



had an impairment or combination of impairments that were severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (“the Listings”), Findings 3-4, *id.* at 18-19; that his allegations regarding his limitations were not totally credible, Finding 5, *id.* at 19; that he had the residual functional capacity to lift and carry up to 20 pounds occasionally and 10 pounds frequently and to sit, stand and walk for up to six hours in an eight-hour workday with the ability to alternate between sitting and standing, but could not perform tasks that require climbing, use of foot controls, reaching overhead or above shoulder level or working around unprotected heights, Finding 7, *id.*; that he was unable to perform any past relevant work, Finding 8, *id.*; that, given his age, limited education, lack of transferable skills and residual functional capacity to perform a significant range of light work, use of Appendix 2 to Subpart P, 20 C.F.R. § 404 (“the Grid”) as a framework for decision-making resulted in the conclusion that there were a significant number of jobs in the national economy that he could perform, Findings 9-13, *id.*; and that he had not been under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 14, *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).

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 evaluation process. At Step 5, 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).

### **Physicians' Reports**

The plaintiff complains that the administrative law judge failed to give proper ("greater") weight to the opinions of a consulting examining physician, Dr. Raymond E. Culver, and a treating surgeon, Dr. Richard M. Cabot, both of whom he contends opined that he was disabled. Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 7) at 2-7. The weight to which a treating physician's opinion is entitled depends in part on the subject matter addressed. Determination that a claimant is disabled is reserved to the commissioner; accordingly, no "special significance" is accorded an opinion even from a treating source as to whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1527(e)(1)-(3), 416.927(e)(1)-(3). Nonetheless, such an opinion is entitled to consideration based on six enumerated factors: (i) the length of the treatment relationship and frequency of examination, (ii) nature and extent of the treatment relationship, (iii) supportability — *i.e.*, adequacy of explanation for the opinion, (iv) consistency with the record as a whole, (v) whether the treating physician is offering an opinion on a medical issue related to his or her specialty, and (vi) other factors highlighted by the claimant or others. *Id.* §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6). Regardless of the subject matter as to which a treating physician's opinion is offered, the commissioner must "always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." *Id.* §§ 404.1527(d)(2), 416.927(d)(2).

On the only page of the record cited in the plaintiff's statement of errors with respect to Dr. Cabot's opinion concerning disability, Itemized Statement at 5 n.2, he stated: "In light of his young age and concern with regard to the disabling nature of this situation, I think that he would be a good candidate for possible bypass grafting." Record at 296. This statement, standing alone, need not necessarily be considered an assertion that the plaintiff is disabled in the doctor's opinion. At oral argument, counsel for the plaintiff pointed to other statements in Dr. Cabot's record that would lend support to such an interpretation. If an assertion as to disability by a treating physician could be considered by the administrative law judge, it could not be given controlling weight, as the plaintiff appears to suggest. Itemized Statement at 4. A treating physician's opinions on the nature and severity of a claimant's impairments is given controlling weight only when they are well-supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence in the case record. 20 C.F.R. §§ 404.1527(d)(2); 416.927(d)(2). Here, the evidence from the state-agency medical consultants, Record at 232-39, 241-48, is inconsistent with an assertion that the plaintiff is disabled. See 20 C.F.R. §§ 404.1527(f)(2)(i); 416.927(f)(2)(i) (administrative law judge must consider findings of state agency medical consultants).<sup>2</sup> See also *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 276 (1st Cir. 1988) (treating physician's conclusions regarding total disability may be rejected, especially when contradictory medical evidence appears in record); *Barrientos v. Secretary of Health & Human Servs.*, 820 F.2d 1, 2-3 (1st Cir. 1987) (opinion of treating physician not necessarily entitled to greater weight than that of a consulting physician).

