



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 had an impairment or combination of impairments 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"), Findings 3-4, Record at 23; that his allegations regarding his limitations were not totally credible, Finding 5, *id.*; that he had the residual functional capacity to lift and/or carry 10 pounds frequently and 20 pounds occasionally, to stand and/or walk a total of 6 hours in an 8-hour work day and to sit for about 6 hours in an 8-hour work day, with unlimited ability to push and/or pull; Finding 7, *id.*; that he had no ability to climb ladders, ropes or scaffolds, with occasional ability to perform other postural functions and a need to avoid concentrated exposure to hazards or commercial driving secondary to fatigue from untreated sleep apnea, *id.*; that he was unable to perform any of his past relevant work, Finding 8, *id.*; that, given his age (younger individual between the ages of 18 and 44), education (high school or equivalent), lack of transferable skills and residual functional capacity to perform a significant range of light and sedentary work, use of Rule 202.21 of Appendix 2 to subpart P, 20 C.F.R. Part 404 (the "Grid") as a framework resulted in the conclusion that there was a significant number of jobs in the national economy that he could perform, Findings 9-13, *id.* at 23-24; and that the plaintiff therefore 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 14, *id.* at 24. 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 review 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), 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 improperly rejected the conclusion of Alan Glann, M.D., that he met the Listing for sleep apnea. Plaintiff's Itemized Statement of Errors (Docket No. 13) ("Itemized Statement") at 4-6. If an applicant for Social Security benefits meets a Listing, he is entitled to benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d). Accordingly, Dr. Glann's opinion that the plaintiff meets a Listing is an opinion on an issue that is reserved to the commissioner and thus is not treated as a medical opinion under applicable regulations. 20 C.F.R. §§ 404.1527(e), 416.927(e). While the commissioner must consider such opinions, Social Security Ruling 96-5p ("SSR 96-5p"), reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2004), at 123, there is no regulatory requirement that the commissioner state any reason for rejecting such an opinion. The administrative law judge did point out that Dr. Glann's opinion that the plaintiff met the Listing for sleep apnea is unsupported by any evidence in the medical records that the plaintiff's apnea resulted in chronic pulmonary hypertension or disturbance in

cognitive functioning, Record at 37, at least one of which is required by the terms of the Listing. Listing 3.00(H). The plaintiff suggests that the fact that Dr. Glann “believed [he] was impaired sufficiently to be unable to drive,” Itemized Statement at 6 and n.17, indicates the required disturbance in cognitive functioning, but the Listings are quite specific in this regard. That element is to be evaluated under section 12.02 of the Listings, Listings 3.00(H), 3.10, and an inability to drive does not begin to meet the requirements of subsections A and B or subsection C of Listing 12.02.

The plaintiff argues that the administrative law judge’s consideration of Dr. Glann’s opinion is nonetheless fatally flawed, apparently because his “choice to emphasize” Dr. Glenn’s characterization of the plaintiff’s sleep apnea as “mild” somehow constitutes an impermissible lay evaluation of raw medical data. Itemized Statement at 5. At oral argument, counsel for the plaintiff identified this “raw medical data” as a letter from Dr. Glann dated May 14, 2002 reporting on the plaintiff’s medical condition, Record at 302-03; a report from Dr. Glann dated October 21, 2001 including Dr. Glann’s interpretation of the results of overnight polysomnography, *id.* at 312-13; a letter dated February 13, 2001 from Dr. Glann reporting on his care of the plaintiff, *id.* at 315; and an “initial evaluation” of the plaintiff by Dr. Glann, dated September 17, 2001, *id.* at 317-18. With the exception of portions of the October 21, 2001 report, none of this material is properly characterized as “raw medical data.” I find no indication in the record that the administrative law judge interpreted the results of the polysomnography tests in a manner inconsistent with Dr. Glann’s interpretation as set forth in that document. Indeed, that is the very document in which Dr. Glann concludes that the data shows the existence of a “[s]leep-disordered breathing abnormality consistent with mild obstructive sleep apnea/hypopnea syndrome.” *Id.* at 313.

