

impairment that was severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 3, *id.*; that he then was unable to perform his past relevant work as a welder, Finding 6, *id.* at 22; that, as of that date, his capacity for the full range of light work was diminished by significant nonexertional limitations that made it impossible to stoop, kneel, crouch or crawl more than occasionally or work with exposure to cold or fumes, Finding 7, *id.*; that, given his residual functional capacity as of December 31, 1991, his age at that time (48 years old, and thus a “younger individual”), education (“limited”) and work experience (skilled, but with no transferable work skills), application of Rule 202.18 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”) directed a conclusion that he was not then disabled, Findings 8-11, *id.*; and that he hence was not under a disability at any time through his date last insured, Finding 12, *id.*² The Appeals Council declined to review the decision, *id.* at 7-8, making it the final determination 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 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 or her past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987);

² The administrative law judge did find the plaintiff disabled as of October 1, 1996 for purposes of a separate application for Supplemental Security Income (“SSI”), which is not dependent on insured status. Record at 17; *see also* Findings 13-19, *id.* at 22-23.

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 this case, the plaintiff's complaints also implicate two other steps of the sequential evaluation process: Steps 2 and 3. Although a claimant bears the burden of proof at Step 2, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* at 1124 (quoting Social Security Ruling 85-28).

At Step 3 of the sequential-evaluation process a claimant has the burden of proving that his or her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. § 404.1520(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment, the claimant's medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the listing for that impairment. 20 C.F.R. §§ 404.1525(d), 404.1528. To equal a listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. § 404.1526(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1526(b).

The plaintiff complains that the administrative law judge erred in determining that, as of December 31, 1991, (i) his heart condition did not meet or equal a listing (specifically, Listing

4.04(C)) and (ii) he suffered from no severe mental impairment. Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 3) at 3-5. I agree that on these bases, the plaintiff is entitled to a remand for further consideration of his SSD application.

I. Discussion

A. Heart Condition

The plaintiff initially complains that the administrative law judge's analysis of whether his heart condition met or equaled a listing was "conclusory," consisting in its entirety of the statement, "[n]o treating or examining physician has mentioned findings equivalent in severity to the criteria of any listed impairment." Statement of Errors at 3; Record at 18. He suggests that the Record contains sufficient evidence that his heart condition met or equaled Listing 4.04(C) that the administrative law judge should have called upon the services of a medical expert to determine whether or not this was so. Statement of Errors at 3. The argument is well-taken.

An individual meets Listing 4.04(C), pertaining to coronary artery disease, if angiographic evidence reveals, *inter alia*, a "70 percent or more narrowing of another nonbypassed coronary artery [other than a left main coronary artery]" and this condition results in "marked limitation of physical activity, as demonstrated by fatigue, palpitation, dyspnea,³ or anginal discomfort on ordinary physical activity, even though the individual is comfortable at rest." Listing 4.04(C).

The plaintiff's date last insured was December 31, 1991. He testified at hearing that "way before I had the angioplasty [in February 1992], I'm going to say, back in at least '91, possibly back into '90, I had these discomfort pains, shortness of breath, I just had, I just put up with it, and finally, I just say it came down to the thing where I couldn't go any further." Record at 60. The Record corroborates that as early as February 26, 1990 he complained of an "approximately 10 day history of

³ "Dyspnea" is "[a]ir hunger resulting in labored or difficult breathing, sometimes accompanied by pain. Normal when due to vigorous (continued on next page)

pressure sensation in his chest and up into his neck,” with the pressure unrelated to exercise. *Id.* at 235; *see also, e.g., id.* at 215 (August 6, 1997 notation of non-examining consultant Floyd B. Guffin, M.D., that plaintiff had suffered from “significant [coronary artery disease] with [complaints of] chest pain since 1990”).

In February 1992 the plaintiff presented to the Maine Medical Center emergency room complaining of “10/10 chest pain associated with diaphoresis⁴ and shortness of breath.” *Id.* at 255. He was found to be suffering from a ninety-five percent stenosis⁵ of his mid-right coronary artery, for which he was treated with angioplasty.⁶ *See, e.g., id.* at 265, 305. He was readmitted to Maine Medical Center in September 1992 for recurrent chest pain of two weeks’ duration, whereupon he was found to have a ninety percent stenosis of a different heart artery, his proximal posterior descending artery. *Id.* at 305-06. Ultimately, he underwent a quadruple coronary artery bypass in November 1996. *See, e.g., id.* at 215, 380.

I agree that the foregoing history suffices to raise a serious question – unanswerable by a layperson such as the administrative law judge – whether the plaintiff’s coronary artery disease met or equaled Listing 4.04(C) as of his date last insured. Inasmuch as appears from the Record, no physician (treating, examining or non-examining) was pointedly asked this precise question. Under the circumstances, the fact that no physician had mentioned findings equivalent in severity to the criteria of any listed impairment, *id.* at 18, was of no particular significance. At oral argument, counsel for the commissioner contended that the plaintiff could not have been found to have met Listing 4.04(C) inasmuch as his February 1992 angioplasty succeeded in lessening his stenosis from ninety-five to twenty percent, *see, e.g., id.* at 256, well below the seventy percent required to meet the Listing.

work or athletic activity.” Taber’s Cyclopedic Medical Dictionary at 442 (14th ed. 1983) (hereinafter “Taber’s”).

⁴ “Diaphoresis” is “[p]rofuse sweating.” Taber’s at 400.

⁵ “Stenosis” is “[c]onstriction or narrowing of a passage or orifice.” Taber’s at 1363.

Nonetheless, counsel conceded that a condition such as a blocked artery does not develop overnight, stating that the commissioner presses no argument that the plaintiff failed to meet the durational requirements of the Listing.⁷ Thus, even if as of February 1992 the plaintiff did not meet Listing 4.04(C), it is possible on this Record that he could have been found to have met or equaled the Listing for a twelve-month period ending prior to that time.

