

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**TIMOTHY GALLANT,** )  
 )  
 **Plaintiff** )  
 )  
 v. )  
 )  
 **LARRY G. MASSANARI,<sup>1</sup>** )  
 **Acting Commissioner of Social Security,** )  
 )  
 **Defendant** )

**Docket No. 00-377-P-H**

**REPORT AND RECOMMENDED DECISION<sup>2</sup>**

This Supplemental Security Income (“SSI”) and Social Security Disability (“SSD”) case returns to this court following a remand in 1999 based on a conclusion that the administrative law judge, who found that the plaintiff was capable of performing his past relevant work, failed to specify her reasons for rejecting certain limitations imposed by the plaintiff’s treating physician and to consider certain aspects of the plaintiff’s past relevant work. The commissioner upon readjudication concluded that the plaintiff was not disabled because he was capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the commissioner’s decision be vacated and the cause remanded for payment of benefits.

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<sup>1</sup> 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.

<sup>2</sup> This 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 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.

Following remand in 1999, a supplemental hearing was held at which the claimant, an independent medical expert, Donald Magioncalda, M.D., and a vocational expert, Ronald Paquin, testified. Record at 363, 396, 399. 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 that the plaintiff met the disability insured status requirements of the Social Security Act on November 6, 1992, the date on which the plaintiff stated that he became unable to work, and had acquired sufficient quarters of coverage to remain insured through December 31, 1997, Finding 1, Record at 360; that he had not engaged in substantial gainful activity since November 6, 1992, Finding 2, *id.*; that the plaintiff had a medically determinable low back injury with chronic pain, an impairment that was severe but did not meet or equal the criteria of any of the impairments listed in Appendix I to Subpart P, 20 C.F.R. § 404, Finding 3, *id.*; that the plaintiff's statements concerning his impairment and its impact on his ability to work were not entirely credible, Finding 4, *id.*; that the plaintiff could sit for eight hours but needed to stretch every hour, could stand for two hours in an eight-hour work day and one hour continuously, could walk for two hours in a work day and one hour continuously, could occasionally lift up to 20 pounds but no weight frequently, should not engage in pushing and pulling or use his feet for repetitive motions, should not squat, crawl, climb, stoop, crouch or kneel and could occasionally reach over his head, Finding 5, *id.*; that he was unable to perform his past relevant work, Finding 6, *id.*; that given his age (39 for purposes of this case), education (high school), work experience and capacity for sedentary work, application of 20 C.F.R. §§ 404.1569 and 416.969 and Rules 201.28 and 201.21 of Table 1 to Appendix 2 to Subpart P, 20 C.F.R. § 404 ("the Grid") would direct a conclusion that the plaintiff was not disabled, Findings 7-9, *id.* at 360-61; that, because the plaintiff was unable to perform the full range of sedentary work, the Grid was used as a framework to determine that the plaintiff was capable

of making an adjustment to work that exists in significant numbers in the national economy, specifically including employment as a parking lot attendant, toll collector and some sedentary cashier jobs, Finding 10, *id.* at 361; and that the plaintiff therefore had not been under a disability at any time through the date of the decision, Finding 11, *id.* The Appeals Council declined to review the decision, *id.* at 345-46, 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).

### **Discussion**

The commissioner in this case reached Step 5 of the sequential evaluation process, at which he bears the burden of showing that there is work available in the national economy that the plaintiff is capable of performing. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). In this case, the administrative law judge found that the plaintiff had a residual functional capacity for sedentary work, with additional limitations, and that he could make an adjustment to work as a parking lot attendant, toll collector and a sedentary cashier. The plaintiff contends that two of these jobs are not sedentary-level jobs and that the third requires transferable skills, a point on which the administrative law judge made no findings. Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff (Docket No. 3) at 3-5.

Sedentary work is defined at 20 C.F.R. §§ 404.1567(a) and 416.967(a). Both regulations provide that this term has the same meaning as it has in the *Dictionary of Occupational Titles* (“DOT”) published by the Department of Labor. The vocational expert did not provide the DOT numbers for the jobs that he identified at the hearing as being available for the plaintiff, but agreed to provide them after the hearing. Record at 406-07. The plaintiff’s counsel represented at oral argument – and counsel for the commissioner did not dispute – that the vocational expert provided DOT numbers for two of the jobs in question, parking lot attendant and toll collector. *See also id.* at 481.

