

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVID RUBY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 03-225-P-S
)	
JO ANNE B. BARNHART,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income (“SSI”) appeal raises the question whether the administrative law judge properly considered the opinion of a treating physician. I recommend that the court affirm the commissioner’s decision.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. § 416.920; *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 degenerative disc disease, an impairment that was severe but did not meet or equal any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the

¹ This action is properly brought under 42 U.S.C. § 1383(c)(3). 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 April 28, 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.

“Listings”), Finding 2, Record at 16; that the plaintiff’s statements concerning his impairment and its effect on his ability to work were not entirely credible, Finding 3, *id.*; that the plaintiff lacked the residual functional capacity to lift and carry more than 20 pounds or more than 10 pounds on a regular basis, Finding 4, *id.*; that he was unable to perform his past relevant work as a gas station attendant, Finding 5, *id.*; that his capacity for the full range of light work was diminished by his inability to perform work not permitting a sit/stand option, to use vibratory tools and to walk on uneven surfaces, Finding 6, *id.*; that given his age (39, a younger individual), limited education, work experience and residual functional capacity, application of Rule 202.18 from Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the “Grid”) would direct a conclusion of “not disabled,” without regard to the skill level of or transferability of skills from the plaintiff’s former work, Findings 7-9, *id.* at 16-17; that although the plaintiff was not able to perform the full range of light work, he was capable of making an adjustment to work that existed in significant numbers in the national economy, so that a finding of “not disabled” was reached within the framework of the Grid, Finding 10, *id.* at 17; and that the plaintiff accordingly was not under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 10 [sic], *id.* The Appeals Council declined to review the decision, *id.* at 4-5, making it the final determination of the commissioner, 20 C.F.R. § 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. § 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 process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his or her past relevant work. 20 C.F.R. § 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).

Discussion

The plaintiff contends that the administrative law judge should have given controlling weight to the physical capacities assessment completed by Stephen Z. Hull, M.D., a physician who was treating him for back pain. Plaintiff's Itemized Statement of Errors ("Itemized Statement") (Docket No. 5) at 5. The applicable regulation provides, in pertinent part:

Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.

20 C.F.R. § 416.927(d)(2). The assessment by Dr. Hull on which the plaintiff relies, Itemized Statement at 3, dated January 10, 2002, states, *inter alia*, that the plaintiff could lift and carry fewer than 10 pounds on an occasional basis; could stand no more than two hours in an eight-hour work day; could sit less than two hours in a normal work day; could sit for no more than fifteen minutes nor stand for more than ten minutes without changing position; had to walk around every fifteen minutes for five minutes; had to shift from sitting

to standing at will; could climb ladders only rarely; could climb stairs no more than nine minutes per hour; could twist, stoop and crouch rarely to no more than nine minutes per hour; could engage in only minimal reaching; could push and pull only with low resistance; should limit exposure to extreme cold; and would be absent from work about twice a month for medical appointments, Record at 203-05. Most of these limitations are not reflected in the residual functional capacity adopted by the administrative law judge. *Id.* at 15.

The plaintiff attempts to discount the findings of a consultant examiner, Steven G. Johnson, M.D., Itemized Statement at 5-6, thereby implicitly and correctly acknowledging that Dr. Johnson's findings are not consistent with the limitations described by Dr. Hull. Dr. Johnson examined the plaintiff on April 12, 2001 and concluded that he had "sustained a soft tissue injury to his lower back and buttocks three years ago" for which he was still under treatment, that there was no mechanical or neurological impairment and that his MRI was normal. Record at 126-27. Dr. Johnson also concluded that the plaintiff had no difficulty sitting, standing or walking; that he would limit the plaintiff to the moderate range of lifting and carrying; that the plaintiff could bend occasionally at the waist; and that the plaintiff would have no difficulty handling objects, hearing, speaking or traveling. *Id.* at 127. This report constitutes substantial evidence that is sufficiently inconsistent with Dr. Hull's limitations to deprive them of controlling weight.

The plaintiff contends that administrative law judge nonetheless committed errors requiring remand because he failed "to explicate the factors relevant to giving Dr. Hull's opinions less than controlling weight" and because he undertook "a lay analysis of a complex medical condition" by "selectively cho[osing] the evidence that fit" an assumption that the plaintiff's allegations of severe pain could only be supported by the signs and symptoms of a serious discogenic pain disorder. Itemized Statement at 6. However, the administrative law judge did give reasons for his rejection of portions of Dr. Hull's assessment.

