

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

RAYMOND A. GOLFIERI,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 06-14-B-W

**RECOMMENDED DECISION ON DEFENDANT’S
MOTION FOR ENTRY OF JUDGMENT AND REMAND**

This Social Security Disability (“SSD”) case comes to the court in an unusual posture. Following filing by the plaintiff of a statement of errors, *see* Plaintiff’s Itemized Statement of Errors (“Statement of Errors”) (Docket No. 12), the commissioner filed a motion for remand pursuant to sentence four of 42 U.S.C. § 405(g) for purposes of finding the plaintiff disabled as of May 1, 2004 (the date of his fifty-fifth birthday), *see* Defendant’s Opposed Motion for Entry of Judgment Under Sentence Four of 42 U.S.C. § 405(g) With Reversal and Remand of the Cause to the Defendant (“Motion for Remand”) (Docket No. 14); Memorandum in Support of Defendant’s Opposed Motion for Entry of Judgment Under Sentence Four of 42 U.S.C. § 405(g) With Reversal and Remand of the Cause to the Defendant (“Remand Memo”) (Docket No. 14); Finding 1, Record at 17.

The plaintiff agreed that he should be found disabled as of then but objected to preclusion of the opportunity to seek a new hearing covering the period from his date of alleged onset of disability

(September 24, 2002) through April 30, 2004 (“Contested Period”). *See* Plaintiff[’s] Objection to Defendant’s Motion To Remand (“Remand Objection”) (Docket No. 15). The commissioner rejoined that, in her view, the evidence of record established that the plaintiff was not disabled during the Contested Period (and hence not entitled to a hearing regarding it). *See* Defendant’s Reply to Plaintiff’s Objection to Defendant’s Opposed Motion for Entry of Judgment Under Sentence Four of 42 U.S.C. § 405(g) With Reversal and Remand of the Cause to the Defendant (“Remand Reply”) (Docket No. 16). I notified the parties that I would hear oral argument limited to the remaining issue of whether the otherwise consented-to remand should reserve to the plaintiff the right to a hearing concerning whether he was disabled during the Contested Period. *See* Notice of Hearing on Motion (Docket No. 17). With the benefit of that oral argument held before me on December 1, 2006, I now recommend that the Motion for Remand be granted as prayed for.

I. Analysis

Sentence four of section 405(g) provides, in relevant part: “The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g).

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 had found, in relevant part, that the medical evidence established the presence of severe impairments, including morbid obesity and low back and leg pains, *see* Finding 3, Record at 17; that the plaintiff’s testimony regarding his pain and mental/emotional limitations was not well-supported by the medical evidence and was not credible to the extent of establishing an inability to perform light work,

Finding 5, *id.*; that he retained the residual functional capacity (“RFC”) to perform at least light work that did not involve more than occasional climbing, balancing, stooping, kneeling, crouching or crawling, Finding 6, *id.*; that he was able to perform his past relevant light work as a highway construction flagman, Finding 7, *id.*; and that he therefore had not been under a disability at any time through the date of decision, Finding 8, *id.*¹

The commissioner now concedes that, contrary to the decision of the administrative law judge, the plaintiff was unable to perform his past relevant work as a highway construction flagman. *See* Remand Memo at 2. The commissioner further concedes that, pursuant to Rule 202.04 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”), the plaintiff was disabled, based on his RFC for light work, age, education and past relevant work experience, as of May 1, 2004. *See id.* at 2-3. The commissioner refuses to concede that the plaintiff is entitled to any further proceeding with respect to the Contested Period, contending that the plaintiff’s age was the single determining factor pursuant to which she concluded he was disabled as of May 1, 2004. *See* Remand Reply at 2.

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); *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).

¹ The plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through June 30, 2006, *see* Finding 1, Record at 17, subsequent to the date of decision of July 29, 2005, *see id.* at 18.

