

degenerative disc disease, an impairment that was severe but did not meet or equal any of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 2, *id.*; that since February 1, 2002 he has lacked the residual functional capacity (“RFC”) to lift and carry more than twenty pounds or more than ten pounds on a regular basis or to climb, stoop or crouch more than occasionally, Finding 4, *id.*; that there has been medical improvement since 1995 in his condition related to his ability to work, Finding 7, *id.*; that, given his exertional capacity for light work, his age (currently 43, a “younger individual”), education (high school) and work experience (semi-skilled but with no transferable work skills), application of Rule 202.21 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”) would direct a conclusion that he was not disabled, Findings 8-11, *id.* at 23-24; that, considering his additional nonexertional limitations within the framework of the above-cited rule, he had been able since February 1, 2002 to make a successful vocational adjustment to work that existed in significant numbers in the national economy, Finding 12, *id.* at 24; and that he therefore had not been under a disability since February 1, 2002, Finding 13, *id.* The Appeals Council declined to review the decision, *id.* at 7-9, 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(f); *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 conclusions 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).

Termination of benefits is governed by 42 U.S.C. § 423(f), which provides in relevant part that benefits may be discontinued only if (i) there is substantial evidence to support a finding of medical improvement related to an individual's ability to work and (ii) the individual is now able to engage in substantial gainful activity. *Id.*, *see also* 20 C.F.R. § 404.1594(a). Medical improvement "is defined as any decrease in the medical severity of an impairment, and any such decrease must be based on changes in the symptoms, signs and/or laboratory findings associated with the claimant's impairment." *Rice v. Chater*, 86 F.3d 1, 2 (1st Cir. 1996) (citations and internal quotation marks omitted); *see also* 20 C.F.R. § 404.1594(b)(1). "To find medical improvement, the Commissioner must compare the prior and current medical evidence to determine whether there have been any such changes in the signs, symptoms and laboratory findings associated with the claimant's impairment." *Rice*, 86 F.3d at 2; *see also* 20 C.F.R. § 404.1594(c)(1). "Once medical improvement *has been shown*, a claimant's failure to meet a prior listing suffices to show that medical improvement *is related to ability to work*, a separate issue which is not even considered until medical improvement has been established." *Rice*, 86 F.3d at 2 n.2 (emphasis in original); *see also* 20 C.F.R. § 404.1594(c)(2) & (3)(i). Failure to seek treatment is not evidence of medical improvement. *Rice*, 86 F.3d at 2. The regulations require actual physical improvement in a claimant's impairment, not simply an improved prognosis. *Id.* at 3.

In reassessing the plaintiff's ability to work, the administrative law judge reached Step 5 of the sequential evaluation 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 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 contends that the administrative law judge erred in (i) determining that the range of jobs of which he remained capable was not significantly diminished by his nonexertional limitations, (ii) failing to properly assess his physical and mental RFC and (iii) reaching a procedurally flawed medical-improvement finding that is unsupported by substantial evidence. *See generally* Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 10). I agree that errors in the administrative law judge's physical RFC assessment justify remand for further proceedings. I need not, and do not, reach the plaintiff's remaining points of error.

I. Discussion

In discussing the plaintiff's physical RFC, the administrative law judge purported to adopt Exhibit 29 – an RFC evaluation by Disability Determination Services ("DDS") non-examining physician Robert Hayes, D.O., dated January 30, 2002. *See* Record at 22, 222-29. The administrative law judge described the Hayes RFC as supporting a finding that the plaintiff could frequently lift ten pounds. *See id.* at 22. However, Dr. Hayes actually checked a box indicating that the plaintiff could frequently lift *less than* ten pounds. *See id.* at 223. As the plaintiff points out, *see* Statement of Errors at 7-8, Dr. Hayes' actual lifting limitation is inconsistent with the demands of a full range of light work, *see, e.g.*, 20 C.F.R. § 404.1567(b) (light work entails, *inter alia*, "frequent lifting or carrying of objects weighing up to 10 pounds"; "[t]o be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.>").

At oral argument, counsel for the commissioner took the position that this glitch could not reasonably be viewed as reversible error inasmuch as (i) Dr. Hayes found that the plaintiff could perform the rest of the light-work requirements, including occasionally lifting and/or carrying twenty pounds, *see* Record at 223, and (ii) the key distinction between light and sedentary work is not the amount of weight carried, but rather the amount of standing and walking one is required to do. Thus, counsel posited, Dr. Hayes did in effect find that the plaintiff retained the RFC for the full range of light work. However, he cited no authority for these propositions; nor have I been able to find any. In the absence of such authority, I decline to embrace the notion that a claimant who can lift *less than* ten pounds frequently (but not ten pounds frequently) is capable of performing a wide or full range of light work.

