

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**DONALD L. BLAKE,** )  
 )  
 **Plaintiff** )  
 )  
 **v.** )  
 )  
 **JO ANNE B. BARNHART,** )  
 **Commissioner of Social Security,** )  
 )  
 **Defendant** )

**Docket No. 03-149-P-S**

**REPORT AND RECOMMENDED DECISION<sup>1</sup>**

This Social Security Disability (“SSD”) appeal raises the issue whether substantial evidence supports the commissioner’s determination that the plaintiff, who suffers from back disorders, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further development.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had disorders of the back with low back pain, status post

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<sup>1</sup> This action is properly brought under 42 U.S.C. § 405(g). 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 February 25, 2004, 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.

cervical fusion, and stenosis – 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, Record at 23; that his allegations regarding his limitations were not totally credible for reasons set forth in the body of the decision, Finding 5, *id.* at 24; that he retained the residual functional capacity (“RFC”) to perform a significant range of sedentary work (never requiring lifting in excess of ten pounds), Findings 7 & 12, *id.*; that considering his age (“younger individual age 45-49”), education (high school) and vocational background (semi-skilled but without transferable skills), and using Rule 201.21 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”) as a framework, a finding was reached that there were a significant number of jobs in the regional and national economies that he could perform, Findings 9-13, *id.*; and he therefore was not under a disability at any time through the date of decision, Finding 14, *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; *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 process, at which stage 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. 1986).

The plaintiff complains that the administrative law judge (i) failed to give adequate weight to the opinion of treating physician Russell G. Remalia, D.O., regarding his RFC and (ii) made a flawed credibility assessment. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff (“Statement of Errors”) (Docket No. 7). I agree.

### **I. Discussion**

In his written RFC evaluation dated February 14, 2002, Dr. Remalia opined, *inter alia*, that the plaintiff was (i) capable of low-stress jobs – work that was sedentary and less than four hours daily, *see* Record at 202, (ii) could sit for thirty minutes at one time and stand for fifteen minutes at one time, *see id.* at 203, (iii) could sit for less than two hours total in an eight-hour workday, *see id.*, (iv) on average, would need to walk or stand and stretch for five minutes for every thirty minutes of sitting but could only work a four-hour day, *see id.* at 204, (v) required a job that permitted shifting positions at will from sitting, standing and walking, *see id.*, (vi) sometimes would need to take unscheduled breaks, *see id.*, and (vii) could occasionally lift less than ten pounds and rarely lift ten pounds, *see id.*

At hearing, the plaintiff testified in response to questions from the administrative law judge that he (i) probably could lift and carry no more than about ten or fifteen pounds without causing himself “malfunctioning,” *id.* at 41, and (ii) to keep himself relatively pain-free in the context of performing a “counter job” – a job for which he had previously applied – he would need to take stretch breaks of five to ten minutes’ duration approximately every half-hour to forty-five minutes, *id.* at 42-43, 49-50. However, in followup questions from his own counsel, the plaintiff testified, *inter alia*, that a gallon of milk is probably the heaviest thing he lifts around the house during the course of the day and that he could not work a full

eight-hour day “at this point and [sic] time[.]” *Id.* at 54. Thus, the plaintiff’s testimony as clarified comported more closely with Dr. Remalia’s RFC.

The administrative law judge predicated his rejection of Dr. Remalia’s RFC and his partially unfavorable assessment of the plaintiff’s credibility on one fact: that the plaintiff assertedly “acknowledged [at hearing] that he can work with stretching every forty-five minutes for five minutes.” *Id.* at 22. However, as counsel for the commissioner conceded during oral argument, the plaintiff’s later clarification that his work capacity was limited to less than an eight-hour day “would certainly seem to undercut the [plaintiff’s] previous testimony.” Counsel argued that the administrative law judge nonetheless took into consideration the subsequent, clarifying testimony, but I find nothing beyond a boilerplate statement to indicate that he did. *See id.* (“After considering the testimony and the medical evidence of record . . .”).

In the absence of any express recognition and resolution of this apparent conflict, the administrative law judge’s finding that the plaintiff admitted he could work with certain restrictions cannot be said to be supported by substantial evidence.<sup>2</sup> That, in turn, calls into question the validity of the administrative law judge’s findings concerning Dr. Remalia’s RFC and the plaintiff’s credibility. *See, e.g.*, 20 C.F.R. § 404.1527(d)(2) (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

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<sup>2</sup> The Record contains two additional RFC assessments, by Disability Determination Services (“DDS”) non-examining physicians Robert Hayes, D.O., *see* Record at 147-54 (report dated June 13, 2001), and Lawrence P. Johnson, M.D., *see id.* at 155-62 (report dated January 16, 2002). Inasmuch as appears, the administrative law judge placed no reliance on either DDS opinion. *See id.* at 18-24. In any event, neither Dr. Hayes nor Dr. Johnson had the benefit of the Remalia RFC (which postdated their reports) – a circumstance that counsels against according significant weight to either DDS opinion. *See, e.g., Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) (“[T]he amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert. In some cases, written reports submitted by non-testifying, non-examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule.”)(citations and internal quotation marks omitted).

give your treating source's opinion."); Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (Supp. 2003) ("SSR 96-7p"), at 134 ("It is . . . not enough for the adjudicator simply to recite the factors that are described in the regulations for evaluating symptoms. The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight."). Remand for further proceedings accordingly is warranted.<sup>3</sup>

## 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 3rd day of March, 2004.

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

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<sup>3</sup> At oral argument, counsel for the commissioner argued that the administrative law judge gave additional reasons (besides the plaintiff's asserted acknowledgement that he could work) for the credibility finding. However, the other "reasons" given are nothing more than the precise type of boilerplate proscribed by SSR 96-7p, to wit: "The claimant's testimony, statements of record, and description of his limitations are not entirely credible in light of the medical evidence and opinions of his treating and examining physicians." Record at 22.

**Plaintiff**

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V.

**Defendant**

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