

law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage to remain insured only through September 30, 1992, Finding 1, Record at 13; that his statements concerning his alleged impairments and their impact on his ability to work as of his date last insured were not entirely credible, Finding 3, *id.* at 14; that as of his date last insured he had no impairment that significantly limited his ability to perform basic work-related functions and therefore did not have a severe impairment, Finding 4, *id.*; and that, therefore, he was not under a disability at any time through his date last insured, Finding 5, *id.* The Appeals Council declined to review the decision, *id.* at 4-5, 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 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, 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).

The plaintiff asserts that the administrative law judge erred in (i) failing to properly assess whether his obesity constituted a severe impairment, (ii) improperly finding his mental health disorders non-severe and, in so doing, failing to follow mandated procedure (20 C.F.R. § 404.1520a(a) & (c)), (iii) neglecting to follow the provisions of Social Security Ruling 83-20 ("SSR 83-20"), which permits the use of non-medical testimony and reasonable inferences to establish a remote onset date, (iv) omitting to develop the medical record by ordering a psychological consultative evaluation in accordance with 20 C.F.R. § 404.1512(d)-(f), and (v) making a flawed credibility determination. *See generally* Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 4). I find no reversible error.

I. Discussion

As the plaintiff acknowledges in his Statement of Errors, "The medical record has no documentation prior to August, 1995. At and after that point, it contains records of [his] stroke and subsequent treatment." *Id.* at 2 (citations omitted). That, in a nutshell, is the problem with the plaintiff's case. The claimant, not the commissioner, is responsible as an initial matter for producing evidence of the existence of a medically determinable impairment as of the relevant time period. *See, e.g.*, 20 C.F.R. § 404.1512(c) ("You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled."). A claimed condition for which no such evidence is produced rightfully is ignored. *See, e.g.*, Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service, Rulings 1983-1991* (Supp. 1993) ("SSR 96-7p"), at 133 ("No symptom or combination of symptoms can be the basis for a finding of disability, no matter how genuine the individual's complaints may appear to be,

unless there are medical signs and laboratory findings demonstrating the existence of a medically determinable physical or mental impairment(s) that could reasonably be expected to product the symptoms.”). That said, I briefly consider the plaintiff’s five points of specific error:

1. **Improper consideration of obesity.** The plaintiff argues as an initial matter that the administrative law judge failed to undertake the sort of “individualized assessment” of functioning that is required to support a determination that obesity is a non-severe impairment. *See* Statement of Errors at 2-3 (citing Social Security Ruling 02-01p (“SSR 02-01p”). The plaintiff misapprehends the point of the ruling on which he relies, which forbids a presumption that any particular level of obesity automatically qualifies as severe or non-severe. *See* SSR 02-01p, 2000 WL 628049 (S.S.A.), at *4 (“There is no specific level of weight or BMI [Body Mass Index] that equates with a ‘severe’ or a ‘not severe’ impairment. Neither do descriptive terms for levels of obesity (e.g., ‘severe,’ ‘extreme,’ or ‘morbid’ obesity) establish whether obesity is or is not a ‘severe’ impairment for disability program purposes. Rather, we will do an individualized assessment of the impact of obesity on an individual’s functioning when deciding whether the impairment is severe.”). The administrative law judge complied with this directive, concluding that the evidence did not support a finding that the plaintiff’s obesity was “severe” as of his date last insured. *See* Record at 13 (“Although the 1995 records indicate that Mr. Souza had a history of obesity and diabetes, the absence of any medical evidence which shows that these conditions significantly interfered with his functioning prior to October, 1992 argues against a finding that he had ‘severe’ impairments before his insured status expired.”).²

2. **Improper consideration of mental health disorder.** The plaintiff’s assertion that the

