

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

STEPHEN M. POOLER,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 03-179-B-W

REPORT AND RECOMMENDED DECISION¹

In this Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal, the plaintiff challenges the hypothetical question posed to the vocational expert by the administrative law judge. I recommend that the court affirm the commissioner’s decision.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. §§ 404.1520, 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 suffered from depression with mild anxiety, a history of polysubstance dependence then in remission, and moderate chronic obstructive pulmonary disease, impairments that were severe but which did not, individually or in combination, meet or medically

¹ This action is properly brought under 42 U.S.C. §§ 405(g) and 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 August 20, 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 *(continued on next page)*

equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Findings 3 & 5, Record at 29; that he was limited to the performance of simple, routine repetitive work not requiring close attention to detail and must avoid work involving more than occasional contact with the public or with supervisors and co-workers but had no physical limitations, Finding 8, *id.*; that his allegations regarding pain, symptomatology and the functional limitations imposed by his impairments were not fully credible, Finding 9, *id.* at 29-30; that his impairments prevented him from returning to his past relevant work, Finding 10, *id.* at 30; that given his age (38 at the alleged onset of disability), education (high school equivalent), lack of transferable skills and residual functional capacity, use of Rule 203.29 of Appendix 2 to Subpart P, 20 C.F.R. part 404 (the “Grid”) as a framework and reliance on the testimony of a vocational expert resulted in the conclusion that a significant number of jobs existed in the national economy that the plaintiff could perform, including vehicle washer, equipment cleaner, hand packer, truck driver and janitor/cleaner, Findings 6-7 & 11-12, *id.* at 29-30; and that the plaintiff accordingly had not been under a qualifying disability at any time since the alleged date of onset of his disability, Finding 13, *id.* at 30. The Appeals Council declined to review the decision, *id.* at 7-8, 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

page references to the administrative record.

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 review 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. §§ 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

The plaintiff first contends that the administrative law judge committed a reversible error because the residual functional capacity found in his decision “does not correspond with the actual RFC posed to the vocational expert at hearing.” Statement of Specific Errors (“Itemized Statement”) (Docket No. 12) at [2]. However, there is and can be no requirement that an administrative law judge is bound by the limitations included in his or her hypothetical questions posed to a vocational expert who testifies before the administrative law judge. The purpose of such questions is to determine whether jobs would be available to the claimant given a certain set of physical and/or mental limitations. An administrative law judge often will ask several hypothetical questions, each containing different limitations. The ultimate decision is and must be based on the administrative law judge's evaluation of all of the evidence; it cannot be tied to the information included in any given hypothetical question. The plaintiff takes nothing by this argument.

The plaintiff next asserts that the administrative law judge's failure to include the following specific mental limitations in his hypothetical question requires reversal: moderate limitations on attention, concentration, the ability to complete a normal work week, the ability to avoid psychologically based

interruptions, the ability to perform at a consistent pace, and the ability to respond appropriately to changes in the work setting; and limitations on the ability to respond appropriately to criticism from supervisors, maintain regular attendance and be punctual within customary tolerances and maintain activities within a schedule. *Id.* at [3]-[4]. He cites the records of two state-agency psychologist-reviewers in support of this argument. *Id.*

The administrative law judge's hypothetical question included the following relevant limitations:

He would only be able to — the hypothetical person would only be able to do routine, repetitive work that did not require very close attention to detail and this person would only be able to have occasional contact with the public, coworkers and supervisors, and this person would only be able to work a job where the stress level was normal and also he would not be able to work at a job that required constant concentration, which is similar to the close attention to detail.

Record at 56-57.

If there is substantial evidence to support the administrative law judge's decision to exclude a particular limitation from the hypothetical question posed to a vocational expert, the absence of that limitation from the question does not provide a basis for remand. *Smith v. Barnhart*, 222 F.Supp.2d 78, 82 (D. Me. 2002). Contrary to the plaintiff's representations, not all of the limitations which he lists as omitted were "found to be moderate limitations by both Dr. Hoch and Dr. Houston." Itemized Statement at [4]. With respect to the limitations on the ability to respond appropriately to criticism from supervisors and to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances, one of the two reviewing psychologists in each case found the plaintiff to be "not significantly limited." Record at 303, 366. The administrative law judge was entitled to rely on the opinion of the reviewer finding that that there were no significant limitations in these categories unless the medical evidence

is uniformly inconsistent with those conclusions. The plaintiff has not established that the evidence is in fact uniformly inconsistent with those conclusions and accordingly is not entitled to remand on this basis.

The cited state-agency assessments do not contain separate categories of limitations entitled “attention” and “concentration,” Itemized Statement at [3], but both reviewers assigned a moderate limitation to “[t]he ability to maintain attention and concentration for extended periods,” Record at 302, 366. The hypothetical question states that the claimant “would not be able to work at a job that required constant concentration,” *id.* at 57, which is a sufficient approximation of that limitation. The plaintiff breaks into three parts, Itemized Statement at [3], a single limitation included in the forms completed by the state-agency reviewers: “The ability to complete a normal workday and work week without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods,” Record at 303, 367. Both reviewers indicated a moderate limitation in this area, as they did with the remaining limitation listed by the plaintiff, ability to respond appropriately to changes in the work setting. *Id.* The administrative law judge did include in his hypothetical question a limitation to “routine, repetitive work that did not require very close attention to detail” and a limitation to “a job where the stress level was normal.” *Id.* at 56-57. This limitation adequately addresses the reviewers’ ranking on ability to respond appropriately to changes in the work setting.²

The administrative law judge’s hypothetical cannot reasonably be construed, however, to address the moderate limitation found by both reviewers in question 11 on the Mental Residual Functional Capacity Assessment forms that they completed. *Id.* at 302-03, 366-67. When the vocational expert was asked by counsel for the plaintiff whether her testimony would be affected if the claimant in the hypothetical question

² In addition, this statement of limitations is supported by the testimony at hearing of Charles L. Tingley, Jr., a clinical
(continued on next page)

had “difficulty getting out of the home and getting to work on, say, a two- to three-times-a-month basis, calling in because of mentally just not wanting to go out the door,” she said that “an employer wouldn’t probably allow that.” *Id.* at 59. Counsel for the plaintiff was unable at oral argument to cite any support in the record for the choice of two to three days a month as the frequency of absence, but the question does raise the issue posed by the state-agency assessments at issue. However, when asked at the hearing to list any limitations imposed on the plaintiff by his mental impairments, Dr. Tingley did not list any such limitation, *id.* at 54-55, and he was not asked any questions by counsel for the plaintiff, *id.* at 55. The administrative law judge specifically said that he was “in agreement with” Dr. Tingley’s opinion testimony and “finds it to be fully consistent with the objective medical evidence of record.” *Id.* at 24. Under these circumstances, the omission of the moderate limitation at issue from the hypothetical question was supported by substantial evidence. *See Berrios Lopez v. Secretary of Health & Human Servs.*, 951 F.2d 427, 431 (1st Cir. 1991) (commissioner [then secretary] may rely solely on testimony of medical advisor, depending on the circumstances).

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.

psychologist, Record at 24, 54-55, on which the administrative law judge relied, *id.* at 24.

Dated this 25th day of August, 2004.

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

Plaintiff

STEPHEN M POOLER

represented by **JACQUELINE L. GOMES**
LAW OFFICE OF JACQUELINE
GOMES
55 STROUDWATER STREET
WESTBROOK, ME 04092
207-854-1210
Email: gomeslaw@maine.rr.com

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **ESKUNDER BOYD**
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: eskunder.boyd@ssa.gov