

Pursuant to the commissioner’s sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had borderline intellectual functioning, depressive and anxiety disorders, asthma and allergies, impairments that were severe but did not meet or equal the criteria of impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 2, Record at 18; that she lacked the residual functional capacity (“RFC”) to work in concentrated exposure to respiratory irritants or to do more than simple, routine work that requires no more than occasional contact with supervisors, co-workers or the general public, Finding 4, *id.* at 19; that considering her age (“younger individual”), educational background (high school) and RFC, she was able to make a successful vocational adjustment to work existing in significant numbers in the national economy, including employment as a cleaning person, Finding 9, *id.*; and that she therefore had not been under a disability at any time through the date of decision, Finding 10, *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. § 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. § 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 or her past

relevant work. 20 C.F.R. § 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).

The instant appeal also implicates Step 3 of the sequential-evaluation process, at which stage a claimant bears the burden of proving that his or her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. § 416.920(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. §§ 416.925(d), 416.928. 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. § 416.926(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. § 416.926(b).

The plaintiff complains that the administrative law judge’s Listings and RFC determinations are unsupported by substantial evidence. *See generally* Statement of Specific Errors (“Statement of Errors”) (Docket No. 3). With respect to the first point, she seeks remand with instructions to call a medical advisor for testimony on the question whether her condition meets or equals Listing 12.05C. *See id.* at 4. With respect to the second point, she seeks remand with instructions to take testimony from a medical advisor to establish an RFC comporting with the evidence of record. *See id.* at 7. I agree that errors were committed in both the Listings and RFC determinations that warrant remand.

II. Discussion

A. Listing 12.05C Determination

Listing 12.05 provides in relevant part:

12.05 *Mental Retardation*: Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period: i.e., the evidence demonstrates or supports onset of the impairment before age 22.

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function;

As the administrative law judge notes, *see* Record at 15, the Record contains two IQ evaluations.

In 1982, clinical psychologist Robert S. Peddicord, Ph.D., administered the Wechsler Intelligence Scale for Children – Revised, yielding a verbal IQ score of 66, a performance IQ score of 74 and a full scale IQ score of 69. *See id.* at 231, 236-37. Dr. Peddicord noted:

Results of the WISC-R revealed mildly retarded to borderline skills overall.

Considering the depressive affect which Jill evidenced during the evaluation and her extreme reluctance to guess or elaborate upon initial responses, results of the WISC-R at this point may not, in fact, reflect her maximal potential. However, results of testing probably do reflect her current level of functioning at least.

Id. at 237.² On November 12, 1987 school consultant Norman Worgull, M.A., administered the Wechsler Adult Intelligence Scale – Revised, obtaining a verbal score of 73, a performance score of 73 and a full scale score of 72. *See id.* at 248-49. Worgull noted:

² Dr. Peddicord also observed: “No reports of previous psychological evaluations were available in our records at the time of the current psychological evaluation. Intake information did include a report of a previous administration of a Wechsler Intelligence Scale for Children (WISC) which was supposedly administered in February of 1981 and was (*continued on next page*)

Generally speaking, Jill was cooperative with the demands of testing and displayed good effort and motivation. When confronted with difficult or challenging tasks, she realistically persisted on those items which she perceived to be within her ability to answer and gave up quickly on those which were not. Overall, good testing rapport was established and the obtained results are believed to be valid and an accurate appraisal of Jill's current cognitive functioning.

Scoring below approximately 97 percent of individuals within her age group, her "true" Full Scale score is likely to fall between 67 and 77.

Id. at 248.

The administrative law judge determined that the plaintiff's condition did not meet or equal a Listing (including Listing 12.05C), reasoning:

No treating or examining physician has mentioned findings equivalent in severity to the criteria of any listed impairment. Although Ms. Plourde's representative has argued that her impairments satisfy the criteria of section 12.05C, the evidence does not definitively show that the claimant has a valid IQ in the 60 through 70 range, as required by this listing. As indicated above, the most recent intelligence testing showed IQs all above 70.

Id. at 16.

The plaintiff argues that the administrative law judge erred in failing (i) to consider whether the IQ test results were consistent with other evidence of record of her functioning or (ii) to consider whether her condition equaled a Listing. *See* Statement of Errors at 3-4.³ The first of these points is well-taken.

supposed to have yielded an IQ score which fell in the low average range. However, further details about the previous testing were not available at the time of the current evaluation, nor was it clear whether the outmoded WISC or the more appropriate and current WISC-R were administered." Record at 236.

