UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JAMES BLACKBURN,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Docket No. 04-151-B-W***
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that he was disabled prior to his date last insured by degenerative disc disease, was then capable of performing 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, *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 acquired sufficient quarters of coverage to remain

[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)(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 March 11, 2005, 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.

insured only through September 30, 1996, Finding 1, Record at 221; that prior to his date last insured he had degenerative disc disease of the cervical spine, an impairment that was severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Findings 3-4, *id.*; that, at all relevant times, he (i) retained the residual functional capacity ("RFC") to lift and carry up to ten pounds occasionally and to stoop, crouch and climb ramps and stairs occasionally, (ii) required a sit-stand option, (iii) was unable to climb ladders, ropes or scaffolds, and (iv) experienced mild to moderate pain occasionally, although those symptoms allowed enough attentiveness and responsiveness to carry out normal work assignments within his RFC satisfactorily, Finding 6, *id.*; that, were he able to perform the full range of sedentary work, Rule 201.25 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") would direct a finding of "not disabled" in view of his age at the time of his alleged onset of disability ("younger individual"), education (ninth grade), work experience (no transferable skills) and RFC, Findings 9-12, *id.* at 221-22; that, using the Grid as a framework for decision-making, the plaintiff was able to make a successful vocational adjustment to work existing in substantial numbers in the national economy, Finding 13, *id.* at 222; and he therefore was not under a disability at any time through the date of decision, Finding 14, *id.*[2] The Appeals Council declined to review the decision, *id.* at 203-05, 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).[3]

The standard of review of the commissioner's decision is whether the determination made is

[2] Presumably, the administrative law judge meant to say that the plaintiff was not under a disability at any time prior to his date last insured.

[3] The decision of which the plaintiff complains was rendered after this court, at the commissioner's request, vacated a prior decision adverse to the plaintiff and remanded the matter for further proceedings. *See* Record at 215, 283-85. Following remand, a new administrative law judge held a supplemental hearing at which the plaintiff and his treating

(continued on next page)

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 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); *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 RFC to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff contends that the administrative law judge's rejection of the testimony of treating physician Dr. Millard did not comply with the standards of 20 C.F.R. § 404.1527, as a result of which the decision cannot be said to have been supported by substantial evidence. *See* Statement of Specific Errors ("Statement of Errors") (Docket No. 6) at 5. I am unpersuaded.

I. Discussion

The plaintiff complains that he has suffered debilitating upper-back, right-arm and neck pain since a slip-and-fall injury on January 18, 1995. *See, e.g.*, Record at 141-48, 157, 261-62. Dr. Millard, of EMMC Family Practice Center, began seeing the plaintiff for chronic neck pain in January 1999, *see id*. at 317 – approximately four years after the injury and two years and three months after the expiration of the

---

physician, Peter S. Millard, M.D., Ph.D., testified, as did a vocational expert, Sharon R. Greenleaf. *See id*. at 215.

plaintiff's insured status. Following the plaintiff's filing of the instant application for SSD benefits in January 1999, *see id*. at 215, Dr. Millard wrote several letters on his behalf, *see id*. at 166-67, 317-18.

In a letter dated April 27, 1999 Dr. Millard stated:

> This letter concerns Mr. Blackburn's severe, disabling back pain. This 43-year-old was well until he slipped and twisted his back and neck in 1995 when he fell out of a truck. He was holding onto the door handle, fell onto his buttocks, and he has pain since that time. He has been to physical therapy without relief. He has had two spinal CT scans, which do show degenerative changes at the C6 through C7 level on the right side. There is osteophyte formation. There is also an osteophyte projecting from the vertebral body and extending into the spinal canal on the right.[4] Mr. Blackburn recently has an EMG which showed median nerve neuropathy and some suggestion of irritability at the C6 through C7 level.
>
> Specific diagnoses: (1) chronic neck and shoulder pain. This pain originated in 1995 with an accident but continues to have a degenerative component. (2) Degenerative changes of the cervical spine with mild radiculopathy. (3) Median nerve neuropathy, not symptomatic. (4) Unable to work because of chronic pain.
>
> The patient has previously been treated with physical therapy and is currently receiving osteopathic manipulative therapy. He has been seen by Dr. Rodney Rozario, a neurosurgeon, who does not feel that he is a surgical candidate.
>
> ***
>
> Resulting functional limitations: The patient is unable to lift and is not able to use his upper extremities for prolonged periods of time.
>
> Vocational restrictions: I feel that the patient is disabled at the present time.
>
> Prognosis: Given the patient's longstanding pain, I feel that [it] is unlikely at this time that it will resolve completely.

