



administrative law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage for purposes of SSD to remain insured through March 31, 1990, Finding 1, Record at 22; that she had diabetes, lumbosacral somatic dysfunction, angina status post-myocardial infarction and status post-detached glenoid<sup>2</sup> labrum, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 3, *id.*; that her statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, *id.*; that she lacked the residual functional capacity (“RFC”) to lift and carry more than ten pounds or to perform tasks requiring more than twenty minutes of consecutive sitting or ten minutes of consecutive standing or walking, Finding 5, *id.*; that her capacity for the full range of sedentary work was diminished by her sitting restrictions and need for a sit-stand option, , Finding 7, *id.* at 23; that, given her age (48 when she applied for benefits), education (high school) and work experience (semi-skilled), and assuming an exertional capacity for sedentary work, application of Rule 201.21 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”) would direct a conclusion that she was not disabled, Findings 8-11, *id.*; that although she was unable to perform a full range of sedentary work, she was capable of making an adjustment to work existing in significant numbers in the national economy, including employment as a ticket seller, cashier and addresser, Finding 12, *id.*; that a finding of “not disabled” was reached within the framework of the Grid, *id.*; and that she therefore had not been under a disability at any time through the date her insured status expired or through the date of decision, Finding 13, *id.* The Appeals Council declined to review the decision, *id.* at 6-7, 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).

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<sup>2</sup> The “glenoid cavity” is the “socket which receives the head of the humerus[.]” Taber’s Cyclopedic Medical Dictionary (“Taber’s”) at 591 (14th ed. 1983). The “humerus” is the “[u]pper bone of the arm from the elbow . . . to the shoulder joint[.]” *Id.* at 672. The plaintiff testified that after a fall at work, she had surgery to repair her rotator cuff. Record at 32.

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 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. §§ 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).

In her statement of errors, the plaintiff complained, *inter alia*, that the administrative law judge erred in failing to recognize that she fell into a so-called "borderline" age category for purposes of the Grid. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 3) at 2-3. At oral argument, counsel for the plaintiff took this a step farther, arguing that, inasmuch as the plaintiff turned age 50 before the date of the administrative law judge's decision, the Grid directed a conclusion that she was disabled as of that date.<sup>3</sup> I agree.

## I. Discussion

The success of the plaintiff's Grid-reliant argument hinges on two propositions: (i) that, in the SSI context, the relevant date for assessing age is the date of the administrative law judge's decision, and (ii) that, in a case in which a vocational expert has testified that a claimant can work but

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<sup>3</sup> Counsel for the commissioner lodged no objection at oral argument to the plaintiff's assertion for the first time of this particular "age"  
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application of the Grid directs otherwise, the Grid trumps. I find no First Circuit caselaw shedding light on either proposition. However, relevant regulations and caselaw from other jurisdictions support both.

As counsel for the plaintiff pointed out at oral argument, in this very case the administrative law judge found that the plaintiff was not disabled “at any time through the date of this decision.” *See* Finding 13, Record at 23. This was no accident, inasmuch as the regulations specify, *inter alia*:

If you file an application for SSI benefits before the first month you meet all the other requirements for eligibility, the application will remain in effect from the date it is filed until we make a final determination on your application, unless there is a hearing decision on your application. If there is a hearing decision, your application will remain in effect until the hearing decision is issued.

(a) If you meet all the requirements for eligibility while your application is in effect, the earliest month for which we can pay you benefits is the month following the month that you first meet all the requirements.

20 C.F.R. § 416.330; *see also, e.g., Crady v. Secretary of Health & Human Servs.*, 835 F.2d 617, 620 (6th Cir. 1987) (“The decision date is the relevant cut-off point for analysis of all factors on which the determination of disability *vel non* is based, including the claimant’s age.”); *Russell v. Commissioner of Soc. Sec.*, 20 F. Supp.2d 1133, 1134 (W.D. Mich. 1998) (“For purposes of determining age under the grids, the claimant’s age as of the time of the decision governs.”) (citation and internal quotation marks omitted).

