

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**RONALD C. JOHNSON,** )  
 )  
 **Plaintiff** )  
 )  
 **v.** )  
 )  
 **JO ANNE B. BARNHART,** )  
 **Commissioner of Social Security,** )  
 )  
 **Defendant** )

**Docket No. 03-166-B-W**

**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 alleges that he is disabled by chronic pain syndrome with fibromyalgia features, is capable of making a successful vocational 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 proceedings.

Pursuant to 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

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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 June 21, 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.

law judge found, in relevant part, that the plaintiff retained the residual functional capacity (“RFC”) to sit, stand or walk for up to eight hours in an eight-hour day (with a need to be able to alternate sitting and standing at his option), to lift up to ten pounds frequently and twenty pounds occasionally and to use his hands for repetitive grasping and fine manipulation, although he could not squat, kneel, crawl, climb or work with his arms above shoulder level and could not be exposed to unprotected heights, moving machinery or cold temperatures, Finding 7, Record at 22; that he retained the RFC to perform substantially the full range of light work – a capacity that was not compromised by any nonexertional limitations, Findings 12 & 14, *id.* at 23; that based on his exertional capacity for light work, age (“younger individual between the ages of 45 and 49”), education (high school or high-school equivalent), and work experience (no transferable skills and/or transferability of skills not an issue), Rule 202.21 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”) would direct a conclusion of not disabled, Findings 9-13, *id.* at 22-23; that using the Grid as a framework for decision-making, the plaintiff was not disabled, Finding 14, *id.* at 23; and that he therefore was not under a disability at any time through the date of decision, Finding 15, *id.*<sup>2</sup> The Appeals Council declined to review the decision, *id.* at 5-7, 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.

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<sup>2</sup> The plaintiff had acquired sufficient quarters of coverage to remain insured, for purposes of SSD, through the date of decision. *See* Finding 1, Record at 22.

*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 contends, in essence, that the administrative law judge could not supportably have relied on either the Grid or the vocational testimony adduced at hearing to buttress his Step 5 finding. *See generally* Itemized Statement of Errors Pursuant to Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 9). I agree that remand for further proceedings is warranted.

## **I. Discussion**

It is not clear in this case whether the administrative law judge did or did not find that the plaintiff suffered from significant nonexertional impairments, or did or did not rely solely on the Grid. In the body of his decision, the administrative law judge stated:

[The Grid] would direct a finding of not disabled if the claimant could perform the full range of light work. However, [the Grid] may be used to direct an unfavorable decision only if the claimant has the exertional residual functional capacity to perform substantially all (as defined in Social Security Ruling 83-11) of the seven primary strength demands required by work at the given level of exertion (as defined in Social Security Ruling 83-10) and there are no nonexertional limitations. Because the claimant does not have the exertional capacity to perform all of the requirements of light work, because he requires a sit/stand option, is unable to squat, kneel, crawl, climb, work with his arms above shoulder level, or be exposed to unprotected heights, moving machinery, or cold temperatures, [the Grid] may not be used to direct a finding but must be used as a framework for determining disability.

Using [Rule 202.21 of the Grid] as a framework, the undersigned has also considered the testimony of the vocational expert.

The Administrative Law Judge called upon the vocational expert to identify jobs which a hypothetical person with the claimant's age, education, work history and residual functional capacity could perform. The vocational expert testified that such a hypothetical person would be able to perform the following unskilled sedentary to light jobs in the boot and shoe industry: as a Lacer, Tasseler, or Ironer, of which there are 30 such jobs for each position in Maine, 300 such jobs for each position in New England, and 3,000 such jobs for each position in the United States. The vocational expert also testified that such a hypothetical person would be able to perform the unskilled sedentary job as a cannery worker, of which there are 50 such jobs in Maine, 500 such jobs in New England, and 5,000 such jobs in the United States.

Based on the testimony of the vocational expert, the undersigned concludes that considering the claimant's age, educational background, work experience, and residual functional capacity, he is capable of making a successful adjustment to work that exists in significant numbers in the national economy.

