

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

CHRISTOPHER RAMSEY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 00-15-B-W</i>
)	
JO ANNE B. BARNHART,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

The plaintiff in this Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal returns to this court after an earlier remand of this case to the Social Security Administration. The plaintiff contends that the administrative law judge failed to comply with applicable regulations in dealing with the report of a physician who examined him once and wrongly considered whether his narcolepsy was treatable with medication, and that his narcolepsy was medically equivalent to a regulatory listing for epilepsy. Plaintiff’s Itemized Statement of Specific Errors (“Itemized Statement”) (Docket No. 14) at 1-7. I recommend that the court affirm the commissioner’s decision.

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 and 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 December 9, 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.

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 medically determinable impairments of sleep disorder, learning disorder, somatic dysfunction and cervical strain by history, and that the correct diagnosis for the sleep disorder was not resolved in the medical evidence, Finding 3, Record at 17; that none of these impairments, or any combination of them, significantly limited his ability to perform work-related activities, resulting in the conclusion that his impairments were not severe, Finding 4, *id.*; and that he 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 5, *id.* The Appeals Council declined to review the decision, *id.* at 5-6, 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 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight

abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* at 1124 (quoting Social Security Ruling 85-28).

Discussion

The plaintiff contends that his impairment is narcolepsy. Itemized Statement at 1. His treating physician, a Dr. Sussman, in 1996 stated that the plaintiff "is a young man who has narcolepsy," Record at 219, but provided no basis for this diagnosis. The doctor did note that the plaintiff "does not want to be referred to neurological services for his narcolepsy," did not request medication for it, *id.*, and that he "probably needs ongoing medication for this," *id.* at 218, although none was prescribed. D.M. Robertson, M.D., a physician specializing in orthopedics and general practice to whom the plaintiff was referred for an evaluation by his current attorney concluded in 1998 that the plaintiff "gives a very convincing history of a disabling sleep disorder" which "might be improved by a trial of Dexedrine." *Id.* at 236. In 2002, upon reviewing his file at the attorney's request, Dr. Robertson stated that the plaintiff "would conform with" Listing 11.03, for epilepsy, in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), *id.* at 237-38. Dr. Robertson based this conclusion on "a detailed description of a [sic] multiple typical narcoleptic episodes" in his notes and offered to arrange a sleep study "to further document this." *Id.* at 237. There is no evidence that such a study was done.

The plaintiff asserts that the administrative law judge treated this physician's opinion incorrectly under 20 C.F.R. § 404.1527(d)(2) and Social Security Ruling 96-2p. Itemized Statement at 3. The first problem with this argument is that the plaintiff characterizes Dr. Robertson as his "treating" physician, *id.*, when it is clear from the record that Dr. Robertson saw the plaintiff only once, at his attorney's request, for evaluation rather than treatment. A "treating" physician, for purposes of Social Security, is a physician "who

provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you.” 20 C.F.R. §§ 404.1502, 416.902. The medical evidence in this case does not “establish[] that [the plaintiff] see[s], or ha[d] seen, [Dr. Robertson] with a frequency consistent with accepted medical practice for the type of treatment and /or evaluation required for [his] medical condition(s),” *id.* In fact, it is clear that the plaintiff’s “relationship with [Dr. Robertson] is not based on [his] medical need for treatment or evaluation, but solely on [his] need to obtain a report in support of [his] claim for disability,” a situation in which the regulation mandates that Dr. Robertson be considered a “non-treating source.” *Id.* At oral argument, counsel for the plaintiff conceded that Dr. Robertson could not be considered to be a treating physician. Accordingly, Social Security Ruling 96-2p, which deals with appropriate treatment of the medical opinions of treating sources, Social Security Ruling 96-2p, reprinted in *West’s Social Security Reporting Service Rulings* (Supp. 2004), at 111, is inapplicable here. Similarly, the subsection of 20 C.F.R. § 404.1527(d) on which the plaintiff relies deals with the weight to be given to a treating source’s opinion and does not apply to Dr. Robertson’s opinion.

The administrative law judge observed that “two recent consultative examinations were essentially benign,” and that the state-agency reviews and most recent consultative examination imposed no limits on work activity other than a restriction against exposure to hazards “based primarily on the claimant’s subjective history.” Record at 16. That is an accurate summary of the state-agency reviews, *id.* at 202-17, and a consulting physician reported to the state agency in November 1997 that the plaintiff had “narcolepsy by history,” and recommended that he consult a neurologist, noting that medication might be helpful, *id.* at 231. The most recent consultative examination reported in the medical record occurred in April 2002; that physician reported that the plaintiff was “perfectly healthy except for his narcolepsy,” and that “lots of medications” should be tried to treat the narcolepsy, concluding that “it is hard to call treatable narcolepsy a

disability at this time on a physical basis.” *Id.* at 239, 241. This physician assigned a sole physical limitation of danger in working with machinery or at heights. *Id.* This evidence is inconsistent with Dr. Robertson’s conclusions and provides support for the administrative law judge’s conclusions.