³ Beyond that, the plaintiff points out in her Statement of Errors that the Record indicates Worgull (who described himself as a "School Consultant") possessed a master's degree, while Dr. Peddicord possessed a Ph.D. and was a clinical psychologist. *See* Statement of Errors at 4; Record at 236, 249. At oral argument, counsel for the plaintiff clarified that she did not mean to suggest that Worgull was unqualified to tender an IQ opinion for purposes of Listing 12.05C. *See* 20 C.F.R. § 416.913(a)(2) (listing among acceptable medical sources: "Licensed or certified psychologists. Included are school psychologists, or other licensed or certified individuals with other titles who perform the same function as a school psychologist in a school setting, for purposes of establishing mental retardation, learning disabilities, and borderline intellectual functioning only[.]"). Per Maine law as in effect today and at the time Worgull tested the plaintiff in
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The plaintiff correctly notes that the administrative law judge did not undertake the proper mode of analysis to resolve conflicts of record as to IQ score. *See* Statement of Errors at 3-4. The administrative law judge simply found that, given the existence of the Worgull scores, the evidence did not “definitively show” that the plaintiff met Listing 12.05C. *See* Record at 16. In so doing, he abdicated his responsibility to choose between conflicting IQ test results or, at a minimum, at least assess the validity of the Peddicord results. While this court defers to an administrative law judge’s resolution of evidentiary conflicts, *see, e.g., Rodriguez*, 647 F.2d at 222 (“The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.”), it cannot in the first instance resolve those conflicts for an administrative law judge, *see, e.g., Soto v. Secretary of Health & Human Servs.*, 795 F.2d 219, 222 (1st Cir. 1986) (“We are ill-equipped to sort out a record that admits of conflicting interpretations. Accordingly, we believe the case must be remanded The Secretary may take additional evidence on remand, and is not obliged to accept the results of claimant’s IQ tests if there is a substantial basis for believing that claimant was feigning the results. If the Secretary does reject the test results on this basis, however, he should state his reasons for doing so.”).

Under the circumstances, the requested remand for testimony of a medical or psychological consultant as to whether the plaintiff’s condition meets or equals Listing 12.05C (followed by reconsideration of the question by an administrative law judge) is appropriate.⁴

1987, a person need only possess a master’s degree to qualify for licensure as a “psychological examiner,” a status that permits him or her, among other things, to administer and interpret IQ tests. *See* 32 M.R.S.A. §§ 3811, 3831(1). It is unclear from the Record whether Worgull was duly licensed; however, counsel for the plaintiff noted that she makes no issue of this.

⁴ As the plaintiff suggests, *see* Statement of Errors at 3, it is appropriate for an administrative law judge to consider the record in its totality (including evidence of the claimant’s functioning), in assessing the validity of a stated IQ score, *see, (continued on next page)*

B. RFC Finding

I briefly consider the plaintiff's challenge to the administrative law judge's RFC determination, in the event the commissioner should find it necessary to proceed past Step 3 on remand. The plaintiff complains that the RFC finding is flawed in its omissions regarding deficits in the plaintiff's concentration, persistence and pace and side effects of medication. *See* Statement of Errors at 4-7. I agree.

The administrative law judge found the plaintiff to lack the RFC "to work in concentrated exposure to respiratory irritants; or do more than simple, routine work which requires no more than occasional contact with supervisors, coworkers, or the general public." Finding 4, Record at 19. The Record contains three mental RFC assessments: one completed by Charles Rothstein, Ph.D., on April 1, 1994 ("First Rothstein MRFC"), *see id.* at 183-85, one completed by David R. Houston, Ph.D., on May 13, 2000 ("Houston MRFC"), *see id.* at 205-07, and one completed by Dr. Rothstein on September 20, 2001 ("Second Rothstein MRFC"), *see id.* at 219-21. With respect to the category "Sustained Concentration and Persistence," the plaintiff was rated by both Drs. Houston and Rothstein (in both the First and Second Rothstein MRFCs) as "moderately limited" in "ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods." *See* Record at 184, 206, 220. In addition, under the same category, the plaintiff was rated by Dr. Houston, and by Dr. Rothstein in the Second Rothstein MRFC, as "moderately limited" in "ability to maintain attention and concentration for extended periods" and

e.g., *Ortiz v. Apfel*, No. 98 C 4552, 1999 WL 984399, at *5 (N.D. Ill. Oct. 25, 1999) ("By its own terms, 12.05C requires a valid IQ score, and the regulations do not limit the question of validity to test results alone in isolation from other factors. Accordingly, the ALJ may discount an IQ score as invalid for a variety of reasons, so long as there is substantial evidence in the record to support his conclusion.") (citations and internal punctuation omitted). In addition, Social Security regulations underscore the importance of consideration of the examiner's own assessment of the validity of the test scores. *See* Listing 12.00D(6)(a).

“ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances,” *see id.* at 205, 219.⁵

Without discussion or explanation, the administrative law judge implicitly rejected all of the foregoing mental limitations. He was not free to choose simply to ignore this uncontradicted evidence, or pick and choose from it *sub silentio*, to craft an RFC. *See, e.g.,* Social Security Ruling 96-6p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2003) (“SSR 96-6p”), at 130 (“Because State agency medical and psychological consultants and other program physicians and psychologists are experts in the Social Security disability programs, the rules in 20 CFR 404.1527(f) and 416.927(f) require administrative law judges and the Appeals Council to consider their findings of fact about the nature and severity of an individual’s impairment(s) as opinions of nonexamining physicians and psychologists. Administrative law judges and the Appeals Council are not bound by findings made by State agency or other program physicians and psychologists, but they may not ignore these opinions and must explain the weight given to the opinions in their decisions.”).⁶