Beyond this, as the plaintiff also observes, there is a further problem with the administrative law judge's reliance on the Hayes report. Dr. Hayes found the plaintiff capable of standing and/or walking (with normal breaks) for a total of about six hours in an eight-hour workday. *See id.* The administrative law judge also so found. *See id.* at 22 (finding no restrictions on plaintiff's ability to perform standing/walking requirements of light work). Yet, in a handwritten February 2003 notation, the plaintiff's treating physician, Melanie C. Rand, D.O., found him incapable of standing for more than half an hour at a time, *see id.* at 333, a limitation inconsistent with the demands of the full range of light work, *see, e.g.,* 20 C.F.R. § 404.1567(b) (“[A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls.”).²

² Dr. Rand found the plaintiff restricted to lifting less than ten pounds, with no bending or twisting and no prolonged standing (greater than half an hour). *See* Record at 333. At his hearing, held on May 20, 2003, the plaintiff also testified about these restrictions, stating: “I am not supposed to bend, I am not supposed to twist, I am not supposed to lift anything over ten pounds, and I’m not supposed to stand for any length, any longer than half an hour at a time.” *Id.* at (continued on next page)

The plaintiff faults Dr. Hayes for not either adopting Dr. Rand's limitation or explaining the discrepancy. *See* Statement of Errors at 8-9. This argument misses the mark; Dr. Hayes could not have done so inasmuch as his report predated by approximately a year Dr. Rand's imposition of the restrictions in question. Nonetheless, the emergence of material new evidence after issuance of a non-examining DDS physician's report lessens the weight to which that report is entitled. *See, e.g., Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) ("We have held that the amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert. In some cases, written reports submitted by non-testifying, non-examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule.") (citations and internal quotation marks omitted).³ One cannot be confident that, had Dr. Hayes seen this later treating-source report, his views would have remained unchanged.

In any event, as the plaintiff further asserts, the administrative law judge should have acknowledged and resolved the material discrepancy between the Rand and Hayes assessments of the plaintiff's ability to stand. *See* Statement of Errors at 8. The decision is devoid of any mention whatsoever of the Rand 2003 restrictions. *See* Record at 15-23. A court cannot step into the breach and resolve such a material

40. While the plaintiff testified he could lift ten pounds, Dr. Rand's note indicates he could lift less than ten pounds. *See id.* at 333.

³ There is a split among the circuit courts of appeals, with respect to which the First Circuit has not weighed in, concerning the relevance in disability-cessation cases of evidence of the plaintiff's condition subsequent to the date disability benefits are terminated. *Compare, e.g., Difford v. Secretary of Health & Human Servs.*, 910 F.2d 1316, 1320 (6th Cir. 1990) (status through date of hearing relevant) *with Johnson v. Apfel*, 191 F.3d 770, 775 (7th Cir. 1999) (status relevant only through date disability determined to have ceased); *see also, e.g., McNabb v. Barnhart*, 340 F.3d 943, 944-45 (9th Cir. 2003) (describing conflict but declining to decide issue). I need not resolve this sticky question inasmuch as, at oral argument, counsel for the commissioner acknowledged that the plaintiff's condition subsequent to the date of termination of his benefits was relevant. In any event, the administrative law judge in this case expressly found that the plaintiff had not been disabled "[s]ince February 1, 2002[,]" Finding 13, Record at 24, rendering consideration of all evidence adduced (*continued on next page*)

evidentiary conflict in the first instance on review. *See* Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (Supp. 2004) (“SSR 96-8p”), at 149 (“In assessing RFC, the adjudicator must discuss the individual’s ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related activity the individual can perform based on the evidence available in the case record. The adjudicator must also explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved.”) (footnote omitted); *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.”).

What is more, Dr. Rand was a treating physician. While an administrative law judge can reject a treating source’s opinion regarding a claimant’s restrictions, he or she “must explain why the opinion was not adopted.” SSR 96-8p, at 150; *see also* 20 C.F.R. § 404.1527(d)(2) (regardless of the subject matter as to which a treating physician’s opinion is offered, the commissioner must “always give good reasons in our notice of determination or decision for the weight we give your treating source’s opinion.”). Again, no such analysis was offered in this case.

For these reasons, reversal and remand for further proceedings is warranted.

II. Conclusion

through the date of hearing appropriate.

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for proceedings not inconsistent 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 14th day of March, 2005.

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

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