In light of the foregoing, the undersigned concludes that the claimant's statements concerning his impairment and its impact on his ability to work are not credible. The claimant's doctor apparently relied quite heavily on the subjective report of symptoms and limitations provided by the claimant, and seemed to uncritically accept as true most, if not all, of what the claimant reported. Yet, as explained in the foregoing, there exist good reasons for questioning the reliability of the claimant's subjective complaints. Dr. Hull's opinion regarding the claimant's functional capacity provides very little explanation of the evidence relied on in forming that opinion. The doctor's own reports fail to reveal the type of significant clinical and laboratory abnormalities one would expect if the claimant were in fact disabled, and the doctor did not specifically address this weakness. Although the claimant has received treatment for the allegedly disabling impairment, that treatment has been essentially routine and/or conservative in nature.

* * *

The undersigned finds that controlling weight may not be given to Dr. Hull's functional capacity as his medical opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques. An MRI on August 1, 2001 revealed only minor degenerative changes in the 4-5 and 5-1 discs with small central bulges (Exhibit 4F). The claimant has no radicular pain, no neurological compromise, and he has full range of motion.

Record at 14-15. The administrative law judge then cites the reports of the state-agency reviewers. *Id.* at 15. Contrary to the argument of the plaintiff, this statement of the administrative law judge's reasons for rejecting Dr. Hull's limitations complies with 20 C.F.R. § 416.927(d)(2).² See, e.g., *Jerry v. Commissioner of Soc. Sec. Admin.*, 97 F.Supp.2d 1219, 1223-24 (D. Or. 2000); *Hayes v. Callahan*, 976 F. Supp. 1391, 1395 (D. Kan. 1997). The plaintiff argues that the administrative law judge's conclusions that he had no radicular pain or neurological compromise and did have full range of motion are

² Counsel for the plaintiff contended at oral argument that Social Security Ruling 96-2p also supports his position on this issue. Contrary to counsel's assertion, nothing in that Ruling requires an administrative law judge to "isolate the amount of weight given" to a treating physician's medical opinion when that opinion is not entitled to controlling weight. Social Security Ruling 96-2p, reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2003) at 111-15. For the reasons stated in the body of this recommended decision, the administrative law judge complied with the terms of this Ruling as well as with 20 C.F.R. § 416.927(d)(2).

inconsistent with Dr. Hull's findings, but they are consistent with Dr. Johnson's findings. The administrative law judge could rely on Dr. Johnson's findings under the circumstances of this case.

The plaintiff's assertion that the administrative law judge's rejection of Dr. Hull's limitations was based on an impermissible lay analysis of medical evidence because the rejection was itself based solely on an assumption that signs and symptoms of a severe discogenic pain disorder were necessary also may not prevail. The opinion does refer to the MRI as revealing only minor changes, but it also refers to Dr. Johnson's conclusions and those of the state-agency reviewers. Record at 15. None of those conclusions is raw medical data that an administrative law judge is not competent to interpret. One of the state-agency reviewers concluded that the plaintiff had a physical capacity exceeding the limits found by the administrative law judge, *id.* at 129, and the other found a physical capacity essentially the same as that adopted by the administrative law judge, *id.* at 196. The first reviewer, after mentioning the MRI, *id.* at 130, stated that the medical records and "physical exam partially supports [sic] limitations alleged by [claimant]. This RFC reflects limitations secondary to pain which is supported by [medical records and physical exam] but few objective findings preclude further restrictions," *id.* at 134. The second reviewer noted that the severity or duration of the symptoms alleged by the plaintiff was disproportionate to the expected severity or duration on the basis of the claimant's medically determinable impairments. *Id.* at 200. The existence of this evidence demonstrates that the administrative law judge did not make a lay evaluation of raw medical data; the necessary evaluations were performed by the state agency's medical professionals.

At oral argument, counsel for the plaintiff cited *Singletary v. Apfel*, 981 F. Supp. 802 (W.D. N.Y. 1997), in support of his contention that this case requires remand for consultation with a medical expert at hearing. However, that case turned on the administrative law judge's reliance on his own lay opinion that

degenerative disc disease and disc bulges cannot cause significant pain or be disabling. *Id.* at 807. For the reasons already noted, that is not the case here.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision 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 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 30th day of April, 2004.

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

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