---

[4] A CT scan performed on January 26, 1995 was interpreted to show an "[a]symmetric osteophyte narrowing the spinal canal and apparently contacting the cord on the right at C6-7 with the right-sided Luschka joint osteophyte also present at that level" and a "[m]idline disc bulge at C5-6 with broad posterior osteophyte in the midline extending slightly more to the right than to the left." Record at 201. A CT scan performed on December 12, 1995 was interpreted to show "[p]ossible subtle disc herniation at C6-7 asymmetric to the left" and "degenerative spurring most notable at C5-6 and C6-7[.]" *See id.* at 202.

Id. at 166-67. By letter dated January 24, 2000 Dr. Millard wrote, *inter alia*:

> We performed nerve conduction studies on 3/3/99 which showed the possibility of mild cervical C6-7 radiculopathy. This is consistent with the clinical evaluation of Dr. Rozario in 1996, following his injury in the fall of 1995.
>
> It is my unequivocal opinion that Mr. Blackburn's situation has not changed since he was evaluated by Dr. Rozario following his injury in the fall of 1995. He has chronic neck pain and his clinical symptoms are identical to that described by Dr. Rozario in his records.

Id. at 318. Dr. Millard reiterated the substance of this letter in another letter dated April 19, 2002. *See id*. at 317.

Dr. Millard also testified at the plaintiff's supplemental hearing, held September 3, 2003. *See id*. at 227, 266-75. He stated, *inter alia*:

1. He had seen the plaintiff a total of about five times, but the plaintiff had seen other providers in his office three or four times. *See id*. at 266. In addition, he had spoken on the phone "numerous times" to the plaintiff, who had been "limited in coming to the office because he's had no health insurance." *Id*.

2. The "key in this case" was his review of old records from Dr. Rozario, H.M.K. Peddie, M.D., and Brian B. Gallagher, M.D. *See id*. at 268 (Dr. Millard's testimony), 156, 160 (notes of Dr. Gallagher dated December 6, 1995 and January 31, 1995, respectively), 157 (note of Dr. Peddie dated January 23, 1995), 158-59 (note of Dr. Rozario dated January 24, 1996). These records convinced him "that what I was seeing was very consistent. I think the same as the symptoms that he had – the descriptions that Dr. Gallagher made. For example, the A symmetry [sic] of his shoulders, the scoliosis, or the S shape that he had in his spine, which I diagnosed and several of my colleagues diagnosed as being related to the pain that he was having, the muscle spasms." *Id*. at 268.

3. He could not say "for sure" that the pain of which the plaintiff complains is related to the

1995 accident; however, "clearly when people traumatize a joint that has arthritis in it then there's an exacerbation of pain." *Id*. at 270.

The administrative law judge also engaged in the following colloquies with Dr. Millard:

> Q Now they're talking here that there was – as a layperson looking at this report, an osteophyte narrowing the spinal canal and apparently contacting the cord of the right at C-6, 7. That was about the only actually [sic] evidence that there was some kind of an impingement in this file, but that I – of course, I don't know. I'm not a doctor, but what do you see?
>
> A Well, he had nerve conduction studies as well, which didn't show any significant . . . nerve impingement, which is precisely why Dr. Rosario [sic] didn't think he'd be benefiting from surgery.
>
> Q So what's causing the – if the nerve is not being impinged what's to explain the pain that we're seeing here?
>
> A Well, you know, clearly we have a very incomplete understanding of back pain. I mean I – you've dealt in this area I'm sure as well.
>
> Q Not as incomplete as mine.
>
> A Well, I'll tell you –
>
> Q That's why I'm hoping you'll throw some light on it here.
>
> A Yeah. I mean my diagnosis is a degenerative joint disease. He's got osteoarthritis . . . or degeneration of the spine, which you and I probably have to a certain extent as well, but it's not causing us pain so the variation in people's X-ray findings and the pain they have is quite substantial. But I do believe the pain that he's having is not related to nerve compression, but is related to the degenerative changes that he has in his spine.
>
> ***
>
> Q I'm looking at some of these earlier records, you know, in '98 and '99 where they're checking, especially where he's talking about his back and he has decreased range of motion, but they note that in some cases he's not in any acute distress. There's no muscle wasting. There's no – let's see here, decreased reflex.
>
> A I agree with you. I think there have been very minimal objective signs in the

sense of signs of nerve compression[,] . . . muscle wasting, that sort of thing. What struck me about him is they [INAUDIBLE] muscle spasm that he has though.

