

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RAYMOND NORTHRUP,)

Plaintiff)

v.)

Docket No. 02-181-B-W

JO ANNE B. BARNHART,)

Commissioner of Social Security,)

Defendant)

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the questions whether the commissioner’s conclusion that the plaintiff is capable of making an adjustment to work that exists in significant numbers in the national economy and that his testimony was not entirely credible are supported by substantial evidence in the record, whether the commissioner properly evaluated the medical evidence and whether the commissioner developed the record adequately. I recommend that the commissioner’s decision be vacated and the case remanded for further action.

¹ This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on October 27, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920, *Goodermote v. Secretary of Health & Human Servs.*, 69 F.3d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from chronic low back strain, an affective disorder and a seizure disorder, impairments that were severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Finding 3, Record at 18; that the plaintiff's statements concerning his impairments and their impact on his ability to work were not entirely credible, Finding 4, *id.*; that the plaintiff lacked the residual functional capacity to lift and carry more than 20 pounds occasionally or more than 10 pounds on a regular basis, bend more than occasionally, squat, kneel, or crawl, climb ladders, ropes or scaffolds, work near unprotected heights or moving machinery or in exposure to extreme cold, or do more than simple, routine work, and that his capacity for the full range of light work was diminished by these limitations, Findings 5 & 7, *id.*; that the plaintiff was unable to perform his past relevant work, Finding 6, *id.*; that given his age (29), education (high school), work experience (skilled) and residual functional capacity, the plaintiff was able to make a successful vocational adjustment to work which existed in significant numbers in the national economy, including employment as a cashier, assembly worker and food preparation worker, Findings 8-11, *id.*; and that, therefore, the claimant was not under a disability as defined in the Social Security Act at any time through the date of the decision, Finding 12, *id.* at 19. The Appeals Council declined to review the decision, *id.* at 5-6, 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. 13, 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).

Discussion

Medical Evidence

The plaintiff complains that the administrative law judge failed to give proper weight to the opinions of his treating physician, Tarek A. El Sharkawy, M.D., and an examining physician to whom he was referred by his attorney, Donald M. Robertson, M.D., or, in the alternative, to explain adequately his reasons for rejecting their conclusions that the plaintiff was totally disabled. Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 5) at 3-6. 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).² Nonetheless, such an opinion is entitled to consideration based on six enumerated

² The plaintiff also contends that the administrative law judge was required to "clarify" Dr. Sharkawy's opinion that he
(continued on next page)

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).

The plaintiff’s itemized statement does not cite any pages of the record in support of its implicit argument that Dr. Sharkawy’s opinion must be given controlling weight. At oral argument, counsel for the plaintiff stated that pages 216 and 218 of the record supported this argument. At page 216, Dr. Sharkawy opines that the plaintiff “now can’t work” under the entry “LOW BACK PAIN;” on page 218, in a letter addressed “To Whom It May Concern,” Dr. Sharkawy states that the plaintiff “currently [is] unable to work because of a lot of pain.” These assertions can only be characterized as statements that the plaintiff is disabled. 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 in any event. A treating physician’s opinions on the nature and severity of a claimant’s impairments are given controlling weight only when they are well-supported by

was totally disabled by further developing the record, apparently by contacting the physician. Itemized Statement at 7-8. Nothing in the record suggests that the administrative law judge did not understand why Dr. Sharkawy reached this conclusion, that Dr. Sharkawy’s records contained a conflict or ambiguity that must be resolved, lacked necessary information, or otherwise did 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 the plaintiff identify any gaps in the information provided in the report necessary to a reasoned evaluation of his claim. *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991). Particularly where, as here, the medical opinion goes to an issue reserved to the commissioner, the plaintiff has failed to show that any further development of the record was required. *See Santiago v. Secretary of Health & Humans Servs.*, 944 F.2d 1, 5-6 (1st Cir. 1991). Nothing in Social Security Ruling 96-2p (“SSR 96-2p”), on which the plaintiff relies, requires a different conclusion on this point. Social Security Ruling 96-2p, *reprinted in West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2003) at 111.

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 consultants, Record at 230-37, 275-82, 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). 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).

