

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JOHN J. PLUNGY, SR.,)

Plaintiff)

v.)

Docket No. 04-71-B-W

JO ANNE B. BARNHART,)

Commissioner of Social Security,)

Defendant)

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the issue whether substantial evidence supports the commissioner’s determination that the plaintiff, who alleges disability stemming from affective and mood disorders, anxiety-related disorders, chest pain and musculoskeletal difficulties, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be affirmed.

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

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 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.

administrative law judge found, in relevant part, that the plaintiff suffered from an affective disorder and an anxiety related disorder, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 3, Record at 25; that he lacked the residual functional capacity (“RFC”) to climb ropes, ladders and scaffolding and needed to avoid fumes and smoke but was able to perform routine, repetitive work, Finding 6, *id.* at 26; that considering his age (45, a “younger individual”), education (limited) and RFC, he was able to make a successful vocational adjustment to work existing in significant numbers in the national economy, Findings 7-9, *id.*; and that he therefore had not been under a disability at any time through the date of decision, Finding 10, *id.*² The Appeals Council declined to review the decision, *id.* at 6-8, 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 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 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);

² Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through at
(continued on next page)

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).

The plaintiff argues that the vocational-expert testimony on which the administrative law judge relied for his Step 5 finding cannot constitute substantial evidence of ability to perform work in the national economy in view of errors and omissions in the hypothetical questions transmitted to that expert. *See generally* Statement of Specific Errors (“Statement of Errors”) (Docket No. 6). I find no reversible error.

I. Discussion

As the plaintiff points out, *see id.* at 5, errors in hypothetical questions propounded to a vocational expert undermine the relevance of that expert’s testimony, *see, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (responses of vocational expert are relevant only to extent offered in response to hypotheticals that correspond to medical evidence of record; “To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.”).

The administrative law judge included only one mental restriction in hypothetical questions propounded to vocational expert Sharon R. Greenleaf: that the hypothetical claimant would “only be able to do regular routine repetitive work” – no “complex or technical work.” *See* Record at 55. The plaintiff complains that, for several reasons, this picture of his mental functioning was unsupported by substantial evidence of record. *See generally* Statement of Errors. First, he asserts that no examining or non-

least December 31, 2005, *see* Finding 1, Record at 25, there was no need to undertake a separate SSD analysis.

examining mental-health practitioner used the phrase “routine repetitive work” to describe his capabilities. *See id.* at 4. Instead, he contends, medical expert Irwin M. Pasternak, M.D., testified at hearing that the plaintiff had significant limitations in concentration, and two non-examining Disability Determination Services (“DDS”) experts found that he had moderate limitations in concentration. *See id.*

In so arguing, the plaintiff overlooks the fact that while the two DDS experts, S. Hoch, Ph.D., and Thomas A. Knox, Ph.D., did rate him moderately limited in concentration, persistence or pace for purposes of their Psychiatric Review Technique Form (“PRTF”) evaluations, *see* Record at 253 (Hoch PRTF), 326 (Knox PRTF), both concluded that he was nonetheless capable of performing simple tasks, *see id.* at 260 (comment by Dr. Hoch that “47 yr old with 7 yrs education + Borderline intelligence who is seen by the current psych CE consultant as able to understand, remember + complete simple tasks. This impression of being able to complete simple tasks without difficulty is consistent with my evaluation of the medical evidence in file. The feelings of anxiety + mild depression would not interfere with his ability to attend to simple tasks.”), 264 (comment by Dr. Knox that plaintiff “appears able to learn, retain, + carry out simple instructions + tasks.”). These assessments, in turn, were consistent with the findings of DDS examining consultant Edward P. Quinn, Ph.D. *See id.* at 188 (“Difficulties with attention, concentration, persistence and pace were not observed beyond what would be expected due to his cognitive limitations. He should be able to complete simple job instructions. He is likely to have some increased difficulties completing more complex and detailed job instructions because of cognitive limitations.”).³

³ At oral argument, counsel for the plaintiff posited that the narrative findings of Drs. Hoch and Knox exceeded their bounds of expertise, addressing vocational (rather than psychological) matters. I disagree. Drs. Hoch and Knox did not discuss the plaintiff’s ability to perform specific jobs, but rather the extent to which his condition affected his ability to perform work-related functions (in other words, his RFC).