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<sup>2</sup> The plaintiff's contention that the administrative law judge was required to "clarify Dr. Cabot's meaning if he did not understand why Dr. Cabot concluded the condition was disabling," Itemized Statement at 3, presumably by contacting Dr. Cabot directly, does not advance his position. He does not identify any indication in the record that Dr. Cabot's brief records contain a conflict or ambiguity that must be resolved, lack necessary information, or do not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §§ 404.1512(e)(1), 416.912(e)(1). Nor does he identify any gaps in the information provided in the (continued on next page)

With respect to the other statements in Dr. Cabot's report, the plaintiff makes a stronger case.<sup>3</sup> He argues that the administrative law judge failed to discuss Dr. Cabot's opinions, let alone give good reasons for not according those opinions any weight as required by 20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2). Itemized Statement at 4-6. Dr. Cabot's records are identified as exhibit 16F in the administrative record. The administrative law judge does not mention Dr. Cabot specifically. His only references to exhibit 16F are found on page 15 of the record, as citations in support of the statements that the plaintiff had been prescribed nitroglycerin but had not used it until 2001 and that he had been treated for claudication of the right superficial femoral artery and advised to undergo surgical intervention.<sup>4</sup> Dr. Cabot's report, replete with supporting medical test results, states that the plaintiff "can only walk about 15 feet" as a result of this condition. Record at 295. While this is the only mention in the report of an impairment that must be considered by the administrative law judge, there is no suggestion in the opinion that the administrative law judge did consider it, and the impairment does not appear to be consistent with the RFC for a significant range of light work found by the administrative law judge, based on an ability to "sit, stand and walk for up to six hours in an eight-hour workday." *Id.* at 19. The lack of any explanation of this implicit rejection of Dr. Cabot's finding requires remand. *See generally Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999).

At oral argument, counsel for the commissioner contended that the administrative law judge's finding that the plaintiff has the residual functional capacity to perform light work "wit[h] the ability to alternate between sitting and standing," Record at 19, is consistent with Dr. Cabot's finding

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reports necessary to a reasoned evaluation of his claim, *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991), or any indication by the administrative law judge that he was confused in any way about any statement included in the reports.

<sup>3</sup> However, to the extent that the plaintiff contends that the administrative law judge's failure to consult a medical advisor at the hearing was reversible error, Itemized Statement at 5, he is wrong. Use of a medical advisor is a matter left to the commissioner's discretion; "nothing in the [Social Security] Act or regulations requires it." *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 5 (1st Cir. 1987); *accord, Siedlecki v. Apfel*, 46 F.Supp.2d 729, 732 (N.D. Ohio 1999).

<sup>4</sup> Contrary to the plaintiff's contention, Itemized Statement at 3, the fact that the administrative law judge reported the plaintiff's treatment for claudication means that he did not "rely on older DDS evaluations to the exclusion of subsequent medical and testimonial  
(continued on next page)

concerning the plaintiff's limited ability to walk. To the contrary, nothing in the administrative law judge's decision, which finds that the plaintiff "is able to sit, stand and walk for up to six hours in an eight-hour workday," *id.*, is necessarily consistent with that finding. As counsel for the commissioner acknowledged at oral argument, the definition of light work assumes an ability to do a substantial amount of walking.

[A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. §§ 404.1567(b), 416.927(b). Here, the administrative law judge did conclude that the plaintiff had the residual functional capacity for a "significant" range of light work, Record at 19, but the sit/stand option does not obviate the need to discuss limitations on the plaintiff's ability to walk while performing light work in the context of the record in this case. *See generally Allen v. Sullivan*, 977 F.3d 385, 389-90 (7th Cir. 1992).

With respect to Dr. Culver, the plaintiff does not explain why the report of this consulting physician who examined the plaintiff at the request of the state agency should have been given "greater weight," Itemized Statement at 2, and refers only to the administrative law judge's failure "to discuss, or even mention" Dr. Culver's "conclu[sion] that [the plaintiff] was disabled," *id.* at 5. For the reasons discussed above, strengthened by the fact that Dr. Culver was not a treating physician, the administrative law judge was not required to accord any weight to such an opinion. In addition, Dr. Culver actually stated "I believe the patient is disabled, but I can't document it for the numerous reasons that I stated above." Record at 225. The physician's own statement that his conclusion is

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evidence contemporaneous with the hearing."

unsupported by medical evidence would render it valueless even if it could have been considered by the administrative law judge.