Record at 21-22. Nonetheless, in his Findings, the administrative law judge determined that the plaintiff retained the RFC to perform "substantially all of the full range of light work," uncompromised by any nonexertional limitations, and made no mention of the vocational testimony. *See* Findings 12-15, *id.* at 23.

As counsel for the commissioner conceded at oral argument, assuming *arguendo* that the administrative law judge did rely solely on the Grid, he erred. As the plaintiff observes, *see* Statement of Errors at 3-4, sole reliance on the Grid is permissible only to the extent that a claimant can perform substantially the full range of work in a given exertional category (in this case, light work), *see, e.g., Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 526 (1st Cir. 1989) ("[S]o long as a nonexertional impairment is justifiably found to be substantially consistent with the performance of the full range of unskilled work, the Grid retains its relevance and the need for vocational testimony is obviated."). A person who requires a sit-stand option cannot perform substantially the full range of light work. *See, e.g., Social Security Ruling 83-12*, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* ("SSR

83-12”), at 39-40 (individual who requires sit-stand option “is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work[,]” although there are some jobs such a person can perform); *Books v. Chater*, 91 F.3d 972, 980 (7th Cir. 1996) (noting that per SSR 83-12, “one cannot assume that individuals limited to light work with a sit/stand option can perform the full range of light jobs because many, if not most, light jobs do not afford an employee the option to sit or stand at will.”).

Even giving the administrative law judge the benefit of the doubt and determining that – as counsel for the commissioner posited at oral argument – the Findings construed together with the body of the decision establish that he used the Grid solely as a “framework” (*i.e.*, relied on vocational-expert testimony), the decision still falls short of meeting the commissioner’s Step 5 burden. As the plaintiff points out, *see* Statement of Errors at 6, 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, *see, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (“To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.”).

As the plaintiff notes, *see* Statement of Errors at 4, although the administrative law judge purported to rely on a June 26, 2001 RFC assessment by the plaintiff’s treating chiropractor, Richard N. Southiere, D.C., he inexplicably omitted certain of Dr. Southiere’s stated restrictions, including restrictions against use of the hands for pushing or pulling, use of the feet for repetitive movements and a need to avoid all but

occasional exposure to dust and fumes, *compare* Record at 20 *with id.* at 227 (Physical Capacities Evaluation by Dr. Southiere dated June 26, 2001).

I am mindful that, as counsel for the commissioner observed at oral argument, (i) Dr. Southiere is a chiropractor – a type of practitioner not recognized as an “acceptable medical source[] to establish whether [a claimant has] a medically determinable impairment(s),” 20 C.F.R. §404.1513(a), and hence a practitioner whose RFC assessment is not entitled to any special consideration, *see id.* § 404.1527(a)(2) & (d), and (ii) in crafting an RFC determination, an administrative law judge may pick and choose and need not adopt any particular medical opinion wholesale. However, once the administrative law judge stated that he had chosen to give “probative weight” to the Southiere opinion, *see* Record at 20, he should have explained his rejection of any given portion of it, enabling the reader (in this case the reviewing court) to discern whether the omission was an oversight or a considered choice.

Nor does the administrative law judge’s partial reliance on the Disability Determination Services (“DDS”) opinions entirely rehabilitate the RFC finding. One of the DDS reviewers who completed an RFC assessment evidently was a layperson (whose opinion accordingly was entitled to no weight). *See* Record at 50, 179 (listing the reviewer as Tom Crutcher, “SDM,” or “Single Decision Maker”). The second DDS reviewer was indeed a physician, Lawrence P. Johnson, M.D., but again the administrative law judge inexplicably omitted a restriction found by Dr. Johnson against more than occasional use of the left upper extremity for pushing or pulling. *Compare id.* at 20 *with id.* at 204 (Johnson RFC assessment dated April 25, 2001). As before, without the benefit of an explanation, it is impossible to discern whether the omission

was an oversight or a considered choice. Nor am I willing to assume that any error was harmless at Step 5, with respect to which the commissioner bears the burden of proof.<sup>3</sup>