The plaintiff also finds it significant that the administrative law judge did not mention the scores on the Epworth Sleepiness Scale assigned to him on four occasions by Dr. Glann. Itemized Statement at 5.

However, there is no regulatory or other legal requirement that the administrative law judge refer to any particular entries in the medical record in reviewing a claimant's medical evidence. Nor does an administrative law judge's review of all of the medical evidence, a task that is the essence of the administrative law judge's job in the Social Security setting, necessarily require that he interpret raw medical data as a lay person. Here, the administrative law judge neither ignored medical evidence — indeed, he specifically addressed Dr. Glann's opinion with respect to the Listing — nor substituted his own views for uncontroverted medical opinion on an issue not reserved to the commissioner. *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999). In *Perez v. Secretary of Health & Human Servs.*, 958 F.2d 445 (1st Cir. 1991), one of the two remaining cases cited by the plaintiff in support of his position on this point, the First Circuit observed that it had held that an ALJ may not reach conclusions about residual functional capacity without any assessment of residual functional capacity by a physician, *id.* at 446. In the other cited case, the record was devoid of any medical evaluation of the claimant's residual functional capacity. *Manso-Pizarro*, 76 F.3d at 17. That is not the case here. *E.g.*, Record at 283-86 (consultative physical examination), 287-94 (state-agency RFC evaluation), 319-26 (same).

In this case, evaluation of the evidence which the plaintiff identifies as inconsistent with Dr. Glann's own characterization of the plaintiff's condition as "mild" — the increase in the apnea index when the plaintiff slept on his back, Itemized Statement at 5, which Dr. Glann thereafter instructed him not to do, Record at 302; the plaintiff's inability to use the CPAP device without surgery, which he refused to consider, *id.* at 302, 351, 352; and the Epworth Scale numbers assigned by Dr. Glann — may all be evaluated without necessarily construing raw medical data. Indeed, counsel for the plaintiff has done so himself. Since Dr. Glann had all of this evidence before him when he characterized the plaintiff's condition as "mild," the administrative law judge was justified in relying on that characterization. Finally, the decision

whether to call a medical expert to testify at the hearing before the administrative law judge remains within the discretion of the commissioner and the failure to do so may not provide the basis for vacating the decision of the commissioner. *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 5 (1st Cir. 1987).

The plaintiff next asserts that the administrative law judge was required to contact Dr. Glann under 20 C.F.R. § 404.1512(e)(1) and Social Security Ruling 96-5p. Itemized Statement at 6. He contends that the administrative law judge was required to “clarify” Dr. Glann’s opinion that his medical condition met the Listing for sleep apnea “and, if not, to ascertain the sleep specialist’s opinion on the particulars of his patient’s mental and physical functional capacity.” *Id.* Since the administrative law judge found it “critical” that Dr. Glann “did not say” whether the plaintiff suffered from pulmonary hypertension or had cognitive impairments, a required element of the Listing, the plaintiff asserts that the administrative law judge was “required” to give Dr. Glann “an opportunity to state his opinion on these points.” *Id.* Initially, it is important to note that the burden of proof with respect to Listing status (Step 3 of the sequential process) and residual functional capacity (Step 4) is on the claimant. The regulation cited by the plaintiff states that a treating physician will be contacted when the evidence received by the administrative law judge “is inadequate for us to determine whether you are disabled.” 20 C.F.R. § 404.1512(e)(1). *See also* 20 C.F.R. § 416.912(e)(1). SSR 96-5p, on which the plaintiff also relies, states that the administrative law judge must make reasonable efforts to contact a treating physician when he “cannot ascertain the basis of” the physician’s opinion on an issue reserved to the commissioner from the case record. SSR 96-5p at 127.