² Counsel for the plaintiff clarified at oral argument that he presses no argument that the Step 2 determination, as it (*continued on next page*)

administrative law judge failed to follow the special technique of 20 C.F.R. § 404.1520a(a) & (c) in determining his mental health disorder to be non-severe, *see* Statement of Errors at 3, is without merit. The administrative law judge's decision is not a model of clarity; however, inasmuch as appears, he did not even consider the alleged mental health disorder to be a medically determinable impairment. *See* Record at 11-13. In any event, there is no evidence establishing that it is. Section 404.1520a(c) – which concerns the necessity to rate the degree of functional limitation – therefore never came into play. *See* 20 C.F.R. § 404.1520a(b) (first step is to assess whether claimant has medically determinable mental impairment; if so, degree of functional limitation must be assessed).

3. **Failure To Apply SSR 83-20.** The plaintiff's arguments notwithstanding, *see* Statement of Errors at 4, SSR 83-20 likewise is inapposite. SSR 83-20 concerns determination of the onset date of disability. *See* SSR 83-20, reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 49 ("In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability."). Such a determination need not be made unless an individual has been determined at some point to have been disabled. *See, e.g., Key v. Callahan*, 109 F.3d 270, 274 (6th Cir.1997) ("Since there was no finding that the claimant is disabled as a result of his mental impairment or any other impairments or combination thereof, no inquiry into onset date is required."). There is no evidence that the plaintiff ever has been found disabled.

4. **Failure To Develop Record.** The plaintiff cites 20 C.F.R. § 404.1512(d)-(f) for the proposition that the administrative law judge erred in failing to order a consultative psychological evaluation. *See* Statement of Errors at 4. However, that regulation contemplates, as an initial matter, that "you [the

concerns the plaintiff's obesity, is unsupported by substantial evidence.

claimant] must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled.” 20 C.F.R. § 404.1512(c). The plaintiff provided no such evidence; therefore, the commissioner’s obligation to help further develop the record was not triggered. Nor does applicable caselaw support the proposition that the commissioner bears any burden to generate initial evidence to support a particular diagnosis or medical condition on which a claimant seeks to rely; rather, the requirement that the commissioner develop the record further arises only under certain circumstances not present when a claimant represented by counsel has been unable to generate any supporting evidence at all. *See, e.g., Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991) (“In most instances, where appellant himself fails to establish a sufficient claim of disability, the [commissioner] need proceed no further.”).

5. **Flawed Credibility Determination.** The plaintiff acknowledges the deferential nature of the standard by which administrative law judges’ credibility determinations are judged; however, he complains that the determination made in his case is too flawed to pass muster. *See* Statement of Errors at 4-5; *see also, e.g., Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) (“The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.”). I am unpersuaded. As the administrative law judge suggested, *see* Record at 13, the fact that the plaintiff’s earliest medical records dated from 1995 and that at least one of those records indicated that he was “fairly active” and still hunting tended to cast doubt on his testimony that he was completely disabled from working as of May 1987.³

³The plaintiff correctly observes that in making this credibility determination, the administrative law judge failed to factor
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II. Conclusion

For the foregoing reasons, I recommend that the commissioner’s decision be **AFFIRMED**.

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 15th day of December, 2003.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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in the plaintiff’s explanation (corroborated by his daughter) that he tended to avoid physicians and treatment, as well as his testimony that he had stopped hunting. See Statement of Errors at 5; Record at 31-33 (plaintiff), 38 (daughter). I see no error in omission of discussion of the hunting testimony, which is vague regarding the time frame when the plaintiff ceased that activity. See Record at 31-32. On the other hand, the failure to acknowledge and discuss the proffered explanation for the lack of medical treatment was indeed error. See SSR 96-7p, at 140 (“[T]he adjudicator must not draw any inferences about an individual’s symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide[.]”). Nonetheless, it was harmless error inasmuch as the administrative law judge (i) was not obliged to accept this explanation at face value and, (ii) in any event, proffered an alternative reason for questioning the plaintiff’s credibility.

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V.

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