As the plaintiff argues, *see* Statement of Errors at 5-6, the administrative law judge committed a second species of *Arocho* error that independently warrants reversal and remand. He omitted from his hypothetical question to the vocational expert one of his own findings: that the plaintiff needed to avoid exposure to “moving machinery.” *Compare* Finding 7, *id.* at 22 *with id.* at 44-45. At oral argument, the commissioner contended that the error was harmless inasmuch as two of the identified shoe jobs (lacer and ironer) do not entail exposure to moving machinery. That appears to be the case. *See, e.g.*, DOT § 690.685-254 (lacer II), 788.684-122 (upper-and-bottom lacer, hand), 788.684-130 (wrinkle chaser, also known, *inter alia*, as ironer), 788.687-070 (lacer I). Nevertheless, the vocational expert testified that the three shoe-industry jobs that she had identified collectively accounted for thirty positions in Maine, three hundred in the region and 3,000 nationally. *See* Record at 45.<sup>4</sup> In the absence of any evidence illuminating (i) how many positions correlate to each of the three shoe jobs, and (ii) whether the third shoe job entails exposure to moving machinery, the commissioner fails to demonstrate that the oversight necessarily was harmless.<sup>5</sup>

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<sup>3</sup> Dictionary of Occupational Titles listings that appear to correspond to the stated jobs do not explain whether those particular jobs entail pushing or pulling with the upper extremity; however, they do state, as a general proposition, that a job is rated “light work” when it requires either “walking or standing to a significant degree,” “sitting most of the time but entails pushing and/or pulling of arm or leg controls” or “working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.” *See, e.g.*, Dictionary of Occupational Titles (U.S. Dep’t of Labor, 4th ed. rev. 1991) (“DOT”) §§ 529.686-014 (cannery worker), 690.685-254 (lacer II), 788.684-122 (upper-and-bottom lacer, hand), 788.684-130 (wrinkle chaser, also known, *inter alia*, as ironer), 788.687-070 (lacer I).

<sup>4</sup> The administrative law judge erroneously stated that the vocational expert had testified that there were thirty jobs in Maine, three hundred in the region and 3,000 nationally for each of the three boot-and-shoe positions. *Compare* Record at 21 *with id.* at 45-46.

<sup>5</sup> The third shoe job is something of a mystery. The hearing transcriptionist referred to it as “chancler [phonetic],” *see* Record at 45, the administrative law judge dubbed it “Tasseler,” *see id.* at 21, and counsel for the commissioner suggested at oral argument that it was a “channeler” position. My research revealed no DOT listing describing either a “chancler” or  
(*continued on next page*)

On these bases, the plaintiff demonstrates entitlement to reversal and remand for further consideration not inconsistent herewith.

For the benefit of the parties on remand, should the court agree with the foregoing disposition, I briefly address the plaintiff's remaining points, discerning no further reversible error:

1. That, in contravention of Social Security Ruling 96-8p, the decision cited no basis or support whatsoever for its RFC assessment and did not address the plaintiff's work-related mental capacities, and in contravention of *Manso-Pizarro* the administrative law judge wrongly interpreted raw medical data. *See* Statement of Errors at 2-3. As discussed above, the administrative law judge's RFC finding is flawed in certain respects that merit remand; however, it cannot fairly be characterized as without any basis whatsoever. *See, e.g.*, Record at 19-20 (discussing bases for RFC assessment). At oral argument, counsel for the plaintiff conceded that there is no issue concerning his mental capacity for unskilled work and, thus, any error in omitting to discuss that issue was harmless. I do not find, nor does the plaintiff identify, any respect in which the administrative law judge attempted to interpret raw medical data in the Record.

