



headaches and was status post hysterectomy in 1992 and post cerebrovascular accident in 1993, impairments which did not, alone or together, meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (“the Listings”), Findings 3-4, Record at 25; that the plaintiff was 43 years old on the date of alleged onset of her disability and had the equivalent of a high school education, Findings 5-6, *id.* at 25-26; that as a consequence of her impairments, the plaintiff was limited to the performance of nearly a full range of work activity at the sedentary exertional level, eroded by the necessity that she avoid constant repetitive grasping with the left upper extremity, concentrated exposure to hazards and more than occasional climbing of ladders, Finding 7, *id.* at 26; that to the extent that they were inconsistent with the proposition that the plaintiff possessed the residual functional capacity to perform nearly a full range of sedentary work, her testimony and written allegations regarding the pain she experienced, her symptoms and the functional limitations imposed by her impairments were found to be not fully credible, inconsistent with her described activities of daily living and not fully consistent with the medical evidence in the record, Finding 8, *id.*; that the plaintiff’s impairments prevented her from returning to her past relevant unskilled to semiskilled work as a cashier, sewing machine operator, certified nurse’s aide and bartender, Finding 9, *id.*; that the plaintiff did not possess vocational skills that would have been readily transferable to jobs of a sedentary exertional level existing in significant numbers in the national economy, Finding 10, *id.*; that using section 201.28 of 20 C.F.R. Part 404, Subpart P, Appendix 2 (“the Grid”) as a framework warranted a finding that there existed in significant numbers in the national economy jobs of a sedentary exertional level that the plaintiff could have been expected to perform in spite of her impairments, Finding 11, *id.* at 26-27; and that, therefore, the plaintiff was not under a disability within the meaning of the Social Security Act at any time before her date last insured, Finding 12, *id.* at 27. The Appeals Council declined to review the decision, *id.* at 4-5, making it the final decision of

the commissioner, 20 C.F.R. § 404.981; *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); *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 commissioner's decision in this case was made at Step 5 of the sequential evaluation process. At this stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. § 404.1520(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.3d 292, 294 (1st Cir. 1986).

### **Discussion**

The plaintiff first contends that the commissioner was required to find her disabled after the administrative law judge found her to have a residual functional capacity only for sedentary work, limited by an inability to perform constant repetitive grasping with the left upper extremity and the need to avoid concentrated exposure to hazards. Itemized Statement of Errors Pursuant to Local Rule 16.3, etc. ("Statement of Errors") (Docket No. 3) at 2-3. In support of her position, the plaintiff quotes from Social Security Ruling 96-9p to the effect that significant manipulative limitation of the ability to handle and work with small objects with both hands will significantly erode the sedentary

occupational base. However, this does not mean that there are no sedentary jobs existing in significant numbers in the national economy that an individual with the plaintiff's limitations can perform. It therefore does not necessarily follow that the plaintiff is disabled under the Social Security Act. "[A] finding that an individual has the ability to do less than a full range of sedentary work does not necessarily equate with a decision of 'disabled.'" Social Security Ruling 96-9p, reprinted in *West's Social Security Reporting Service Rulings 1983-1992* (Supp. 2001) at 152. The question is not, as the plaintiff puts it, whether the residual functional capacity found by the administrative law judge "supports disability," Statement of Errors at 3, but rather whether there is support in the record for the commissioner's decision that the plaintiff is not disabled under the Social Security Act.

The plaintiff next argues that the administrative law judge's finding that her nonexertional limitations do not significantly erode the sedentary occupational base was not supported by vocational testimony or other evidence as required by *Burgos Lopez v. Secretary of Health & Human Servs.*, 747 F.2d 37, 42 (1st Cir. 1984). Statement of Errors at 3-4. The administrative law judge apparently used the Grid as a framework in reaching his decision in this case. Record at 26-27.

To the extent that the claimant's nonexertional limitations reduce her ability to perform jobs of which she is exertionally capable, the [commissioner] may not rely solely on the grids. The regulations provide that if the claimant has exertional and nonexertional limitations and is not disabled based on strength limitations alone, then the grids may provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations. Full consideration must be given to all of the relevant facts.

When the claimant's nonexertional limitations require that the grids be used only as a "framework," the [commissioner] must introduce expert vocational testimony or other evidence to prove that a significant number of jobs are available for the claimant.

*Smith v. Bowen*, 826 F.2d 1120, 1122 (D.C. Cir. 1987) (citations and internal punctuation omitted). In this case, no vocational expert was called to testify by the administrative law judge. His decision

does not discuss any evidence concerning jobs that might be available in significant numbers for the plaintiff given the limitations he found to exist.

There is language in the administrative law judge's decision that suggests that he found the plaintiff's nonexertional limitations to have no more than a slight impact on her ability to perform the full range of sedentary work. He found that the plaintiff was "limited to the performance of a nearly full range of work activity of a sedentary exertional level" that is "further eroded only" by the limitations noted above and a need to avoid more than occasional climbing of ladders. Record at 26. Social Security Ruling 96-9p requires that the commissioner cite examples of jobs that the claimant can do and state the incidence of such work "[w]here there is more than a slight impact on the individual's ability to perform the full range of sedentary work." Social Security Ruling 96-9p at 156.

However, the finding that the plaintiff must avoid constant repetitive grasping with the left hand, Record at 26, is inconsistent with a finding that the resulting erosion of the unskilled sedentary occupational base was only slight or less than significant. Social Security Ruling 96-9p at 159. The administrative law judge's invocation of the use of the Grid as a framework also implies a finding that the impact of the nonexertional impairments is more than slight. *See id.* at 155-56; *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994) (the Grid is to be used directly only when a claimant's nonexertional limitations do not significantly impair her ability to perform at a given exertional level). While the commissioner may rely on the Grid even if a nonexertional impairment is significant if the impairment has the effect "only of reducing that occupational base marginally," *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989), he may do so only when the factual predicate "is amply supportable," *id.* at 526. No such ample support appears in the administrative law judge's opinion in this case. Under the circumstances, the administrative law judge's failure to identify specific jobs that the plaintiff could do and to indicate the incidence of such jobs as required by Social



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