short, this was not a case in which “there [were] gaps in the evidence necessary to a reasoned evaluation of the claim.”⁹

C. Credibility and Pain Determinations

In his third statement of error, the plaintiff reiterates his contention that the credibility findings of the administrative law judge are not entitled to deference and asserts that the administrative law judge failed to evaluate his subjective complaints of pain in accordance with *Avery v. Secretary of Health and Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986). Statement of Errors at 12-18. The first claimed error is without merit for the reasons discussed above.

⁸ The plaintiff also indicated to treating physicians on other occasions that he had obtained work or was working. *See, e.g.*, Record at 292 (December 8, 1997 note of Clay M. Triplehorn, D.O., stating that plaintiff had started job for snow-machine trailer company), 310 (May 3, 1996 note of Dr. Triplehorn stating that plaintiff given a work excuse at his request).

⁹ The plaintiff argues that this case is similar to *Hawkins v. Chater*, 113 F.3d 1162 (10th Cir. 1997), in which the Court of Appeals for the Tenth Circuit remanded for further development of the record. *See* Statement of Errors at 11. It is not. In *Hawkins* the administrative law judge had concluded at Step 2, based solely on a misreading of the bare medical records, that the plaintiff’s hypertension and chest-pain conditions were non-severe. *Hawkins*, 113 F.3d at 1169-70.

Turning to the second claimed error, *Avery* instructs that an adjudicator “be aware that symptoms, such as pain, can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder.” *Avery*, 797 F.2d at 23 (citation and internal quotation marks omitted). “Thus, before a complete evaluation of this individual’s RFC can be made, a full description of the individual’s prior work record, daily activities and any additional statements from the claimant, his or her treating physician or other third party relative to the alleged pain must be considered.” *Id.* (citation and internal quotation marks omitted).

Social Security Ruling 96-7p, promulgated subsequent to *Avery*, describes evidence relevant to evaluation of pain and other claimed symptomology as including:

1. The individual’s daily activities;
2. The location, duration, frequency, and intensity of the individual’s pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;
4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
7. Any other factors concerning the individual’s functional limitations and restrictions due to pain or other symptoms.

Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991 (Supp. 2001)*, at 135. After obtaining such information the administrative law judge must make a credibility finding regarding the claimed pain or other symptomology. *See, e.g., id.* at 137 (“The determination or decision must contain specific reasons for the finding on credibility, supported by the

evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight."). On review, the supportability of this determination is assessed on the basis described above – *i.e.*, "entitled to deference, especially when supported by specific findings." *Frustaglia*, 829 F.2d at 195.

The plaintiff identifies two asserted *Avery* errors: (i) that the administrative law judge failed even to mention the need to consider the *Avery* factors and that (ii) his credibility findings concerning pain do not amount to a "fair criticism" in light of the overall medical records, which reveal extensive treatment and consistent complaints of pain to treating physicians. Statement of Errors at 17-18. The first claimed error is itself erroneous. The administrative law judge both outlined the *Avery* factors and discussed why he concluded, based on analysis of several of those factors, that the plaintiff's claims of disabling pain were not entirely credible. *See* Record at 17-18.¹⁰ The second claimed error, which again restates the theme of improper credibility determination, is unpersuasive for the reasons discussed above.

D. Consideration of Listings

In his final statement of error, the plaintiff claims that the administrative law judge failed to give adequate consideration to whether his spine impairments met or equaled Listing 1.05(C), asserting that "[w]hen there is significant evidence showing that an impairment is at least arguably close to a listing the ALJ must discuss the evidence on whether a listing is met or equaled and explain the underlying reasoning." Statement of Errors at 18.

Listing 1.05(C) states in its entirety:

¹⁰ In addition, in response to questions posed either by the administrative law judge or by his attorney, the plaintiff gave hearing testimony touching on the *Avery* factors, including his activities of daily living, his use of medications or other pain-relief measures and the nature of the pain and functional restriction he claimed. *See generally* Record at 30-51.

Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

The administrative law judge's Step 3 analysis is indeed conclusory. *See* Record at 18 (“At Step 3 of the sequential evaluation process, [the plaintiff] has no impairment which meets or is equivalent in severity to an impairment listed in Appendix 1 of the regulations.”). However, the medical evidence identified by the plaintiff's counsel at oral argument falls considerably short of meeting the plaintiff's own premise that “there is significant evidence showing that an impairment is at least arguably close to a listing.” At oral argument the plaintiff's counsel pinpointed (i) a July 13, 1998 office note of Brian P. Fitzpatrick, M.D., *id.* at 275-76, (ii) the May 1996 MRI report, *id.* at 307, and (iii) April 1996 and June 1996 notes of Dr. Triplehorn, for which he provided no page numbers but which appear to be located at *id.* at 305-06, 312-14.

The plaintiff did consult Dr. Fitzpatrick on July 13, 1998 “with a chief complaint of back pain, numbness in legs of 2 months duration,” *id.* at 276, but on musculoskeletal examination Dr. Fitzpatrick found normal range of motion, muscle strength and tone, *id.* at 275. The May 1996 MRI interpretation did not definitively diagnose a herniated disc. *See id.* at 307. On April 25, 1996 Dr. Triplehorn assessed the plaintiff as having “[p]ersisting chronic lower back pain with radiation down the right leg with apparent decreased sensation to sharp stimuli in the lateral aspect of the right foot since L5-S1 discectomy October 1995 by Dr. Turner.” *Id.* at 313. But he detected no muscular weakness and noted that the plaintiff reportedly had “done well” at physical therapy – to the point where, per his physical therapists, he might be ready for a work-conditioning program. *Id.* The June 1996 office note is uninformative, merely stating that Dr. Triplehorn awaited the results of an MRI. *Id.* at 305-06.

In these reports, I glean no definitive evidence of disc herniation or of the types of extreme restrictions – e.g., “significant limitation of motion in the spine” and “significant motor loss with muscle weakness” – required by Listing 1.05(C).

Nor did the plaintiff focus the attention of the administrative law judge at hearing on a Step 3 claim; to the contrary, counsel for the plaintiff underscored the issue of RFC, *see* Record at 28-29, which is relevant only if a claimant’s condition does not meet or equal a Listing. Under such circumstances the administrative law judge ordinarily is not faulted for failing to develop the record further. *See, e.g., Hawkins*, 113 F.3d at 1167 (when a claimant is represented by counsel an administrative law judge “should ordinarily be entitled to rely on the claimant’s counsel to structure and present claimant’s case in a way that the claimant’s claims are adequately explored”); *compare, e.g., Diaz v. Secretary of Health & Human Servs.*, 746 F.2d 921, 924 (1st Cir. 1984) (“[E]ven though claimant specifically argued to both the ALJ and the Appeals Council that he met listing 111.09, the Secretary’s opinion contains no mention of that listing or findings with respect to it. This absence renders the decision inadequate to permit effective judicial review.”).¹¹

II. Conclusion

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

NOTICE

¹¹ Moreover, two of the three cases on which the plaintiff relies are distinguishable from the instant case in that the plaintiffs there had put considerably more evidence on the table that they did in fact meet or equal a Listing. In *Groves v. Apfel*, 148 F.3d 809, 811 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit held the Step 3 finding of the administrative law judge that the plaintiff did not meet Listing 1.05(C) “analytically inadequate – in a word, unreasoned” in view of his utter failure to discuss competing evidence by a treating physician implying that the plaintiff did meet the Listing. In *Olson v. Apfel*, 17 F. Supp.2d 783, 787-88 (N.D. Ill. 1998), the District Court for the Northern District of Illinois held *inter alia* that the poorly explicated Step 3 decision of the administrative law judge was not supported by substantial evidence, but did so against the backdrop “that the evidence in support of a finding that Plaintiff is disabled is more than substantial. It is overwhelming[.]” *id.* at 792. The third case, *Clifton v. Chater*, 79 F.3d 1007 (10th Cir. 1996), could be construed to stand for the proposition that an inadequate Step 3 discussion, without more, merits remand for further proceedings. However, I find no First Circuit case indicating that poor explication on the part of an administrative law judge constitutes *per se* reversible error in the realm of Social Security adjudications.

v.

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