The jobs of parking lot attendant, DOT number 915.473-010, and toll collector, DOT number 211.462-038, are classified by the DOT at the light exertional level, a step above the sedentary level. *Dictionary of Occupational Titles* (U.S. Dep’t of Labor, 4th ed. Rev. 1991) §§ 211.462-038 & 915.473-010; Record at 484-85. There is at least a rebuttable presumption in favor of the DOT classifications. *Porch v. Chater*, 115 F.3d 567, 572 (8th Cir. 1997); *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995); *Westberry v. Chater*, Docket No. 95-211-P-C, Report and Recommended Decision dated March 21, 1996, at 6-8 (affirmed May 6, 1996); *see also Tom v. Heckler*, 779 F.2d 1250, 1255-56 (7th Cir. 1985) (holding that DOT classifications control outright); *Mimms v. Heckler*, 750 F.2d 180, 186 (2d Cir. 1984) (same). Even assuming that the law in this circuit would permit the commissioner to present evidence refuting the presumption in favor of the DOT classifications, there is no such evidence in the present record. The vocational expert was not asked to testify about any particular circumstances in the plaintiff’s condition that would make these positions suitable despite their classification at a higher-than-sedentary level and the administrative law judge made no attempt in his decision to provide such an explanation. Indeed, the vocational expert testified erroneously that these two positions were classified at the sedentary level. Record at 404.

At oral argument, counsel for the commissioner pointed out that a recently promulgated Social Security Ruling, 00-4p, clarifies that the DOT does not automatically trump the testimony of a vocational expert. This ruling provides in relevant part:

Occupational evidence provided by a VE [vocational expert] or VS [vocational specialist] generally should be consistent with the occupational information supplied by the DOT. When there is an apparent unresolved conflict between VE or VS evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about whether the claimant is disabled. At the hearings level, as part of the adjudicator's duty to fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such consistency.

Neither the DOT nor the VE or VS evidence automatically "trumps" when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony rather than on the DOT information.

Social Security Ruling, SSR 00-4p.; Titles II and XVI: Use of Vocational Expert and Vocational Specialist Evidence, and Other Reliable Occupational Information in Disability Decisions, 65 Fed. Reg. 75,759, 75,760 (Dec. 4, 2000). I agree with counsel for the plaintiff that, even were this ruling applicable in this case – which I find it is not – it would not be inconsistent with the approach taken here.<sup>3</sup>

Counsel for the commissioner also contended at oral argument that the vocational expert derived the jobs in issue from his own database, not from the DOT. While there is some support in the record for this proposition, *see* Record at 406, the vocational expert clearly indicated that he could

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<sup>3</sup> In promulgating SSR 00-4p the commissioner provided: "This Ruling is effective on the date of its publication in the Federal Register [December 4, 2000]. The clarified standard stated in this ruling with respect to inquiring about possible conflicts applies on the effective date of the ruling to all claims for disability benefits in which a hearing before an ALJ has not yet been held, or that is pending a hearing before an ALJ on remand. The clarified standard on resolving identified conflicts applies to all claims for disability or blindness benefits on the effective date of the ruling." 65 Fed. Reg. at 75,761. The plaintiff's hearing on remand was held on January 27, 2000, Record at 362, and the decision of the administrative law judge issued on June 28, 2000, *id.* at 361, well prior to the effective date of the new ruling.

correlate the jobs described with DOT numbers, *see id.* at 406-07, and thus there is no reason to believe the DOT numbers do not capture the essence of the jobs about which he testified.<sup>4</sup>

