

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

RAYMOND D. RANKINS, JR.,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 03-209-B-W

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises questions concerning the hypothetical questions posed to a vocational expert by the administrative law judge and his analysis of the plaintiff’s residual functional capacity. 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, *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 was insured for purposes of SSD benefits only through September 30, 1996, Finding 1, Record at 26; that he had a combination of impairments that was considered severe but which did not meet or medically equal the criteria of any impairment listed in

¹ 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)(3)(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 page references to the *(continued on next page)*

Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Findings 3-4, *id.* at 26 & 19; that the plaintiff’s allegations concerning his limitations were not totally credible, Finding 5, *id.* at 26; that at the relevant time the plaintiff had the residual functional capacity to stand and walk for two hours in a work day, to sit for at least six hours and to lift and carry ten pounds, Finding 7, *id.*; that he was unable to perform any of his past relevant work, Finding 8, *id.*; that, given his age (younger individual), education (high school or high school equivalent), lack of transferable skills and residual functional capacity for the full range of sedentary work, section 201.28 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the “Grid”) directs a finding that the plaintiff was not disabled, Findings 9-13, *id.* at 26-27; and that the plaintiff accordingly was not under a disability as that term is defined in the Social Security Act at an time through September 30, 1996, Finding 14, *id.* at 27. The Appeals Council declined to review the decision, *id.* at 6-9, 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. *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 evaluation process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past

administrative record.

relevant work. 20 C.F.R. § 404.1520(e); *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 functional 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 “decided on an RFC for ‘less than a full range of sedentary work’” and was therefore required to follow the guidelines established by Social Security Ruling 96-9p, which he did not do. Plaintiff's Itemized Statement of Errors (“Itemized Statement”) (Docket No. 7) at 5. He asserts that the administrative law judge found such a residual functional capacity, even though he notes that the administrative law judge “categorized the Plaintiff's RFC in his decision as a ‘full range of sedentary,’” because the hypothetical question presented to the vocational expert at the hearing included restrictions inconsistent with a residual functional capacity for a full range of sedentary work. *Id.*

The administrative law judge clearly found that the plaintiff had a residual functional capacity for the full range of sedentary work at the relevant time. Finding 12, Record at 27.² He could not have applied the Grid, Findings 13-14, *id.*, if he had not done so, Grid § 201.28. The fact that an administrative law judge asks a vocational expert a hypothetical question some of the particulars of which may not be consistent with such a residual functional capacity, as was the case here, Record at 70-73, does not and cannot control the administrative law judge's ultimate conclusion as to the appropriate residual functional capacity to be assigned to the claimant. An administrative law judge may, and often should, pose a series of hypothetical questions to an expert; the factual assumptions in one or more of those questions may, and often should, be

² The plaintiff does not argue that the record does not contain substantial evidence to support this finding.

inconsistent with those in one or more of the others. That is the means by which the administrative law judge explores all of the possible outcomes raised by the record. The commissioner can never be bound by the facts that are included in a given hypothetical question posed by an administrative law judge. This basic misunderstanding of the role of the hypothetical question is the basis of the plaintiff's first argument, making it unnecessary to address the specific points made by the plaintiff in that regard.³

At oral argument counsel for the plaintiff modified his argument, asserting that the administrative law judge is bound by the limitations included in his hypothetical question to a vocational expert when the administrative law judge relies on the vocational expert's response. When asked how he knew that the administrative law judge relied on the vocational expert's response to the hypothetical question at issue, counsel replied that the administrative law judge's opinion "talks about" the vocational expert's testimony at page 25 of the record. The only mention of the vocational expert's testimony at that page of the record is in the context of identifying the exertional level of the plaintiff's past relevant work. Since the administrative law judge found that the plaintiff could not perform any of his past relevant work, Record at 26, the administrative law judge's only reliance on the testimony of the vocational expert was in the plaintiff's favor. In addition, the question to the vocational expert that elicited the response that the plaintiff's past relevant work had been at the heavy exertional level, *id.* at 70, was not a hypothetical question. The plaintiff takes nothing by this argument.

The plaintiff's second and final argument is that the administrative law judge provided the vocational expert with an inaccurate definition of the term "moderate" in describing the mental impairments included in

³ The plaintiff also points out an unusual number of points at which the transcription of the tape recording of the hearing in this case includes the statement "inaudible," observing that this "make[s] it difficult for a reviewing authority to know whether there were additional limitations or restrictions set forth in the hypothetical." Itemized Statement at 7. Since the administrative law judge did not find that the plaintiff had a residual functional capacity that included any of the possible (*continued on next page*)

his hypothetical question. Itemized Statement at 8-9. As I have noted, the administrative law judge's opinion mentions the testimony of the vocational expert only in regard to the exertional level of the plaintiff's past relevant work. Record at 25. The decision does not mention or rely on the vocational expert's testimony concerning jobs that might be available to the plaintiff, which was the purpose of the hypothetical question. Since the question that included the term "moderate" had no bearing on the administrative law judge's findings, any consideration of the question whether his definition of that term was adequate would be irrelevant.

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 25th day of August, 2004.

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

Plaintiff

restrictions included in his hypothetical question, the plaintiff gains nothing from this observation.

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