Remand accordingly is required for determination whether, in the opinion of a medical expert and/or other qualified physician(s), the plaintiff's coronary artery disease met or equaled Listing 4.04(C) as of his date last insured.

B. Mental Condition

The plaintiff next complains that the administrative law judge erred in concluding that his mental impairments did not even meet the minimal Step 2 threshold as of his date last insured. Statement of Errors at 3-5; *see also* Record at 18. I agree that this finding is unsupported by substantial evidence of record.

As the plaintiff acknowledges, there is not a great deal of evidence in the Record concerning his mental condition in 1990 and 1991. *See* Statement of Errors at 4. However, all available evidence points in the direction that, as of December 31, 1991, he suffered from at least two mental impairments properly classified as "severe" for purposes of Step 2: borderline intellectual functioning and anxiety.

In a January 1997 report, Disability Determination Services ("DDS") consultant James M. Moran, Ed.D., assessed the plaintiff as having borderline intellectual functioning and "many signs and

⁶ "Angioplasty" is "[p]lastic surgery upon blood vessels." Taber's at 84.

⁷ With regard to the so-called durational requirement, "[t]he law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment [wh]ich can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 20 C.F.R. § 404.1505(a).

symptoms associated with Agoraphobia with a history of panic attacks.” Record at 395.⁸ At least four federal circuit courts of appeals have held that, absent evidence to the contrary, a person’s intellectual functioning is presumed to have been approximately constant throughout his or her life. *Hodges v. Barnhart*, 276 F.3d 1265, 1268-69 (11th Cir. 2001); *Muncy v. Apfel*, 247 F.3d 728, 734 (8th Cir. 2001); *Guzman v. Bowen*, 801 F.2d 273, 275 (7th Cir. 1986); *Branham v. Heckler*, 775 F.2d 1271, 1274 (4th Cir. 1985). In this case, there is no evidence that the plaintiff suffered from a head injury or other event that would have impacted his IQ between his date last insured and the January 1997 testing. To the contrary, the available evidence tends to corroborate a finding that his intellectual functioning has remained constant. *See, e.g.*, Record at 51 (school was “very hard” for plaintiff, who cannot read well).

Further, and although the plaintiff did not seek treatment for his mental-health conditions until 1996, two of his treating clinicians submitted letters opining that he suffered from anxiety as of December 31, 1991. *Id.* at 512 (letter dated March 11, 1998, from Elliot J. Gruen, D.O., stating, “I did not know Mr. Webster in 1991, but I think it is likely that his anxiety difficulties and lability are life long problems.”); 517 (letter dated March 17, 1998 from Douglas J. Smith, M.A. LCPC, stating, “I have been seeing Mr. Webster in psychotherapy since late fall 1996 to treat several problems, including his severe anxiety, secondary to a bipolar disorder. . . . [A]s far as the question of the preexistence of these disorders, there seems to be little question that he has been struggling with these

⁸ Moran found “mild to moderate impairments in his activities of daily living, moderate impairments in his social functioning, and mild impairments in his ability to concentrate and attend to a task, and to function in a variety of work settings.” Record at 395. A mental impairment generally is considered non-severe (for purposes of Step 2) if the degree of limitation in three functional areas (activities of daily living, social functioning, and concentration, persistence or pace) is rated as “none” or “mild,” and there have been no episodes of decompensation. 20 C.F.R. § 404.1520a(d)(1).

problems throughout his life. A review of his psycho-social history reveals a pattern of symptoms, events and behavior that supports this view.”).⁹

In sum, the administrative law judge’s finding that the plaintiff suffered from no severe mental impairment as of his date last insured flies in the face of the available evidence of record. One cannot be confident that the error, as woven through the fabric of the administrative law judge’s decision through to Step 5, was harmless. The administrative law judge relied on the Grid to direct a conclusion of non-disability as of the plaintiff’s date last insured. In cases in which a nonexertional impairment is determined to be significant, the commissioner may yet rely exclusively upon the Grid if “a non-strength 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). “[S]uch a shorthand approach is permissible, so long as the factual predicate . . . is amply supportable.” *Id.* at 526.

Here, it is not at all self-evident that the plaintiff’s mental impairments, combined with significant nonexertional limitations found to exist as of his date last insured (*e.g.*, his inability to stoop, kneel, crouch or crawl more than occasionally, *see* Finding 7, Record at 22), would have the effect of eroding the occupational base for light work only marginally, thus warranting continued reliance on the Grid.

The plaintiff accordingly is entitled to remand for consideration of whether his combined impairments met or equaled Listing 4.04(C) as of his date last insured. If not, the commissioner must make a finding as to the plaintiff’s mental residual functional capacity as of his date last insured and

⁹ Two DDS non-examining consultants addressing the question of the plaintiff’s mental status as of his date last insured concluded that there was “insufficient evidence” to make a determination. Record at 201, 222. These unilluminating assessments, which predated the submission of the 1998 Gruen and Smith letters, cannot support a finding that the plaintiff’s mental impairments were non-severe as of his date last insured. *See, e.g., Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) (“[T]he 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 (continued on next page)

reconsider whether, given his combined nonexertional impairments (both mental and physical), he was capable of performing work existing in significant numbers in the national economy as of that time. In making the latter assessment, the commissioner would be well-advised to seek the assistance a vocational expert rather than relying solely on the Grid.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the cause **REMANDED** for proceedings not inconsistent herewith.

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

ADMIN

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

CIVIL DOCKET FOR CASE #: 01-CV-242

WEBSTER v. SOCIAL SECURITY, COM

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information provided the expert.”) (citations and internal quotation marks omitted).

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

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