As to the third job in issue, the DOT classifies the position of cashier I as sedentary, DOT § 211.362-010, and it is likely that this is the type of cashier position to which the vocational expert referred when he identified work as a cashier as the third type of work available for the plaintiff. *Id.* at 404-07.<sup>5</sup> However, as the plaintiff points out, the DOT also advises that the job of cashier I requires specific vocational preparation for a period of between six months and one year.<sup>6</sup> Such a job cannot be classified as unskilled work, which is defined, *inter alia*, as a job that can be learned in 30 days with little specific vocational preparation. 20 C.F.R. §§ 404.1568(a) & 416.968(a). While the administrative law judge found that the plaintiff had semi-skilled work experience, Record at 359, a determination that he is able to perform a new semi-skilled position as a cashier depends on the extent to which the skills he had previously acquired are transferable to the new position. *See* 20 C.F.R. §§ 404.1568(d)(1) & 416.968(d)(1) (noting that such a determination “depends largely on the similarity of occupationally significant work activities among different jobs”); Social Security Ruling 82-41, *reprinted in West’s Social Security Reporting Service*, Rulings 1975-82 at 849-50 (“[T]he content of work activities in some semiskilled jobs may be little more than unskilled” and, “[t]herefore, close attention must be paid to the actual complexities of the job in dealing with data, people, or objects and to the judgments required to do the work.”). The administrative law judge’s opinion does not include any discussion of the question whether the semi-skilled work experience

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<sup>4</sup> Nor am I persuaded by an additional argument by counsel for the commissioner that, inasmuch as DOT job descriptions have not been updated in twenty or more years and that (per counsel’s own personal observations *en route* to oral argument) the nature of the jobs at issue has changed, the DOT descriptions in issue should be accorded less weight.

<sup>5</sup> Counsel for the commissioner contended at oral argument that the vocational expert testified about a light-exertion job, cashier II, which requires no transferable skills. Although the vocational expert testified initially that, “Cashier might not be strictly sedentary. It’d be light[,]” Record at 404, he later made clear that the plaintiff could perform the subset of cashier jobs considered sedentary, *id.* at 407.

<sup>6</sup> Specifically, the DOT lists a specific vocational preparation level of 5 for a cashier I. Appendix C to the DOT, entitled “Components (*continued on next page*)

gained by the plaintiff is transferable to the position of cashier, perhaps because it does note that the vocational expert testified that the plaintiff's past work experience provided "no transferable skills." Record at 359. I can only conclude that the record lacks evidentiary support for the conclusion that the plaintiff could work as a cashier.

The conclusion that the record lacks evidentiary support for any of the three positions upon which the administrative relies as support for his conclusion that the plaintiff is not disabled makes it unnecessary to consider the plaintiff's remaining arguments.

The plaintiff has requested remand with an order for payment of benefits. The Social Security Act authorizes the court to enter a judgment "affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The commissioner had a full and fair opportunity to develop the record and meet his burden at Step 5. A remand for further administrative proceedings on the issue of disability would be unfair to the plaintiff, who has done all the Social Security Act requires of him to demonstrate his entitlement to disability benefits. *Field v. Chater*, 920 F. Supp. 240, 244 (D. Me. 1995).

I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** with directors to award benefits to the plaintiff.

### **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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of the Definition Trailer," defines level 5 as requiring over 6 months and up to and including 1 year of vocational preparation.

***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 14th day of August, 2001.***

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

ADMIN

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-377

GALLANT v. SOCIAL SECURITY, COM Filed: 12/21/00

Assigned to: JUDGE D. BROCK HORNBY

Referred to: MAG. JUDGE DAVID M. COHEN

Demand: \$0,000 Nature of Suit: 863

Lead Docket: None Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 42:405 Review of HHS Decision (SSID)

TIMOTHY GALLANT DANIEL W. EMERY, ESQ.

plaintiff

[COR LD NTC]

36 YARMOUTH CROSSING DR

P.O. BOX 670

YARMOUTH, ME 04096

(207) 846-0989

v.

SOCIAL SECURITY ADMINISTRATION JAMES M. MOORE, Esq.

COMMISSIONER  
defendant

[COR LD NTC]  
U.S. ATTORNEY'S OFFICE  
P.O. BOX 2460  
BANGOR, ME 04402-2460  
945-0344

JOSEPH DUNN, ESQ.  
[COR LD NTC]  
JFK FEDERAL BUILDING  
ROOM 625  
BOSTON, MA 02203-0002  
617/565-4277