The basis for Dr. Glann’s opinion is set forth in his records and can be ascertained; the administrative law judge stated his reasons for finding that the opinion was not supported by objective medical data. Record at 18. *See Alejandro v. Barnhart*, 291 F.Supp.2d 497, 512 (S.D.Tex. 2003). Neither the regulation nor

the Ruling requires the commissioner to give a physician a second chance to support his conclusions in circumstances where the physician may not have been familiar with all of the requirements of a Listing. *See generally Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (ALJ's disagreement with treating physician's conclusion not equivalent of finding that evidence from physician is inadequate to make disability determination); *White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) ("It is the inadequacy of the record, rather than the rejection of the treating physician's opinion, that triggers the duty to recontact that physician.").

In this case, it was incumbent on the plaintiff to show from the medical records that he suffered from pulmonary hypertension or cognitive impairments as described in Listing 12.02; I have already concluded that the records do not contain such evidence. The commissioner was not required to give the plaintiff's treating physician the opportunity to create such records after the hearing. It is highly unlikely that either condition would go unremarked in the plaintiff's extensive medical records. Remand in order to recontact Dr. Glann would be based purely on speculation.

The plaintiff fares better with his final argument concerning the administrative law judge's evaluation of his credibility. The plaintiff's argument is brief, Itemized Statement at 7, but raises a valid concern. The administrative law judge found that "the claimant's allegations regarding his limitations are not totally credible for reasons set forth in the body of the decision." Record at 23. The only reference in the body of the decision to the plaintiff's credibility is the following:

The claimant's subjective complaints of symptoms and their resulting work-related limitations are credible only to the extent that certain strenuous activities are precluded. However, the objective clinical findings are out of proportion with the claimant's subjective symptoms, and do not support a conclusion that such symptom-related limitations are of an intensity, frequency or duration as to preclude performance of all exertional activities (SSR 96-7p).

*Id.* at 21. Merely to mention a Ruling is not to comply with it. Social Security Ruling 96-7p requires that the administrative law judge articulate the reasons for his credibility finding. Social Security Ruling 96-7p (“SSR 96-7p”), reprinted in *West’s Social Security Reporting Service Rulings* (Supp. 2004), at 136. “The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and the reasons for that weight.” *Id.* at 137. The administrative law judge’s opinion in this case does not meet this standard.

At oral argument, counsel for the commissioner argued that the administrative law judge discusses his evaluation of the plaintiff’s testimony at pages 38-39 of the record in a manner that satisfies the intent of SSR 96-7p, although it admittedly does not conform exactly to the Ruling’s requirement. I cannot agree. On those pages, the administrative law judge lists some of the information reported by the plaintiff on various forms; he does not refer to the plaintiff’s testimony at all. There is no statement explaining the reasons for any finding about the credibility of the defendant’s written or oral statements, which is required. SSR 96-7p at 133. A reviewing court is not able to determine the weight given by the administrative law judge to the plaintiff’s statements about his symptoms and limitations or the reasons for that weight from what appears on pages 38-39, or anywhere else in the decision. There is no apparent consideration of the seven factors set forth by the Ruling as ones that the adjudicator “must consider.” *Id.* at 135.

I cannot conclude that this error in the decision is harmless. The decision strongly suggests that the plaintiff’s statements are inconsistent with the administrative law judge’s conclusions. Record at 40. The plaintiff’s testimony about his pain and limitations at the hearing, *id.* at 67-70, 73-80, which the administrative law judge does not even mention, may fairly be said to be inconsistent with the conclusion that the plaintiff has a residual functional capacity to perform a significant range of light and sedentary work, *id.*

at 24. It may be that the medical evidence is inconsistent with this testimony and that there are other reasons for rejecting it. One simply cannot tell whether that is the case from the administrative law judge's decision in this case. The failure to comply with SSR 96-7p requires remand in this case.

**Conclusion**

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case remanded for further proceedings consistent 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 25th day of August, 2004.

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

**Plaintiff**

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