

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920, *Goodermote v. Secretary of Health & Human Servs.*, 69 F.3d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the medical evidence established that the plaintiff had bipolar disorder, an impairment that was severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), Finding 3, Record at 18; that the plaintiff's statements concerning her impairment and its impact on her ability to work were not entirely credible, Finding 4, *id.*; that the plaintiff lacked the residual functional capacity to carry out more than simple, occasionally detailed, non-complex instructions, to do which that involved more than occasional incidental public contact, to tolerate more than routine supervision or to do work that required more than occasional coordination of activities with coworkers and would experience occasional mild to moderate distraction from work tasks due to anxiety, Finding 5, *id.*; that she was unable to perform her past relevant work, Finding 6, *id.*; that her non-exertional impairments significantly narrowed the range of work she was capable of performing, Finding 7, *id.*; that given her age (31), education (high school), work experience (semi-skilled) and residual functional capacity, she was able to make a successful adjustment to work that existed in significant numbers in the national economy, specifically work as a rural mail carrier and laborer in an industry other than construction, Findings 8-11, *id.* at 18-19; and that the plaintiff therefore had not been under a disability as that term is defined in the Social Security Act at any time though the date of the decision, Finding 12, *id.* at 19. 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, 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 made 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 her past relevant work. 20 C.F.R. §§ 404.1520(f), 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

A. Vocational Expert

The plaintiff's first assertion of reversible error concerns the testimony of the vocational expert at the hearing before the administrative law judge. She contends that the administrative law judge erred by failing to inquire of the vocational expert whether her testimony was consistent with the Dictionary of Occupational Titles ("DOT") and by relying on her testimony when that testimony in fact diverged significantly from the DOT. Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 9) at 4-5. Social Security Ruling 00-4p ("SSR 00-4p") does require an administrative law judge to make such an inquiry on the record. Social Security Ruling 00-4p, reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2003) at 244, 246. However, the mere failure to ask such a question cannot by itself require remand; such an exercise would be an empty one if the vocational expert's testimony were in fact consistent with the DOT. Only an inconsistency between the testimony and the DOT that affects a

plaintiff's claim could reasonably provide the basis for overturning the commissioner's decision, and I accordingly will consider only alleged inconsistencies specifically identified by a plaintiff.

In that regard, the plaintiff asserts that the DOT descriptions of the jobs listed by the vocational expert in response to the administrative law judge's hypothetical question do not "conform" to the terms of the hypothetical question. Itemized Statement at 5. The administrative law judge's decision relies on two jobs identified by the vocational expert: rural mail carrier and laborer in an industry other than construction. Record at 19. Counsel for the commissioner conceded at oral argument that the administrative law judge's reliance on the rural mail carrier position was not justified and I therefore do not consider it further. The plaintiff contends that the nine jobs within the DOT classification of "general laborer, not construction" identified by the vocational expert in response to the hypothetical question were either not within the residual functional capacity assigned to the plaintiff by the administrative law judge or not available in significant numbers in the national economy, or both. Itemized Statement at 5-7.

The administrative law judge found that the plaintiff "lack[ed] the residual functional capacity to carry out more than simple, occasionally detailed, non-complex instructions." Record at 18. His hypothetical question to the vocational expert included the requirement that the plaintiff have "a job that involves only simple instructions, occasionally detailed, but not complex." *Id.* at 57. A General Educational Development ("GED") reasoning level of 3 listed in the DOT in connection with a specific job requires a worker to "[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form" and to "[d]eal with problems involving several concrete variables in or from standardized situations." Dictionary of Occupational Titles (U.S. Dep't of Labor 4th ed. 1991) § 230.363-010. By contrast, a job with a GED reasoning level of 1 requires a worker to "[a]pply commonsense understanding to carry out simple one- or two-step instructions" and to "[d]eal with standardized situations

