

administrative law judge found, in relevant part, that for purposes of SSD the plaintiff had acquired sufficient quarters of coverage to remain insured through the date of decision, Finding 1, Record at 20; that she had an impairment or combination of impairments that were “severe” but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Findings 3-4, *id.* at 21; that she retained the residual functional capacity (“RFC”) to lift and carry ten pounds on a regular basis and twenty pounds occasionally, to bend, twist and use foot and hand controls on an occasional basis and to do simple, repetitive work, Finding 7, *id.*; that her past relevant work as a cashier, shoe inspector² and flagger did not require the performance of work-related activities precluded by her RFC, Finding 8, *id.*; that her medically determinable disorder of the back, depression and borderline intellectual functioning did not prevent her from performing past relevant work, Finding 9, *id.*; and that she therefore was not under a disability at any time through the date of decision, Finding 10, *id.* The Appeals Council declined to review the decision, *id.* at 6-8, 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).

² The administrative law judge uses the term “show inspector,” *see* Finding 8, Record at 21; however, that is a typographical error, *see, e.g., id.* at 20.

The administrative law judge in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings of the plaintiff's RFC and the physical and mental demands of past work and determine whether the plaintiff's RFC would permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service Rulings 1975-1982* ("SSR 82-62"), at 813.

The plaintiff contends that two of the administrative law judge's findings are unsupported by substantial evidence of record: (i) that her chronic obstructive pulmonary disease ("COPD") was non-severe and (ii) that she was capable of returning to past relevant work as a cashier, shoe inspector and flagger. *See* Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 8) at 3-8. She also asserts that remand is warranted on the basis of the existence of new, material evidence and a showing of good cause for its untimely proffer. *See id.* at 9-12. The second of this trio of points has merit, warranting remand for further development.

I. Discussion

As the plaintiff correctly observes, *see id.* at 6, work that occurred more than fifteen years prior to the time of adjudication of a claim typically is excluded from consideration of whether a claimant can return to past relevant work, *see, e.g., Rivera-Torres v. Secretary of Health & Human Servs.*, 837 F.2d 4, 7 (1st Cir. 1988); 20 C.F.R. §§ 404.1565(a), 416.965(a); SSR 82-62, at 809-11.³ As the First Circuit has made plain, "[n]ormally, absent some reasonable explanation for departing from the 15 year rule, we would

³ For purposes of SSD claims, the fifteen-year period is measured backward from the date a claimant's insured status (*continued on next page*)

not uphold the denial of benefits to claimant on the ground that claimant can perform his past work[.]”
Rivera-Torres, 837 F.2d at 7.

The Record contains three documents, all submitted by or on behalf of the plaintiff, describing her past relevant work. *See* Record at 96 (contained in Disability Report – Adult, dated May 5, 2000), 104-11 (Work History Report dated May 27, 2000), 133-34 (Claimant’s Work Background – undated). The plaintiff also testified at hearing with respect to one of her past jobs, that of flagger. *See id.* at 41.⁴ The plaintiffs’ work-history documents are in some respects inconsistent with each other, *compare id.* at 96 *with id.* at 104-11, 133-34, and at least one of them is incomplete, listing only work performed through 1994, *see id.* at 133-34. Nonetheless, with respect to the jobs in issue, the following evidence stands uncontradicted:

1. Shoe inspector: that this job was performed in the 1970s. *See id.* at 104.
2. Cashier: that two cashiering jobs (those of cashier/service desk and cashier/cook) were performed in the 1970s, *see id.*, while a third, performed in the 1990s, consisted not only of cashiering but also of “floor person” and sorter work, *see id.* at 96, alternatively described as “stores laborer” work, *see id.* at 133.
3. Flagger: that this job, which was performed in the 1990s, *see id.* at 104, entailed walking and standing but no sitting, *see id.* at 96.⁵

expired, if earlier than the date of adjudication of the claim. *See* 20 C.F.R. §§ 404.1565(a), 416.965(a). In this case, the plaintiff’s insured status had not expired as of the date of adjudication.

⁴ The Record also contains what appears to be an agency-generated printout of the plaintiff’s earnings record, sorted by year and containing details of each employer, for the years 1985 through 2001. *See* Record at 86-89. However, inasmuch as that document is devoid of any comprehensible information concerning the nature of the work performed, *see id.*, it is difficult to discern whether it matches the plaintiff’s work-history information.

⁵ Improbably, the plaintiff describes the flagger job as involving twelve to sixteen hours a day of walking and nine-and-a-half hours of standing. *See* Record at 96. While such a proclamation normally would bear on a claimant’s credibility, it seems appropriate in this case to make allowances given that (i) the plaintiff suffers from borderline intellectual (*continued on next page*)

The plaintiff's SSD and SSI claims were adjudicated on June 25, 2002. *See id.* at 21. Pursuant to the fifteen-year rule, to the extent the administrative law judge wished to rely on any work performed prior to June 1987, he should have provided a reasonable explanation for the deviation. He did not do so. *See id.* at 17-20. Hence, as counsel for the commissioner conceded at oral argument, the administrative law judge erred in categorizing the shoe-inspector job and two of the three cashiering jobs, all of which were performed in the 1970s, as past relevant work.

Two jobs survive the fifteen-year-rule cut (one cashiering job and the flagger job); however, the administrative law judge's determinations regarding them turn out to be flawed for other reasons.

As the plaintiff points out, *see* Statement of Errors at 7, the evidence is uncontradicted that the 1990s cashier job entailed work other than cashiering. Vocational expert Yvonne Batson testified at hearing that a person with the hypothetical RFC profile ultimately adopted by the administrative law judge could return to "the cashier job." *See* Record at 47-48. However, in response to a question from the plaintiff's counsel, Batson clarified that a person with that hypothetical RFC could return only to a pure cashiering job – not one requiring the performance of other duties such as stores laborer. *See id.* at 50.