### **Other Issues**

I will briefly discuss other issues raised by the plaintiff for the benefit of the commissioner should the court adopt my recommendation that this matter be remanded.

The plaintiff contends that the administrative law judge's opinion is "internally inconsistent," apparently because it expressly relies on the RFC provided by one of the state-agency medical reviewers but also includes a limitation, not included in that evaluation, from the RFC of the other state-agency medical reviewer. Itemized Statement at 2-3. There is nothing inconsistent in such use of the two reports and no reason for remand as a result of this approach.

The plaintiff also argues that the administrative law judge's conclusion concerning his credibility "was arrived at improperly and was not supported by substantial evidence." *Id.* at 9. Contrary to the plaintiff's assertion, *id.* at 10, the decision provides sufficient explanation for the administrative law judge's conclusion that "the claimant's allegations regarding his limitations are not totally credible," Record at 19. This explanation appears at page 16 of the record. *See generally Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987). The plaintiff points out that the administrative law judge did not look at statements he made in a prior application for benefits to determine whether they were consistent with his testimony at the hearing concerning the effects of his impairments, as required by Social Security Ruling 96-7p. Itemized Statement at 11. However, the pages of the record he cites as evidence of his statements in the prior application, Record at 87-94, contain only the conclusory statements that "I became unable to work because of my disabling condition on May 15, 1997," and "I am still disabled," *id.* at 91, which have no value for comparison to the defendant's specific testimony at the hearing, as it is discussed by the administrative

law judge, for the purpose of evaluating the consistency of the plaintiff's statements, the factor at issue in the cited social security ruling, Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service Rulings*, 2002 Supplementary Pamphlet, at 138. The plaintiff cites no authority for his further contention that the decision must be overturned because the administrative law judge failed to request records of his surgery which took place on December 5, 2001 before issuing his decision on January 25, 2002. Itemized Statement at 12. The plaintiff was represented by counsel at the hearing and could easily have submitted the records. The commissioner was under no obligation to seek them herself. The plaintiff also attacks as "very superficial," *id.* at 12, the administrative law judge's consideration of possible reasons for the plaintiff's failure to obtain treatment, which was one of the considerations in his analysis of the plaintiff's credibility, Record at 16. After receiving the decision, the plaintiff did submit an affidavit in which he stated that his ability to get to treatment is limited by a lack of public transportation and lack of a private vehicle and that he could not afford to pay for a glucose meter to monitor his blood sugar. *Id.* at 316-17. Aside from the fact that the administrative law judge could not consider information first provided after he issued his decision, these assertions do not address several of the specific instances noted by the administrative law judge: minimal treatment for any complaint between 1993 and 2001, continuing to smoke and drink, using no medications except an occasional aspirin for control of pain, and failure to follow a diabetic diet. *Id.* at 16. The plaintiff's final contention with respect to credibility is that the administrative law judge was required to seek a post-hearing psychological evaluation due to "a high level of pain . . . not fully supported by objective findings in this limited record" which he asserts "points to depression or other emotional problems." Itemized Statement at 13. He asserts that he "discussed being depressed and being on an anti-depressant medication," citing page 46 of the record. *Id.* In fact, the plaintiff's testimony at that page of the record is only that "I lose my temper every once [i]n a while and my wife

just says to go see the doctor. She thought it was depression.” There is no mention of anti-depressant medication and a spouse’s suggestion that a claimant might be suffering from depression is far from sufficient evidence to require further investigation of any sort by the administrative law judge. The plaintiff cites no authority for this argument, and I am aware of none. *Cf. Carter v. Chater*, 73 F.3d 1019, 1021-22 (10th Cir. 1996).

**Conclusion**

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the cause **REMANDED** for further proceedings consistent with this opinion.

**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 12th day of March, 2003.

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David M. Cohen  
United States Magistrate Judge

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