2. That the plaintiff's age at the time of decision, 49 and a half years old, calls into question the applicability of Grid Rule 202.11. *See* Statement of Errors at 5 n.3. Inasmuch as application of Rule 202.11 (pertaining to persons in the next higher age category, "closely approaching advanced age") would have led to the same outcome (not disabled), *see* Rule 202.11, Table 2 to Grid, any error in failing to

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a "tasseler" job. At oral argument, counsel for the commissioner suggested that the job was subsumed under a listing for "channeler – insole," DOT § 690.685-086; however, that simply is too great a stretch. The "channeler – insole" listing bears no resemblance to the third job as described by the vocational expert. *Compare* Record at 46 with DOT § 690.685-086. There thus is simply no evidence as to whether the third job – whatever it is – entails exposure to moving machinery. As counsel for the commissioner seemingly implicitly conceded, the plaintiff's performance of the fourth and final job listed by the vocational expert, that of cannery worker, is precluded by the necessity to avoid exposure to moving  
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consider whether the plaintiff should be categorized for Grid purposes as a person closely approaching advanced age was harmless.

3. That the jobs cited by the vocational expert do not exist in significant numbers in the national economy. *See* Statement of Errors at 6-7. The vocational expert testified that there were thirty of the shoe-industry jobs in Maine, three hundred in the region and 3,000 nationally. *See* Record at 45.<sup>6</sup> I find “raw numbers” caselaw indicating that even numbers in that ballpark can be “significant.” *See, e.g., Jenkins v. Bowen*, 861 F.2d 1083, 1087 (8th Cir.1988) (500 jobs in region a significant number); *Allen v. Bowen*, 816 F.2d 600, 602 (11th Cir.1987) (174 positions in area in which plaintiff lived a significant number); *Mercer v. Halter*, No. Civ.A.4:00-CV-1257-BE, 2001 WL 257842, at \*6 (N.D. Tex. Mar. 7, 2001) (given plaintiff’s specialized skills, 500 jobs in Texas and 5,000 in national economy a significant number); *Nix v. Sullivan*, 744 F.Supp. 855, 863 (N.D. Ind. 1990), *aff’d*, 936 F.2d 575 (7th Cir. 1991) (675 jobs in region a significant number).<sup>7</sup>

To the extent the plaintiff argues that the shoe-industry jobs should be disregarded inasmuch as they do not actually permit a sit-stand option, *see* Statement of Errors at 6-7, I disagree. In fact, the vocational expert testified that because employees in those lines of work are paid on a “piecework” basis an employer would not care whether they sat or stood, although their choice would impact their income. *See* Record at 46-47. While the plaintiff argued in his Statement of Errors that these piecework jobs should be

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machinery. *See* DOT § 529.686-014 (cannery worker).

<sup>6</sup> For purposes of this argument, I ignore the cannery-worker job. As the plaintiff observes, *see* Statement of Errors at 7, the administrative law judge erroneously found that there were five hundred such jobs in the region and 5,000 nationally. The vocational expert testified only that there were fifty such full-time-equivalent jobs in Maine; she offered no regional or national statistics for that job. *Compare* Record at 21 *with id.* at 45.

<sup>7</sup> The plaintiff’s counsel also posited at oral argument that the commissioner cannot rely on a single job to meet her Step 5 burden, at least unless there are thousands and thousands of positions within that job category (*e.g.*, a store-clerk job). This argument is without merit. As counsel for the commissioner pointed out, this court previously held that the commissioner could rely on the existence of one job with 350 positions regionally to satisfy her Step 5 burden. *See Welch (continued on next page)*

disregarded because there are no statistics as to whether a person who must do them with a sit-stand option can earn even minimal compensation, *see* Statement of Errors at 6-7, his counsel acknowledged at oral argument that he had no authority for that proposition and clarified that, in any event, the point was folded into his sit-stand argument.

4. That the administrative law judge failed to resolve conflicts between the vocational testimony and the DOT, as required by Social Security Ruling 00-4p. *See* Statement of Errors at 7-8. At oral argument, counsel for the plaintiff withdrew that argument, stating that it was not necessary for the court to reach it.

## II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further 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, 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 24th day of June, 2004.

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

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*v. Barnhart*, 91 Soc. Sec. Rep. Serv. 463 (D. Me. 2003) (rec dec., *aff'd* Nov. 24, 2003).

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V.

**Defendant**

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