



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 medical evidence established that the plaintiff had an affective mood disorder, carpal tunnel syndrome, epicondylitis of the right elbow and degenerative joint disease of the right acromioclavicular joint – 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”), Finding 3, Record at 18; that the evidence supported a finding that the plaintiff retained the residual functional capacity (“RFC”), *inter alia*, to lift and carry twenty pounds occasionally and ten pounds frequently and to occasionally perform overhead work with his right upper extremity, although he was unable to constantly handle or reach, Finding 5, *id.*; that although the plaintiff was unable to perform his past relevant work or the full range of light work, he was capable of making a successful vocational adjustment to work existing in significant numbers in the national economy, Findings 6, 10, *id.*; and that he therefore had not been under a disability at any time through the date of decision, Finding 11, *id.* The Appeals Council declined to review the decision, *id.* at 5-6, 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).<sup>2</sup>

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.

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<sup>2</sup> The decision in issue was rendered on remand from the Appeals Council, which vacated a prior decision in this case. *See, e.g.*, Record at 12, 131-33.

*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 erroneously (i) found that he retained the RFC to use his hands and wrists frequently, (ii) asked a vocational expert at hearing to assume the existence of that unsupported RFC, and (iii) then relied on testimony premised on the flawed RFC to support his Step 5 finding. *See generally* Statement of Errors and Fact Sheet ("Statement of Errors") (Docket No. 8). I agree.

## **I. Discussion**

It is bedrock Social Security law that the responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). Further, an administrative law judge, as a layperson, is not qualified to translate raw medical data into functional restrictions; he typically must rely on medical experts to do so for him. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (although an administrative law judge is not precluded from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record").

The Record contains two Disability Determination Services (“DDS”) physical RFC assessments, one completed by Karen Anne Brown, SDM, on November 6, 2001 and one completed by Lawrence P. Johnson, M.D., on December 3, 2001. *See* Record at 292-99, 318-25. Inasmuch as appears, the acronym “SDM” stands for “Single Decision Maker,” *see id.* at 84, and Brown is not a medical expert. In any event, the administrative law judge made plain that he did not rely on either assessment, stating: “Due to new and material evidence, including the testimony at hearing, the findings of the medical experts at the state Disability Determination Services are found to be no longer consistent with the record as a whole. Therefore, their findings are given less weight by the undersigned.” *Id.* at 16.

With respect to upper-extremity limitations the administrative law judge relied, instead, on two other opinions of record: an independent medical evaluation completed on February 28, 2001 by Peter K. Esponnette, M.D., in the context of a workers’ compensation claim, and a consulting-examiner report completed on October 2, 2001 by William F. Boucher, M.D., for DDS. *See id.* at 16, 277-83, 284-86. The administrative law judge accurately summarized the upper-extremity limitations noted by Drs. Esponnette and Boucher: that, per Dr. Esponnette, the plaintiff should avoid highly forceful grasping, highly repetitive hand motions or exposure to vibratory equipment and, per Dr. Boucher, the plaintiff should avoid sustained or repetitive use of the right arm above shoulder level or forceful repetitive pushing or pulling with the right arm. *See id.* at 16, 283, 285. However, without explanation, he then crafted an RFC that deviates in some respects from those opinions. *See, e.g., id.* at 72-73 (asking vocational expert to assume, *inter alia*, a hypothetical claimant who has “limitations as far as reaching is concerned, they should not have to do

any overhead work more than occasionally. They should not have to handle or use his right upper extremity for reaching constantly. That is, he can use those – his right upper extremity frequently for that work.”<sup>3</sup>

The vocational expert opined that a claimant with the RFC posited by the administrative law judge could perform baler machine operator, press feeder and hand sprayer jobs. *See id.* at 72-74. However, as the plaintiff points out, *see* Statement of Errors at [2], when his counsel asked the vocational expert whether a claimant capable of performing only occasional (rather than frequent) handling or grasping could do any of those three jobs, she testified that such a claimant could not. *See id.* at 82-83. Counsel for the commissioner pointed out at oral argument that no medical evidence of record supports the plaintiff’s contention that he is limited to performing only occasional handling or grasping; however, even assuming *arguendo* that this is so, I do not construe the Esponnette, Boucher and Boothby reports as providing positive evidence that the plaintiff retained the RFC to perform those activities frequently.

In summary, it is not clear that the administrative law judge’s upper-extremity RFC determination – particularly his finding that the plaintiff was capable of frequent reaching – squares with the Esponnette and Boucher opinions. Put differently, the Record appears devoid of “positive evidence” supporting that particular (and as it turns out critical) aspect of RFC. Accordingly, reversal and remand for further proceedings is warranted.<sup>4</sup>

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<sup>3</sup> The Record contains what arguably is a third opinion shedding light on upper-extremity limitations, from John A. Boothby, M.D., dated November 21, 2000, stating in relevant part: “If [the plaintiff] is able to change his job so he does not have frequent repetitive wrist motions, that is also beneficial for most patients [with carpal tunnel syndrome].” Record at 276. This, as well, provides no positive evidence that the plaintiff is capable of frequent reaching or handling.

<sup>4</sup> At oral argument, I asked counsel for both the plaintiff and the commissioner to comment on the significance of a seeming admission by the plaintiff that he could work. The transcript of the plaintiff’s hearing before the administrative law judge contains a colloquy in which the plaintiff admitted to the administrative law judge that he did not want to take a minimum-wage job. *See* Record at 64-66. Following this dialogue, the administrative law judge stated: “The disability program is not for people who don’t want to take minimum wage jobs. Disability program is for people who cannot do any jobs. Are you that?” *Id.* at 66. The plaintiff responded: “I feel I could do something, but I don’t know what.” *Id.* Counsel for the commissioner agreed that this comment could not satisfy the commissioner’s Step 5 burden to prove the  
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**II. Conclusion**

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for proceedings not inconsistent 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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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

**Plaintiff**

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plaintiff’s ability to perform work existing in significant numbers in the national economy; rather, she suggested, the comment was properly considered at Step 4 in weighing the plaintiff’s credibility. I am satisfied that this vague comment does not contribute to a positive finding that the plaintiff was capable of frequent grasping and handling.

V.

**Defendant**

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