Turning to the second proposition, the regulations make clear that in cases in which there are either exertional (*i.e.*, strength) impairments alone, or a combination of exertional and nonexertional impairments, the Grid rules control. *See, e.g.*, Rule 200.00(e)(2) to Grid (“[W]here an individual has an impairment or combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart [*i.e.*, the Grid rules] are considered in determining first whether a

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argument.

finding of disabled may be possible based on the strength limitations alone . . . .”); *Cooper v. Sullivan*, 880 F.2d 1152, 1155 (9th Cir. 1989) (“First, the grids must be consulted to determine whether a finding of disability can be based on the exertional impairments alone. If so, then benefits must be awarded.”) (citation omitted).<sup>4</sup>

The plaintiff turned 50 on May 26, 1998; a few days later, on June 3, 1998, the decision of the administrative law judge issued. Record at 21, 24. The administrative law judge noted that Rule 201.21 of Table 1 of the Grid would direct a conclusion of “not disabled” and that the same result would be reached without regard to transferability of work skills. Finding 11, *id.* at 23. Rule 201.21, which presumes that a claimant is limited to sedentary work, is a “[y]ounger individual age 45-49,” is a high school graduate or more and is skilled or semiskilled without transferable skills, does indeed direct a conclusion of “not disabled.” Rule 201.21, Table 1 to Grid. However, as pointed out by the plaintiff’s counsel at oral argument, Rule 201.14, in which all other factors are the same except that the claimant is presumed to be “[c]losely approaching advanced age” (age 50-54), directs a conclusion of “disabled.” Rule 201.14, Table 1 to Grid; Rule 201.00(g) to Grid.<sup>5</sup>

I agree with the assertion of plaintiff’s counsel at oral argument that this is one of those rare cases in which (at least for purposes of her SSI claim) remand for payment of benefits is warranted. *See Seavey v. Barnhart*, 276 F.3d 1, 11 (1st Cir. 2001) (holding that “ordinarily the court can order the agency to provide the relief it denied only in the unusual case in which the underlying facts and law

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<sup>4</sup> This would not be the case if a claimant were determined solely to have nonexertional (*i.e.*, non-strength) impairment(s); then the Grid would be wholly inapplicable. *See, e.g.*, Rule 200.00(e)(1) to Grid; *Cooper*, 880 F.2d at 1155 (“[W]here a claimant suffers solely from a nonexertional impairment, the grids do not resolve the disability question; other testimony is required.”) (footnote and citation omitted). However, the plaintiff in this case, whom the administrative law judge determined, *inter alia*, required a sit-stand option, *see* Finding 7, Record at 23, clearly had “exertional” impairments, *see, e.g.*, Social Security Ruling 96-9p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2001) (“SSR 96-9p”), at 157-58 (categorizing need to alternate sitting, standing as “exertional” limitation).

<sup>5</sup> While the existence of transferable work skills would dictate the opposite conclusion for a person age 50-54, *see* Rule 201.15, Table 1 to Grid, a vocational expert testified at hearing that the plaintiff had no transferable work skills, *see* Record at 63.

are such that the agency has no discretion to act in any manner other than to award or to deny benefits”).

The Grid theory does not avail the plaintiff with respect to her SSD claim; her date last insured was March 31, 1990, at which time she was only 41. *See, e.g., Smith v. Barnhart*, No. 00 C 2643, 2002 WL 126107, at \*3 (N.D. Ill. Jan. 31, 2001) (noting that, in SSD case, evaluation of whether claimant falls into borderline age category is undertaken by “determining, based on the evidence, whether a claimant’s age is within a few days or a few months of a higher age category *at the time the disability insured status expires.*”) (emphasis in original). Nonetheless, inasmuch as the plaintiff’s SSD claim was denied solely on the coattails of the SSI decision, with no independent analysis pursuant to the sequential-evaluation process, *see* Record at 16-23, remand is warranted for adequate consideration of that claim.

## II. Conclusion

For the foregoing reasons, I recommend that the commissioner’s decision be **VACATED** and the case **REMANDED** for payment of benefits with respect to the plaintiff’s SSI claim and for further proceedings not inconsistent herewith with respect to her SSD claim.

### 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 26th day of March, 2002.

David M. Cohen  
United States Magistrate Judge

PORTLD ADMIN

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

CIVIL DOCKET FOR CASE #: 01-CV-189

LEVESQUE v. SOCIAL SECURITY, COM

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Referred to: MAG. JUDGE DAVID M. COHEN

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