Q Okay. So tell me about that.

A You know, well, I think if you can just see the –

Q By your examination what did you find?

A Yeah, the A symmetry [sic] of his shoulders. He tends to stand like this because he's having pain between the shoulder blades and if you actually examined the muscles in that area you'd notice there's a tremendous A symmetry [sic] of his back and there's a lot of spasm on one side.

Q Well, what I'm getting [at] is how do we get that back to 1996?

***

A Well, because Gallagher or Petty [sic], one of those two commented on those particular aspects of the muscle spasm in the A symmetry [sic], in the shoulder blades.

CLMT: It was Dr. Petty [sic].

ME: It was, yes.

Id. at 268-69, 272-73.

Ultimately, the administrative law judge declined to embrace Dr. Millard's opinion, explaining:

On numerous occasions Dr. Millard has stated that the claimant's condition is disabling and that his clinical symptoms are identical to those reported by physicians who examined him prior to the date last insured. However, Dr. Millard admitted at hearing that the claimant had only very minimal objective findings on examinations. It should be noted that Dr. Millard has been the claimant's treating physician only since January 26, 1999, and that he has only seen the claimant about five times since then. The undersigned finds Dr. Millard's opinions of disability are not well supported or consistent with the record as a whole.

Id. at 217 (citations omitted).

The plaintiff contends that, per 20 C.F.R. § 404.1527, an administrative law judge is required "to

give considerable weight to the opinions of a treating physician, or provide a clear explanation as to why such weight has not been given." Statement of Errors at 4. He posits:

> The two points the ALJ used to support his finding that Dr. Millard's opinions "are not well supported or consistent with the record as a whole" are misconstrued. Dr. Millard never agreed that there were only very minimal objective findings, but rather, framed that in the context of nerve compression but not degenerative arthritis or back pain. Likewise, the Doctor had a very clear explanation for only seeing [the plaintiff] in his office five times.

Id. at 5. He adds: "The ALJ points to no evidence that contradicts Dr. Millard's considered medical opinion regarding the Plaintiff's disability, and the ALJ is permitted to accept medical testimony that requires an inference in establishing onset date." *Id*. (citing Social Security Ruling 83-20 ("SSR 83-20")).

The plaintiff's points of error are not persuasive. As an initial matter, as counsel for the plaintiff conceded at oral argument, Dr. Millard's opinion bears on the subject of whether or not the plaintiff was "disabled" for purposes of eligibility for SSD benefits. Such an opinion is not – as the plaintiff contends – entitled to controlling or "considerable" weight. Rather, as regards determinations reserved to the commissioner (which include the ultimate question of disability), even opinions of a treating source are accorded no "special significance." *See* 20 C.F.R. § 404.1527(e)(1)-(3). Nor must an administrative law judge provide a "clear explanation" of the weight given such an opinion. As counsel for the commissioner posited at oral argument, he or she simply must "give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." *Id*. § 404.1527(d)(2).

It is true, as the plaintiff suggests, that Dr. Millard's testimony was more nuanced than described by the administrative law judge. Dr. Millard's relationship with the plaintiff was not confined to the five office visits; Dr. Millard spoke to him "numerous" times on the phone as an accommodation to his inability to afford additional face-to-face visits. And while Dr. Millard agreed that certain objective signs had been

minimal (for example, of muscle wasting and nerve compression), he did not agree that this was the case with respect to muscle spasms.

Nonetheless, the administrative law judge also found that Dr. Millard's opinions of disability were not well-supported or consistent with the record as a whole. *See* Record at 217. The plaintiff's argument notwithstanding, this conclusion was not buttressed solely by the administrative law judge's arguably flawed observations that (i) Dr. Millard agreed with him that objective signs had been minimal, and (ii) Dr. Millard had only seen the plaintiff on five occasions. The administrative law judge had also just described, in detail and with citation to the hearing testimony and Record exhibits, why in his view the contemporaneous medical evidence did not paint a picture of a man disabled by a neck injury in the months prior to and including September 1996. *See id*.