To be deemed capable of returning to past relevant work, a claimant must retain the RFC to perform "the actual functional demands and job duties of a particular past relevant job." *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991) (citations and internal quotation marks omitted).⁶ The only evidence of record concerning the nature of the cashier job is the plaintiff's own

functioning, *see* Finding 9, *id.* at 21, and (ii) what matters for these purposes is whether she spent her time exclusively walking and/or standing, not how much time she spent doing each.

⁶ "Alternatively [at Step 4], when the demands of the particular job which claimant performed in the past cannot be met, if the claimant has the capacity to meet the functional demands of that occupation as customarily required in the national economy, then a finding of non-disability also follows." *Santiago*, 944 F.2d at 5 n.1; *see also, e.g.*, SSR 82-62, at 811. Here, as in *Santiago*, the administrative law judge made no findings respecting this second prong of the Step 4 (*continued on next page*)

documentation. Inasmuch as (i) that job comprised other duties besides cashiering, and (ii) Batson clarified that a person with the hypothetical RFC posited by the administrative law judge could return only to a pure cashiering job, not one mixed with other duties such as those of a stores laborer, the administrative law judge erred in finding the plaintiff capable of returning to past relevant work as a cashier.

Finally, as the plaintiff posits, *see* Statement of Errors at 8, the administrative law judge’s finding concerning her ability to return to the flagger job also is fatally flawed. Consistent with the plaintiff’s own description of her job duties as a flagger, Batson testified at hearing that a person with the hypothetical RFC posited by the administrative law judge could return to the flagger job if that person “could stand the whole day[.]” Record at 48. However, the administrative law judge made no finding that the plaintiff retained the capability to stand for an entire day. Rather, he found her “limited to light duty work[.]” *Id.* at 20. “[T]he full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday.” Social Security Ruling 83-10, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (“SSR 83-10”), at 29. The determination that the plaintiff retained the RFC to perform the flagger job accordingly was unsupported by substantial evidence.

The administrative law judge’s Step 4 finding that the plaintiff could return to past relevant work – the basis on which her SSI and SSD claims were denied – is unsupported by substantial evidence. Remand for further proceedings accordingly is warranted.

For the guidance of the parties on remand, I briefly consider the plaintiff’s remaining two points of error.

disjunctive test, as a result of which it is not implicated. *See id.*; Record at 20 (relying on Batson’s testimony that plaintiff could return to past relevant work as cashier, shoe inspector and flagger “as performed by the claimant”).

1. Non-severity of COPD: The plaintiff's arguments notwithstanding, *see* Statement of Errors at 3-5, the administrative law judge's finding that her COPD was not severe is supported by substantial evidence in the form of the reports of Disability Determination Services ("DDS") examining consultant Christopher S. Smith, M.D., and DDS non-examining consultants Lawrence P. Johnson, M.D., and James H. Hall, M.D. *See* Record at 142-44 (report of Dr. Johnson dated September 4, 2000), 168-70 (report of Dr. Hall dated January 19, 2001); 299-301 (report of Dr. Smith dated July 6, 2000). While, as the plaintiff notes, *see* Statement of Errors at 3-4, Dr. Smith did not have the benefit of results of an August 24, 2000 pulmonary-function test, Drs. Johnson and Hall did, *see* Record at 144, 170. Finally, the administrative law judge supportably rejected the RFC assessment of treating physician Abe N. Palihan, M.D. Determination of a claimant's RFC is reserved to the commissioner; accordingly, no "special significance" is accorded an opinion even from a treating source as to RFC. *See* 20 C.F.R. §§ 404.1527(e)(2)-(3), 416.927(e)(2)-(3). The administrative law judge thoughtfully considered Dr. Palihan's RFC report, rejecting it on the basis of its inconsistency with other evidence of record and lack of objective medical underpinning. *See* Record at 19-20. This approach was consistent with that prescribed in controlling regulations. *See* 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

2. New and material evidence. This point of error implicates 42 U.S.C. § 405(g), which provides "the statutory authority to remand for further proceedings where new evidence is presented after the ALJ decision if the evidence is material *and* good cause is shown for the failure to present it on a timely basis." *Mills v. Apfel*, 244 F.3d 1, 5 (1st Cir. 2001) (emphasis in original). The plaintiff contends that she demonstrates "good cause" for the late proffer inasmuch as the evidence previously did not exist. *See* Statement of Errors at 11. Such an excuse does not suffice. If it did, nearly all late-submitted evidence would be cognizable – a result clearly at odds with the intentment of section 405(g) as construed by the

First Circuit. *See, e.g., Evangelista v. Secretary of Health & Human Servs.*, 826 F.2d 136, 141 (1st Cir. 1987) (“Congress plainly intended that remands for good cause should be few and far between, that a yo-yo effect be avoided – to the end that the process not bog down and unduly impede the timely resolution of social security appeals.”); *see also, e.g., Lisa v. Secretary of Dep’t of Health & Human Servs.*, 940 F.2d 40, 45 (2d Cir. 1991) (“Lisa must go beyond showing that the proffered evidence did not exist during the pendency of the administrative proceeding. Rather, she must establish good cause for failing to produce and present the evidence at that time.”). Nonetheless, counsel for the commissioner represented at oral argument that, as a matter of standard practice, the commissioner would take the late-proffered new evidence into consideration were remand warranted on other grounds.

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 30th day of January, 2004.

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

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