with occasional or no variables in or from these situations encountered on the job,” while a job with a GED reasoning level of 2 requires a worker to “[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions” and to “[d]eal with problems involving a few concrete variables in or from standardized situations.” Appendix C, § III to DOT. The limitation found by the administrative law judge and included in his hypothetical question might be consistent with a GED reasoning level of 1 or 2, but it is not consistent with a GED reasoning level of 3. *See generally Allen v. Barnhart*, 90 Soc. Sec. Rep. Serv. 476, 486 (N.D.Cal. 2003) (noting that jobs with GED reasoning level of 2, which presupposes ability to follow detailed and involved instructions, exceeded administrative law judge’s limitation to simple, routine tasks); *Walton v. Chater*, No. 94 C 1484, 1995 WL 579535, at *4 (N.D. Ill. Sept. 25, 1995) (“A job like cashiering, which requires the manipulation of written, oral, or diagrammatic instructions and the solving of problems involving concrete variables, does not jibe with the abilities of a person who can only perform work which needs little or no judgment to do simple duties.”) (footnote omitted).

With respect to the second job, or, more specifically, category of jobs, found by the administrative law judge to be available to the plaintiff, counsel for the commissioner agreed at oral argument that seven of the nine jobs within this category identified by the vocational expert, *id.* at 61, are found in the DOT, as identified by counsel for the plaintiff, with three possible entries for one of the jobs. The plaintiff contends that all but two of these jobs are classified at GED reasoning levels of 2 or 3, making them inconsistent with the administrative law judge’s finding as to her functional limitations. Itemized Statement at 6-7. I agree that as to the single job in this list that has a GED reasoning level of 3, the limitation found by the administrative law judge precludes the job of final assembler for the plaintiff, for the reasons discussed above. DOT §

706.381-018. All of the other listed jobs have GED reasoning levels of 1 or 2,² and I cannot conclude that a level of 2 is necessarily inconsistent with the administrative law judge's stated finding. In addition, counsel for the commissioner at oral argument identified nine more jobs that she contended fit within the category. Of these jobs, two had a GED reasoning level of 1 and seven had a GED reasoning level of 2.³ The fact that these jobs have GED reasoning levels consistent with the administrative law judge's hypothetical question to the vocational expert makes it unnecessary to consider the commissioner's argument that it is the specific vocational preparation ("SVP") level that governs the question whether a job listing in the DOT is consistent with a vocational expert's testimony rather than the GED reasoning level.

The plaintiff next argues that the administrative law judge may not rely on the remaining jobs identified in this category because he failed to clarify the vocational expert's responses to questions concerning the numbers of such jobs available, "which were vague and unhelpful." Itemized Statement at 7. She states that the vocational expert's testimony on this point was not in accord with the DOT, *id.*, but at oral argument counsel for the plaintiff stated that this assertion merely restates her arguments concerning GED reasoning levels, discussed above. The number of jobs available is not included in the DOT. When the administrative law judge asked the vocational expert whether these jobs "meet the limitations that I gave you," the vocational expert replied "I think so, I mean they're entry level." Record at 61. While the response that the jobs were entry-level jobs does not by itself establish that they were consistent with the

² The jobs are folder, DOT § 369.687-018 (GED reasoning level 2); glove turner and former, automatic, DOT § 583.686-018 (GED reasoning level 1); card lacer, jacquard, DOT § 683.685-018 (GED reasoning level 2); ripper, DOT § 617.685-030 (GED reasoning level 2); lacer II, DOT § 690.685-254 (GED reasoning level 2); lacer I, DOT § 788.687-070 (GED reasoning level 1); shoe turner, DOT § 788.687-130 (GED reasoning level 2); and boner, DOT § 789.687-018 (GED reasoning level 2).

³ The jobs are final assembler, DOT § 713.687-018 (GED reasoning level 1) and DOT § 789.687-046 (GED reasoning level 2); folder, DOT § 686.685-030 (GED reasoning level 2), DOT § 789.687-058 (GED reasoning level 1); lacer, DOT § 732.687-034 (GED reasoning level 2), DOT § 774.687-014 (GED reasoning level 2) and DOT § 789.687-094 (GED reasoning level 2); glove turner, DOT § 784.687-038 (GED reasoning level 2); ripper, DOT § 782.687-038 (GED reasoning level 2).