While Drs. Hoch, Knox and Quinn did not use the exact term “routine repetitive work,” the administrative law judge’s hypothetical question to Greenleaf captured the essence of the findings of those DDS consultants. Thus, I discern no reversible error on this basis.

The plaintiff further complains that the administrative law judge did not include, in his hypothetical question to Greenleaf, his own finding that the plaintiff suffered from a marked deficiency in concentration. *See* Statement of Errors at 5. However, the administrative law judge did not make such a finding. *See* Finding 6, Record at 26. Rather, he simply noted that Dr. Pasternak had expressed that opinion. *See id.* at 24. While, unfortunately, the administrative law judge did not make explicit findings regarding that opinion, it is reasonably apparent that he rejected it in favor of the Quinn, Hoch and Knox assessments. *See id.* Such a choice is one the court will not disturb. *See, e.g., Rodriguez, 647 F.2d at 222* (“The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.”).

The plaintiff finally complains that the administrative law judge did not factor into his mental RFC assessment notes from a three-week inpatient stay at Acadia Hospital, from which the plaintiff was discharged just five days prior to his hearing on March 17, 2003 with only a “fair” prognosis. *See* Statement of Errors at 4-5; *see also* Record at 32, 35 (plaintiff’s testimony), 444-46 (Acadia Hospital records). The plaintiff points out that he was admitted on February 25, 2003 with a Global Assessment of Functioning, or GAF, score of 28 and discharged on March 12, 2003 with a GAF score of only 35. *See* Statement of Errors at 4-5; Record at 444.⁴ As he observes, *see* Statement of Errors at 4, a GAF score of 35 describes a patient who suffers from:

⁴ A GAF score represents “the clinician’s judgment of the individual’s overall level of functioning.” American Psychiatric (*continued on next page*)

Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).

DSM-IV-TR, at 34 (emphasis omitted).

Nonetheless, as the administrative law judge pointed out, a note in the Acadia discharge record indicates that the plaintiff retained the ability to problem-solve and follow “most” instructions. Record at 23; *see also id.* at 444. At oral argument, counsel for the plaintiff protested that the administrative law judge misread this handwritten note, which describes the plaintiff as a “[h]ands-on learner, may need [assistance] to problem solve and transfer skills to new settings. Can follow most instructions [with] a visual demo and practice.” *Id.* at 444.⁵ However, while I agree that the note indicates the plaintiff “may” need assistance problem-solving and would need a visual demonstration and practice to be able to follow “most instructions,” it is consistent with a capacity to follow simple instructions. In any event, as counsel for the commissioner noted at oral argument, the Record evidence does not indicate that the plaintiff’s GAF score was in the range of 35 for a period of twelve months or more – a scenario she acknowledged would be “problematic” – but rather simply that as of a certain day he was functioning at that level.

At oral argument, counsel for the plaintiff made a final, additional contention: that, assuming *arguendo* the administrative law judge properly relied on the mental RFC evaluations of Drs. Hoch and Knox to find the plaintiff capable of performing routine, repetitive work, he erred in overlooking other

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 100 (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.

⁵ The handwritten note employs a cryptic symbol that counsel for the plaintiff suggested, and I agree, likely means (*continued on next page*)

restrictions found by those two DDS evaluators – for example, Dr. Hoch’s finding that the plaintiff might suffer increased anxiety in an occupational setting, *see* Record at 255, and Dr. Knox’s finding that the plaintiff could not interact with the public and could adapt to “minor changes” in routine, *see id.* at 264. While the administrative law judge’s mental RFC determination is not fully consistent with the narrative findings of Dr. Knox inasmuch as it omits Dr. Knox’s restriction on dealing with the public, it is fully consistent with the narrative findings of Dr. Hoch. *See id.* at 260 (“The feelings of anxiety + mild depression would not interfere with his ability to attend to simple tasks. His social skills + personal appearance are intact + he seems able to adapt adequately to routine changes.”). Dr. Hoch did not “find” that the plaintiff might suffer increased anxiety in an occupational setting; rather, in the page of the Record cited by plaintiff’s counsel, he merely summarized evidence contained elsewhere in the Record. *See id.* at 255.

Inasmuch as the mental RFC the administrative law judge transmitted to Greenleaf is supported by substantial evidence of record, it follows that her testimony in response to his hypothetical question was relevant. Accordingly, there is no reversible error.

II. 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.

“assistance” or “help.” *See* Record at 444.

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

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