

1999 for purposes of eligibility for SSD benefits, Finding 1, Record at 22; that he had degenerative joint disease, particularly of the right knee, an impairment that was severe but which did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (“the Listings”), Finding 3, *id.*; that his statements concerning his impairment and its impact on his ability to work were not credible to the extent alleged and contradicted by the opinion of treating sources and his own statements and actions, Finding 4, *id.*; that he had the functional capacity to lift and carry no more than ten pounds and to stand or walk for no more than two hours per work day, Finding 5, *id.*; that he was unable to perform his past relevant work, Finding 6, *id.*; that given his age (47), education (high school) and residual functional capacity for sedentary work, he was able to make a successful vocational adjustment to work that exists in significant numbers in the national economy, Findings 7-9, *id.*; and that he accordingly had not been under a disability, as defined in the Social Security Act, at any time through the date his insured status expired or at any time through the date of the 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. §§ 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).

The administrative law judge in this case purported to use the Grid as a framework for decision making. Record at 21. She found the plaintiff "capable of sedentary work not requiring substantial literary skills" and immediately concluded that "[a] finding of 'not disabled' is therefore reached within the framework of the Medical-Vocational guidelines." *Id.* If the administrative law judge did in fact use the Grid as a framework rather than applying it directly, she must have concluded that the plaintiff's lack of "substantial literary skills" had very little effect on the plaintiff's ability to perform a full range of sedentary work. Social Security Ruling 83-14 ("SSR 83-14"), reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 47. If this nonexertional impairment had any greater effect, more analysis would have been required. *Id.*²

The plaintiff contends that the administrative law judge was required to seek the testimony of a vocational expert at the hearing and that the administrative law judge was required to evaluate the effect of his "extremely limited literacy," his "partially amputated finger" and "[t]he nonexertional limitations imposed by chronic pain" on his ability to perform a full range of sedentary work. Itemized Statement of Specific Errors (Docket No. 6) at 2-3. These contentions are undermined by the fact that counsel for the plaintiff, who also represents him here, stated at the hearing that he was alleging only the knee degeneration and pain as severe impairments. Record at 296. The plaintiff testified about his ability to read and write at the

² Counsel for the commissioner stated at oral argument that the administrative law judge's assertion that the Grid was
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hearing, *id.* at 296-98, and mentioned almost in passing that he had lost part of his right index finger, *id.* at 304.

“If the occupational base is significantly limited by a nonexertional impairment, the [commissioner] may not rely on the Grid to carry the burden of proving that there are other jobs a claimant can do. Usually, testimony of a vocational expert is required.” *Heggarty v. Sullivan*, 947 F.2d 990, 996 (1st Cir. 1991). However, if a significant nonexertional impairment has the effect of only reducing the occupational base marginally, the Grid may be relied on exclusively. *Id.* The definition of sedentary work does not refer to literacy at all. 20 C.F.R. §§ 404.1567(a), 416.967(a). For those in the plaintiff’s age group, the Grid differentiates between individuals who have a high school education³ and those who have limited education but are “at least literate and able to communicate in English.” Grid §§ 201.18 - 201.21. However the plaintiff’s literacy skills are characterized, and whether or not he had transferable skills from his past relevant work, an issue not addressed by the administrative law judge, the Grid in all such cases directs a finding of not disabled. Under these circumstances, the plaintiff’s contention that his limited ability to read and write significantly affects the occupational base at the sedentary level cannot stand. *See Glenn v. Secretary of Health & Human Servs.*, 814 F.2d 387, 389-92 (7th Cir. 1987). The plaintiff testified that he could read at an eighth grade level and reported that he reads history for two hours daily. Record at 296, 85. *See also* Grid § 201.00(h) (finding of “disabled” warranted for individual aged 45-49 who is restricted to sedentary work, is unskilled or has no transferable skills, can no longer perform past relevant work and is unable to read or write in English). Since the plaintiff’s degree of literacy is specifically included in the Grid, it may not be used to overturn the commissioner’s use of the Grid.

used as a framework, Record at 21, was a “clerical error,” and agreed that the administrative law judge in this case in fact
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With respect to pain, the plaintiff testified that the pain in his right knee was always at the level of eight to nine on a scale of one to ten and that he could not do a job with a sit/stand option because “I’d be in so much pain I’d have to have my pain killers and it just, I couldn’t function.” Record at 303, 306. However, he also testified that the only medication he was taking was Ibuprofen as an anti-inflammatory. *Id.* at 303. He testified that he did some housecleaning every day and shopped at a nearby grocery market. *Id.* at 305. On the Adult Function Form he indicated that he prepared his own meals. *Id.* at 83-84. As the administrative law judge noted, *id.* at 20, the medical records of the plaintiff’s treating physician show that he spent part of the summer of 2001 golfing in Nova Scotia and could not be expected to keep medical appointments during the month of November, when he would be deer hunting, *id.* at 238-39.⁴ This is substantial evidence to support the administrative law judge’s conclusion that the plaintiff’s “impairment is not as egregious as he has represented it to be,” *id.* at 20, which in turn supports her apparent conclusion that the plaintiff’s pain did not have the effect of reducing the sedentary occupational base more than marginally.⁵

Assuming *arguendo* that the plaintiff’s claim regarding his index finger has not been waived, neither his own testimony nor the single page of the medical records which he cites indicates any limitations in work functions resulting from his “right second digit partial amputation.” *Id.* at 111. Indeed, on the same page of

applied the Grid directly.

³ The plaintiff testified that he went to school through the 12th grade. Record at 296.

⁴ Counsel for the plaintiff contended at oral argument that the administrative law judge had a duty to question the plaintiff about these entries in the medical record because they “contradicted” other medical evidence which he failed to identify. He understandably cited no authority for this position, which would expand the role of the administrative law judge from that of a neutral finder of fact into that of an advocate for every claimant.

⁵ At oral argument, counsel for the plaintiff stated that he had been prepared to offer testimony at the hearing to the effect that these entries in the medical record were erroneous, but that the administrative law judge cut his presentation short and left the room. He acknowledged that he did not object to the ending of the hearing in this manner, and the transcript bears this out. Record at 306-07. This court can only rely on the administrative record before it in dealing with an appeal from the commissioner’s decision; raising such a procedural issue for the first time at oral argument is inappropriate. In
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the medical record the plaintiff reported that he had been cutting trees with the public works department without any noted difficulty due to the finger. *Id.* While “[m]ost unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions,” Social Security Ruling 96-9p, reprinted in *West’s Social Security Reporting Service Rulings* (2003) at 159, there is no medical or other evidence in the record demonstrating any degree of limitation resulting from the partial amputation of one of the plaintiff’s fingers. In the absence of such evidence, the administrative law judge did not err in failing to consider the possible effect of that alleged impairment on the plaintiff’s ability to perform the full range of sedentary work.

Because there was no showing of a significant limitation on the sedentary occupational base by any of the impairments now identified by the plaintiff, the administrative law judge was not required to obtain the testimony of a vocational expert.

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 23rd day of December, 2003.

addition, failure to mention an issue in the itemized statement of errors, as is the case here, constitutes a waiver of that issue. *Ward v. Apfel*, 1999 WL 1995199(D. Me. June 2, 1999), at *5.

/s/ David M. Cohen
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United States Magistrate Judge

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