limitations included in the hypothetical question,⁴ the vocational expert's initial affirmative response to this question was sufficient, absent any other specific suggestion from the plaintiff of the manner in which those limitations were not consistent with the DOT definitions. The plaintiff admits that at least two of these jobs had a DOT reasoning level within the stated limitations. Itemized Statement at 7. The vocational expert testified that there were 414 jobs for laborers other than construction in Maine at the sedentary exertional level and 3,900 at the light exertional level. Record at 60. The plaintiff does not contend that these numbers have to be broken down for each of the specific jobs within the general category, and no reason for such a requirement is readily apparent. Under the circumstances, the evidence concerning jobs as a laborer other than construction available to the plaintiff has not been shown to be insufficient to support the commissioner's decision.

B. Medical Evidence

The plaintiff contends that the administrative law judge failed to give appropriate weight to the opinion of her treating physician, John Arness, M.D., and was required to develop the record further. Itemized Statement at 8-13. She apparently takes the position that the administrative law judge was required to give controlling weight to the opinion of Dr. Arness that she had a "generally severe impairment for sustained gainful employment," *id.* at 9, an opinion expressed by Dr. Arness after the hearing, Record at 303, and, in the alternative, that the administrative law judge's alleged failure to give his reasons for not doing so requires remand, Itemized Statement at 8-12. Dr. Arness expressed this conclusion despite indicating that none of the specific areas of mental residual functional capacity assessment was impaired at

⁴ The comment "they're entry level" responds to the fact that the administrative law judge did not include any transferable skills in the hypothetical question rather than to the inclusion of the mental limitations in the hypothetical question. See 20 C.F.R. §§ 404.1565(a), 416.965(a) ("If you cannot use your skills in other skilled or semi-skilled work, we will consider your work background the same as unskilled."). Unskilled work is defined as "work which needs little or no (*continued on next page*)

the severe level. Record at 303. Of course, a treating physician's conclusion that a claimant is disabled, which is the most reasonable interpretation of the language from Dr. Arness's report on which the plaintiff relies, is an opinion on an issue that is reserved to the commissioner and is not treated as a medical opinion under the regulations. 20 C.F.R. §§ 404.1527(e), 416.927(e). Such an opinion cannot be given controlling weight and there is no requirement that the administrative law judge state any reason for rejecting it.

Dr. Arness's assessment of impairment in the specific areas of functioning listed on the Mental Health Residual Functional Capacity Assessment on which the plaintiff also relies includes a rating of "moderately severe impairment" in the following abilities: achieve goals and respond to time limits, sustain attention and concentration, and exercise acceptable judgment. Record at 303. The administrative law judge mentions Dr. Arness's report only as follows:

Although Mr. Hodgson's current treating psychiatrist, John Arness, M.D., has indicated that she experienced an exacerbation of depression following the hearing (Exhibits 13F-15F), the record as a whole does not show that the claimant's bipolar disorder is so severe that it results in serious, ongoing functional deficits. Furthermore, Dr. Arness makes no reference to the exacerbatory effects of cannabis abuse on Ms. Hodgson's mood instability.

Id. at 16.

Dr. Arness's "moderately severe impairment" ratings are inconsistent with other medical evidence in the record. As the administrative law judge noted, *id.*, Michael Tofani, M.D., a treating psychiatrist, assigned the plaintiff ratings for Global Assessment of Functioning ("GAF")⁵ in a range from 65 to 75 in the

judgment to do simple duties that can be learned on the job in a short period of time." 20 C.F.R. §§ 404.1568(a), 416.968(a).

⁵ A GAF score represents "the clinician's judgment of the individual's overall level of functioning." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (4th ed., text rev. 2000) ("DSM-IV-TR"). The GAF score is taken from the GAF scale, which "is to be rated with respect only to psychological, social, and occupational functioning." *Id.* The GAF scale ranges from 1000 (superior functioning) to 1 (persistent danger of severely hurting self or others, persistent inability to maintain minimal personal hygiene, or serious suicidal act with clear expectation of death). *Id.* at 34. Individuals with a GAF of 60 have moderate symptoms or moderate difficulty in social or occupational functioning. *Id.* at 34.