The plaintiff’s final point – that the administrative law judge ignored an issue of possible side effects of medication – also has merit. The Record contains a letter of treating physician David H. Dumont, M.D., listing the handful of medications the plaintiff was prescribed as of her November 10, 2000 visit (including Paxil and Xanax) and stating: “The patient has complained from fatigue [sic] from her previous medications

⁵ To the extent there is a conflict between the First and Second Rothstein MRFCs, the latter report, with respect to which Dr. Rothstein had the benefit of the report of a May 5, 2000 consultative examination with Disability Determination Services (“DDS”) clinical psychologist David W. Booth, Ph.D., controls. *See* Record at 335 (report of Dr. Booth that “[i]t would be expected that [the plaintiff] would have difficulty concentrating on work requirements and persisting with what is asked of her, as symptoms of emotional distress – acute anxiety and depression – interfere.”).

⁶ The administrative law judge evidently credited a further finding of Drs. Houston and Rothstein (in both the First and Second Rothstein MRFCs), under the heading “Sustained Concentration and Persistence,” that the plaintiff was “markedly limited” in her “ability to carry out detailed instructions.” *Compare* Record, Finding 4 at 19 (plaintiff lacks RFC to do more than simple, routine work) *with id.* at 183, 205, 219.

and we are making an attempt to decrease her medications. At this point, I am not sure how much of her fatigue is actually from medications or from depression secondary to her anxiety disorder. In any case, the plaintiff does have a marked somnolence.” Record at 363.

Dr. Dumont’s statement, though admittedly equivocal, flagged the side-effects issue sufficiently to put it into play. Under the circumstances, “[a]t the very least, the administrative law judge should have made a finding on [the plaintiff’s] claim regarding side effects, making it possible for a reviewing tribunal to know that the claim was not entirely ignored.” *Figueroa v. Secretary of Health, Educ. & Welfare*, 585 F.2d 551, 554 (1st Cir. 1978).⁷ While the administrative law judge considered the issue of somnolence, he treated it as a question of whether the plaintiff had a “severe” sleep disorder, ignoring the possibility raised by Dr. Dumont that the condition might properly be characterized, at least to some degree, as one of side effects of medication. *See* Record at 17. This analytical error was not necessarily harmless, inasmuch as Social Security regulations require that any side effects of medication be taken into consideration in evaluating the severity of a claimant’s condition. *See* Listing 12.00G.⁸

For these reasons, should the commissioner reach Steps 4 and 5 on remand, she is instructed to take additional testimony from a medical advisor on the question of the plaintiff’s RFC (including whether

⁷ The First Circuit in *Figueroa* found the plaintiff’s subjective complaints of side effects from his epilepsy medication, coupled with a certified letter from his doctor listing his medications and a caution in relevant Social Security regulations that epilepsy medications may cause side effects, sufficient to put the side-effects issue into play. *See Figueroa*, 585 F.2d at 553-54. Although not mentioned by the plaintiff in her Statement of Errors, I note that in this case, as in *Figueroa*, relevant Social Security regulations caution that medication side effects may be an issue. *See* Listing 12.00G (“Drugs used in the treatment of some mental illnesses may cause drowsiness, blunted effect, or other side effects involving other body systems. We will consider such side effects when we evaluate the overall severity of your impairment.”).

⁸ At oral argument, counsel for the commissioner contended that the plaintiff admitted at hearing that her daytime sleepiness stemmed from poor sleep habits, obviating the need for the administrative law judge to address the side-effects issue. *See* Record at 31 (colloquy between administrative law judge and plaintiff, in which he asked: “How come you can sleep during the day but you can’t sleep at night?” and she answered: “Probably because I sleep so much during the day.”). Taking into consideration the plaintiff’s borderline intellectual functioning, her answer cannot fairly be construed as a concession that she suffers no medication-induced somnolence. She merely confirmed that she sleeps a great deal during the day and cannot sleep well at night – a situation that conceivably could stem in whole or in part from side
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she suffers any side effects of medication), to make a fresh RFC determination and to factor that new RFC into any hypothetical questions posed to a vocational expert.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for further proceedings consistent 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 31st day of October, 2003.

David M. Cohen
United States Magistrate Judge

Plaintiff

JILL PLOURDE

represented by **DAVID A. CHASE**
MACDONALD, CHASE &
DUFOUR
700 MOUNT HOPE AVENUE
440 EVERGREEN WOODS
BANGOR, ME 4401

effects of medications.

942-5558
Email: eholland@macchasedufour.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **HUNG TRAN**
OFFICE OF GENERAL COUNSEL
SOCIAL SECURITY
ADMINISTRATION
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203
(617)565-4277
Email: hung.t.tran@ssa.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

JAMES M. MOORE
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344
Email: jim.moore@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

PETER S. KRYNSKI
SOCIAL SECURITY DISABILITY
LITIGATION - ANSWER SECTION
OFFICE OF THE GENERAL
COUNSEL
5107 LEESBURG PIKE ROOM 1704
FALLS CHURCH, VA 22041-3255
(703) 305-0183
TERMINATED: 10/27/2003
LEAD ATTORNEY

ATTORNEY TO BE NOTICED