In this case, however, while the administrative law judge does discuss Dr. Sharkawy's evaluation of the plaintiff's mental condition, Record at 15, and refers to Dr. Sharkawy's records in his discussion of the plaintiff's credibility, *id.* at 16, he does not discuss Dr. Sharkawy's opinions concerning the plaintiff's physical condition, let alone give good reasons for according those opinions whatever weight, if any, he may have accorded them. At oral argument, counsel for the commissioner contended, without citation to authority, that Dr. Sharkawy did not establish any physical limitations, and that the administrative law judge accordingly did not need to discuss his reasons for rejecting Dr. Sharkawy's conclusions. Counsel for the plaintiff admitted that Dr. Sharkawy did not set limitations in the terms used by the commissioner in determining residual functional capacity but argued that his references to the plaintiff's pain and functional abilities were sufficient to require the administrative law judge to discuss them. Dr. Sharkawy does record a diagnosis of low back pain, for which medication was prescribed, *id.* at 216; that the plaintiff could not lift, bend or twist from side to side because of back pain, with tenderness and mild muscle spasm in the lower back on examination, and "very little functional ability" due to back pain, *id.* at 217-18; and that the

plaintiff's low back pain "interferes with his daily activity and ability to work," *id.* at 316. These are sufficient "medical signs," 20 C.F.R. §§ 404.1527(d)(3), 416.927(d)(3), to require the administrative law judge to discuss Dr. Sharkawy's opinions. The lack of any explanation for the implicit rejection of Dr. Sharkawy's findings requires remand. *See generally Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999).

Dr. Robertson, whose report was provided to the administrative law judge after the hearing but before his decision was issued, Record at 4, 19, 303-14, is not mentioned at all in the decision. At oral argument, counsel for the plaintiff could not cite any authority to support the proposition that Dr. Robertson's diagnosis of "sacral asymplocation," Record at 303, is a medically accepted diagnosis. Counsel also conceded that there was no medical evidence in the record to support such a diagnosis, but contended that the absence of such evidence required the administrative law judge to develop the record further. It is not the commissioner's burden to generate initial evidence to support a particular diagnosis or medical condition on which the plaintiff seeks to rely; as I have already noted, the requirement that the commissioner develop the record further arises only under certain circumstances not present when there is a bare diagnosis with no supporting evidence at all. *See* footnote 2 above.

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 improperly failed to explain why he rejected the findings of the state-agency reviewers with respect to his psychological limitations and also failed to provide the required analysis of those limitations in the body of his decision. Itemized Statement at 8-10. The state-agency reviewers found several areas in which the plaintiff's functioning was "moderately limited" by a psychiatric impairment. Record at 253-54, 271-72. While moderate limitations do not, standing

alone, require a conclusion that a claimant is disabled, the administrative law judge's reduction of these reports to the single limitation expressed in his hypothetical questions to the vocational expert — "because of his lack of concentration he would only be able to do simple routine work," *id.* at 52 — is the focus of the plaintiff's challenge. The state-agency reviewers' conclusions that the plaintiff "appears to be able to interact appropriately [with] a small number of coworkers [and] supervisors [and] can adapt to minor changes in routine," *id.* at 255, and that the plaintiff "is able to socialize [and] interact in small groups[;] [o]nly routine changes are accommodated," *id.* at 273, were apparently rejected in part by the administrative law judge because Dr. Sharkawy's December 2001 records "reflect significant improvement in the claimant's mental state" since August 2001, *id.* at 15. That analysis, while minimal, is sufficient to support the rejection of some of the limitations suggested by the state-agency reviewers whose work was completed before December 2001. Record at 255, 273.

Finally, the plaintiff attacks the administrative law judge's assessment of his credibility and testimony concerning pain. Itemized Statement at 12-18. I find the treatment of these subjects in the decision, Record at 16, to be minimally adequate under *Da Rosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986), *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986) and SSR 96-7p.

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 31st day of October, 2003.

David M. Cohen
United States Magistrate Judge

Plaintiff

RAYMOND NORTHROP

represented by **FRANCIS JACKSON**
JACKSON & MACNICHOL
85 INDIA STREET
P.O. BOX 17713
PORTLAND, ME 04112-8713
207-772-9000
Email: mail@jackson-macnichol.com

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **ESKUNDER BOYD**
ASSISTANT REGIONAL COUNSEL
OFFICE OF THE CHIEF COUNSEL,
REGION 1
2225 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: eskunder.boyd@ssa.gov