period from December 2001 to February 2002, *id.* at 256-62, which “indicate no more than mild functional difficulties,” *id.* at 16. A GAF score of 65 indicates “only mild dysfunction.” *Bartyzel v. Commissioner of Soc. Sec.*, 74 Fed.Appx. 515, 520 (6th Cir. 2003) (citing DSM-IV-TR). A GAF score of 75 indicates “very mild limitations in functioning.” *Covucci v. Apfel*, 31 Fed.Appx. 909, 913 (6th Cir. 2002) (internal quotation marks omitted). These were the most recent assessments before the hearing held by the administrative law judge on November 26, 2002. *Id.* at 20.

In addition, the assessments by the state agency reviewers conflict with Dr. Arness’s ratings. The state agency reviewers assigned a degree of limitation no higher than moderate to difficulties in maintaining social functioning and difficulties in maintaining concentration, persistence or pace. Record at 231, 236, 286. The administrative law judge also noted that the plaintiff’s reported activities of daily living were inconsistent with Dr. Arness’s ratings, *id.* at 16, a conclusion that is supported by the record evidence.⁶ Thus, while the administrative law judge’s evaluation of the medical evidence, and specifically his statement of his reasons for rejecting Dr. Arness’s conclusions, does not comply with 20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2), *see also* Social Security Ruling 96-2p, reprinted in *West’s Social Security Reporting Service* Rulings (Supp. 2003) at 114-15, the error is harmless given the conflicting medical evidence on which the administrative law judge was entitled to rely, *see Rodriguez-Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 4 (1st Cir. 1987). *See generally Bryant ex rel. Bryant v. Apfel*, 141 F.3d 1249, 1252 (8th Cir. 1998). The administrative law judge’s hypothetical question to the vocational expert, including limitations to “a job that involves only simple instructions, occasionally detailed, but not complex”

⁶ Counsel for the commissioner noted at oral argument that the record reflected that Dr. Arness had only spent one-half hour with the plaintiff before creating his report, Record at 316, but this fact was not mentioned by the administrative law judge.

with “occasional incidental public contact” and only occasional coordination of activities with co-workers, Record at 57, is consistent with the medical evidence in the record other than Dr. Arness’s assessment.⁷

The plaintiff next contends that the administrative law judge “failed to properly develop the record.” Itemized Statement at 12. However, she does not identify any reason why further development of the record was necessary other than her assertion that the administrative law judge failed to “evaluate and discuss Dr. Arness’ evidence.” *Id.* at 13. I have already discussed that alleged failure.

C. Credibility

The plaintiff finds a discrepancy, allegedly requiring remand, between the administrative law judge’s written finding that her “statements concerning her impairment and its impact on her ability to work are not entirely credible,” Record at 18, and his statement at the hearing that “she’s been credible, and I appreciate the candor,” *id.* at 63. Itemized Statement at 13-14. However, the latter comment, when considered in context, most likely refers to the plaintiff’s testimony about her daily activities, her use of marijuana and her interest in “being a rural newspaper man.” Record at 51-55. It is not necessarily inconsistent with a finding that the plaintiff’s statements specifically concerning her impairment and its impact on her ability to work were not entirely credible.

The plaintiff also contends that the administrative law judge’s evaluation of her credibility failed to comply with Social Security Ruling 96-7p. Itemized Statement at 14-15. The administrative law judge’s discussion of the plaintiff’s activities of daily living in connection with her credibility, Record at 16, is minimally sufficient under the Ruling. Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service Rulings* (Supp. 2003) at 134-35, 137-38. Contrary to the plaintiff’s argument, Itemized

⁷ Contrary to the plaintiff’s cursory suggestion, Itemized Statement at 9-10, nothing in the administrative law judge’s (continued on next page)

Statement at 15, the administrative law judge is not required to discuss whether the medical records would support a finding of disability in connection with his evaluation of a claimant's credibility.

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, 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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opinion suggests that he drew impermissible medical conclusions based on raw medical data or that he should have consulted a medical advisor. *Cf. Rodriguez-Pagan*, 819 F.2d at 5 (use of medical advisor discretionary, not required).

V.

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