The cited exhibits reasonably can be construed to support his view. *See, e.g., id*. at 156 (part of Exhibit 4F) (treatment note of Dr. Gallagher dated December 6, 1995, observing, *inter alia*, that plaintiff "did well with his physical therapy and has returned to work. At the present time any exertion at work produces pain medial to the right scapular which radiates to the anterior chest. . . . On neurological exam, he is alert and oriented, cranial nerves two through twelve are entirely normal. Fundoscopic examination is unremarkable. On motor exam, he has good tone and strength in the upper and lower extremities. There is no ataxia or movement disorder. Sensory exam is intact to all modalities. Deep tendon reflexes are two plus and symmetrical in the upper and lower extremities. Plantar responses are flexor. His gait is unremarkable."); 157 (part of Exhibit 4F) (treatment note of Dr. Peddie dated January 23, 1995, observing, *inter alia*: "On examination, he looks well. Rotation to the left is limited by pain in the central posterior low neck. Other movements are quite free but also cause some discomfort in the same area."), 158-59 (Exhibit

5F) (treatment note of Dr. Rozario dated January 24, 1996, observing that while plaintiff complained of neck pain radiating into head, pain in right arm, radiating into arm, and occasional lower extremity discomfort (every three to four weeks), "he does not feel that this is sufficiently severe to consider anything surgical at this point"; finding, on physical examination, that forward flexion of his neck was performed well although he did have "some discomfort with right lateral flexion").[5]

What is more, the administrative law judge also accorded considerable weight to the findings of a Disability Determination Services ("DDS") non-examining consultant who discounted the plaintiff's claimed inability to stand or sit in any position for any length of time as of his date last insured on the basis that it was unsupported by the Rozario treatment note of January 1996. *See id*. at 219; *see also id*. at 193-200 (RFC assessment dated May 15, 1999 by Robert Hayes, D.O.).

Nor, finally, does the plaintiff gain anything by citation to SSR 83-20. As an initial matter, it is far from clear that the ruling, which pertains to adjudication of the onset date of disability once a claimant has been determined to be disabled, applies to this case. *See* SSR 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 49 ("In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability."); *see also, e.g., Key v. Callahan*, 109 F.3d 270, 274 (6th Cir.1997) ("Since there was no finding that the claimant is disabled as a result of his mental impairment or any other impairments or combination thereof, no inquiry into onset date is required.").

In any event, even if it did apply, the outcome would be the same. Nothing in SSR 83-20 compels

[5] As counsel for the commissioner pointed out at oral argument, there is a discrepancy between Dr. Millard's description of Dr. Peddie's note and the note itself. Dr. Millard testified that Dr. Peddie had commented on the muscle spasms caused by the asymmetry of the plaintiff's shoulder blades. *See* Record at 273. While Dr. Peddie did note that an x-ray had shown "a lateral shift to the left of query C7 on D1[,]" he did not make note of muscle spasms. *See id*. at 157.

an administrative law judge to accept the retrospective opinion of a later-treating physician when the administrative law judge supportably finds that opinion inconsistent with the medical evidence as a whole. *See, e.g., Thomas v. Chater*, No. 96-6127, 1996 WL 730490, at **2 (2d Cir. Dec. 18, 1996) (administrative law judge did not transgress SSR 83-20 in rejecting treating physician's retrospective opinion concerning onset date when much other evidence showed plaintiff was not disabled as of relevant date).

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner 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 14th day of March, 2005.

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

Plaintiff

JAMES BLACKBURN	represented by	**DAVID A. CHASE** MACDONALD, CHASE & DUFOUR 700 MOUNT HOPE AVENUE 440 EVERGREEN WOODS BANGOR, ME 4401 942-5558 Email: eholland@macchasedufour.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

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 *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **KAREN BURZYCKI** ASSISTANT REGIONAL COUNSEL Room 625 J.F.K. FEDERAL BUILDING BOSTON, MA 02203 617/565-4277 Email: karen.burzycki@ssa.gov *ATTORNEY TO BE NOTICED*