At this point in the analysis the plaintiff’s assertion, unsupported by citation to authority, that “[t]he existence of medications that may be helpful . . . is irrelevant at this stage, since those medications have not been prescribed by a physician or refused by” the plaintiff, Itemized Statement at 5, must be considered. He contends, without citation to the record, that “the expense of medical care is one of the issues that has prevented trial of other medications,” *id.*, but the only evidence in the record on this point is the plaintiff’s reports to his treating physician in 1996 that he “could not afford” the Vivactyl and Ritalin prescribed at that time. Record at 218, 219. The plaintiff told other physicians that he stopped taking Ritalin because “[h]e got chest pain.” *Id.* at 229, 236, 239. The plaintiff testified at the hearing that he stopped taking both medications because “I started getting nauseous, and I would get chest pains, things like that.” *Id.* at 26. He also testified that he had not been to see his treating physician “in quite some time,” *id.* at 35, and there are no records of medical treatment in the administrative record since 1996. Although he was represented by counsel at the hearing, the plaintiff offered no testimony about his ability to pay for treatment or medication at any relevant time. He did testify that he went to the school nurse when he was sick, “that’s the cheapest way for me to do it,” *id.* at 36, that he had no medical insurance and had once had Medicaid “for a short period of time,” *id.* at 40, but it cannot reasonably be inferred from these statements that the plaintiff was at all relevant times unable to afford the alternate medications which the record does demonstrate that he did not seek. To the extent that the administrative law judge’s decision rests on a finding that the plaintiff did not follow prescribed treatment, a finding that is not apparent from the face of the

document, the plaintiff has not demonstrated a good reason for failing to try other medications for his condition. *See* 20 C.F.R. §§ 404.1530(b), 416.930(b).²

The administrative law judge made his determination at Step 2, where the issue is the severity of the impairment rather than compliance with treatment. Whether the plaintiff refused treatment for the impairment or was unable to obtain treatment for financial reasons is not the issue. *See McGuire v. Heckler*, 589 F. Supp. 718, 723 n.34 (S.D.N.Y. 1984) (“The Secretary’s regulations do not explicitly authorized an ALJ to consider the ease with which an impairment could be cured when determining whether that impairment is ‘severe.’ Rather, a separate rule, 20 C.F.R. § 404.1530(a) (1983), states that the Secretary will not award benefits unless the claimant ‘follow[s] treatment prescribed by his physician *if this treatment can restore [claimant’s] ability to work.*’”) (emphasis in original). There is simply no evidence in this record of any effect on the plaintiff’s ability to perform basic work activities caused by the alleged narcolepsy other than the plaintiff’s own statements. Even at Step 2, some medical evidence is required. 20 C.F.R. §§ 404.1529(c), 416.929(c). As noted above, all of the medical evidence that addresses the point, other than Dr. Robertson’s conclusory statement that the plaintiff is disabled, concludes that the plaintiff’s ability to perform work is limited only by a need to avoid exposure to machinery and heights. This is no evidence of anything more than a slight restriction on the plaintiff’s ability to perform basic work activities. *See Limpert v. Apfel*, 1998 WL 812569 (E.D.N.Y. May 27, 1998), at *3.

The plaintiff devotes much of his written submission to his contention that his narcolepsy was the medical equivalent of Listing 11.03, for epilepsy. Itemized Statement at 2, 6-7. This is supported by the

² The plaintiff contends that he should be awarded benefits and that “if he then refuses to follow a prescribed treatment, his disability may be terminated under 20 C.F.R. § 404.1530(b).” Itemized Statement at 5. A oral argument, counsel for the plaintiff clarified that he did not intend to suggest by this argument that the commissioner should award benefits first and check on the claimant’s compliance with treatment thereafter, but rather that consideration of failure to follow treatment is (continued on next page)

opinion that his attorney solicited from Dr. Robertson. Record at 237-38. However, the Listings come into play only at Step 3 of the sequential evaluation process, which is reached only if the impairment is found to be severe at Step 2. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). Where, as here, the determination at Step 2 that the impairment was not severe is supported by substantial evidence, there is no reason to consider arguments with respect to Step 3.³

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 13th day of December, 2004.

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

Plaintiff

CHRISTOPHER RAMSEY

represented by **FRANCIS JACKSON**

not appropriate at Step 2.

³ I also do not consider the plaintiff's assertions that the administrative law judge impermissibly relied on his weight and smoking, Itemized Statement at 5-6, because the record contains sufficient evidence supporting the administrative law judge's conclusion independent of any possible reliance on those factors.

JACKSON & MACNICHOL
85 INDIA STREET
P.O. BOX 17713
PORTLAND, ME 04112-8713
207-772-9000
Email: mail@jackson-macnichol.com

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **DINO L. TRUBIANO**
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617-565-4277
Email: dino.trubiano@ssa.gov