



was severe but which did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (“the Listings”), Findings 3-4, *id.*; that his allegations regarding his limitations were not totally credible, Finding 5, *id.*; that he had the residual functional capacity to lift and carry no more than 20 pounds occasionally and 10 pounds frequently and needed to be able to change position between sitting and standing at his option, could only occasionally climb stairs, could not work around moving machinery or at hazardous heights and could not stand or walk on uneven surfaces, Finding 7, *id.*; that he was unable to perform any of his past relevant work, Finding 8, *id.*; that, as of the date last insured, given his age (“younger individual”), education (high school equivalent), work background (skilled and semi-skilled) and residual functional capacity to perform a significant range of light work, use of Rules 202.13, 202.14, 202.15, 202.20, 202.21, 202.22, 201.21, 201.22, 201.27, 201.28 and 201.29 found in Appendix 2 to Subpart P, 20 C.F.R. Part 404 (“the Grid”) as a framework for decision-making resulted in a conclusion that the plaintiff was able to perform several jobs existing in significant numbers in the national economy, Findings 9-13, *id.* at 20-21; and that he, therefore, was not under a disability as defined in the Social Security Act at any time through the date of the decision, Finding 14, *id.* at 21. 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; *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 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); *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. 1984).

The plaintiff challenges only the testimony of the vocational expert called by the administrative law judge at the hearing in this case. Statement of Errors, etc. (Docket No. 6) at [3]-[4]. Specifically, he contends that one of the six jobs listed by the vocational expert as jobs that he could perform within the limitations set by the administrative law judge in his hypothetical questions should be eliminated because it is classified as semi-skilled rather than unskilled; two others should be eliminated because the vocational expert testified that they would be "affected" by his need to avoid concrete or uneven surfaces; and, because the vocational expert testified that all six of these jobs would be unaffected by the need for a sit/stand option rather than stating how the available numbers of such jobs would be reduced or otherwise affected by that option, his testimony is "clearly not credible and internally inconsistent," *id.* at [3], and must therefore be disregarded.

In order to find that a claimant is not disabled at Step 5, the commissioner must show that the work which the claimant is able to do "exist[s] in significant numbers in the national economy (either in the region where you live or in several regions of the country)." 20 C.F.R. § 404.1561. The plaintiff correctly points out, Statement of Errors at [3], that the administrative law judge's questions to the vocational expert specified unskilled jobs, Record at 36-39, and that the first job listed by the vocational expert, security guard, *id.* at 36, is a semi-skilled job, listed in the Dictionary of Occupational Titles with a specific

vocational preparation level of 3, *Dictionary of Occupational Titles* (U. S. Dep't of Labor, 4th ed. rev. 1991) § 372.667-034; Social Security Ruling 00-4p (“SSR 00-4p”), reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2003), at 245. However, elimination of this job from the vocational expert's response leaves five jobs, more than enough to meet the “significant number” requirement of section 404.1561.

The plaintiff next points to the vocational expert's testimony concerning the job of officer helper. The vocational expert did testify that half of the numbers he had given for this job — 90,000 in the national economy and 350 in the state — would be eliminated by additional limitations given by the administrative law judge in a second hypothetical, Record at 36-37, but the remaining number is still significant within the meaning of section 404.1561, particularly if other jobs are also available. The plaintiff states that the vocational expert testified that two of the other four jobs would be “affected” by a need to avoid concrete or uneven surfaces, Record at 38-39, asking the court to deem this testimony the equivalent of eliminating those jobs. Counsel for the commissioner agreed at oral argument that such characterization of the testimony is appropriate. Even with the elimination of these jobs, however, two jobs — and half of the office helper jobs — remain, and the “significant” level required by section 404.1561 is still met. *See also* 20 C.F.R. § 404.1566(b).

Invoking SSR 83-12, the plaintiff's final argument is that the vocational expert testified that all six jobs would be unaffected by his need for a sit/stand option “without providing any foundation as to how those numbers would be reduced or affected by the requirement.” Statement of Errors at [3]. To the contrary, the vocational expert specifically testified that the available numbers of those jobs would not be affected at all by a sit/stand requirement. Record at 38. The ruling cited by the plaintiff does include the statement that “[u]nskilled types of jobs are particularly structured so that a person cannot ordinarily sit or

stand at will.” Social Security Ruling 83-12, reprinted in *West’s Social Security Reporting Service* Rulings 1983-1991 at 40. However, that does not mean that all unskilled jobs are incompatible with a sit/stand option or that the vocational expert’s testimony that the six jobs at issue here are compatible with a sit/stand option is “not credible and internally inconsistent.” The vocational expert is precisely the person to be consulted on such a question; it obviously falls within his area of expertise. The plaintiff’s necessarily- implied argument based on the perceived inconsistency between the vocational expert’s testimony and the quoted statement from SSR 83-12 has been directly rejected by at least two circuit courts of appeals, for similar reasons which I find persuasive. *Walls v. Barnhart*, 296 F.3d 287, 290-91 (4th Cir. 2002); *Books v. Chater*, 91 F.3d 972, 980-81 (7th Cir. 1996). The plaintiff is not entitled to relief on this basis.

### **Conclusion**

For the foregoing reasons, I recommend that the decision of the commissioner 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 16th day of December, 2003.

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

**Plaintiff**

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