Although the administrative law judge reached Step 4 of the sequential-evaluation process in determining the plaintiff capable of returning to past relevant work, the commissioner now relies on Step 5 in arguing that no further proceedings are necessary on remand with respect to the Contested Period. *See* Remand Reply at 2. Specifically, she argues that a person of the plaintiff's age during the Contested Period, with an RFC for light work as found by the administrative law judge and the plaintiff's education and past relevant work experience, would be found not disabled pursuant to the Grid. *See id.*²

At Step 5 of the sequential process, 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's Statement of Errors identifies "three principal sets of errors." Statement of Errors at 2. One set, which assails the administrative law judge's Step 4 finding, *see id.* at 11-13, is rendered moot by the commissioner's concession that the Step 4 finding is erroneous. At oral argument, the plaintiff's counsel clarified that he (i) disclaimed reliance on a second set of claimed errors concerning the administrative law judge's handling of the plaintiff's alleged depression, *see id.* at 13-15, (ii) continued to rely on the third set of errors, asserting that the administrative law judge improperly determined RFC by mishandling the opinions of treating and examining physicians and incorrectly evaluating obesity, *see id.* at 2-

² Counsel for the commissioner confirmed at oral argument that she relies on Rule 202.13 of Table 2 of the Grid for her finding of non-disability during the Contested Period.

11, and (iii) pressed a new contention that the plaintiff was entitled to consideration whether he was disabled for the six-month period prior to his fifty-fifth birthday (the so-called “borderline age issue”).

In response, counsel for the commissioner (i) objected to assertion for the first time at oral argument of the borderline-age issue and (ii) disputed that the plaintiff’s RFC arguments entitle him to remand with instructions to hold a rehearing with respect to the Contested Period. I sustain the commissioner’s objection to the raising of the borderline-age issue and concur with her position regarding the RFC arguments.

At oral argument, counsel for the plaintiff explained that he had not included the borderline-age argument in the Statement of Errors because it was generated by the filing of the Motion for Remand. Nonetheless, as he acknowledged at oral argument, he did file an objection to the Motion for Remand in which he omitted any mention of the borderline-age issue. He candidly conceded that the issue was omitted because he had not then thought of it. Counsel for the commissioner protested that, had he been made aware of this issue in a timely fashion, he could have brought it to the attention of the Appeals Council for consideration of broadening of the scope of the Motion for Remand. He also observed, correctly, that this court has put the Social Security bar on notice that issues raised for the first time at oral argument will be deemed waived. *See, e.g., Farrin v. Barnhart*, No. 05-144-P-H, 2006 WL 549376, at *5 (D. Me. Mar. 6, 2006) (rec. dec., *aff’d* Mar. 28, 2006) (“Counsel for the plaintiff in this case and the Social Security bar generally are hereby placed on notice that in the future, issues or claims not raised in the itemized statement of errors required by this court’s Local Rule 16.3(a) will be considered waived and will not be addressed by this court.”) (footnote omitted). The objection accordingly is sustained.

The plaintiff’s remaining basis for rehearing with respect to the Contested Period (challenging the supportability of the administrative law judge’s RFC assessment) consists of two subpoints: that the administrative law judge (i) improperly discounted the RFC opinion of a treating physician, Peter Just,

M.D., and ignored the disability opinion of an impartial medical examiner, Dennis P. White, D.O., and (ii) failed to factor in the effects of the plaintiff's obesity (particularly those caused by his sleep apnea), in contravention of Social Security Ruling 02-1p ("SSR 02-1p"). *See* Statement of Errors at 2-11. For the reasons that follow, I discern no reversible error:

1. Just Opinion. Dr. Just, a pain-management specialist to whom the plaintiff was referred by his primary-care physician, Dr. Saddi, saw the plaintiff on August 22, 2003, September 3, 2003 (for an injection procedure) and December 3, 2004. *See* Record at 110-12, 122, 152-53. He submitted an RFC assessment dated February 25, 2005, *see id.* at 165-68, rating the plaintiff, *inter alia*, as capable of standing and/or walking less than two hours in an eight-hour workday and sitting less than six hours in an eight-hour workday, *see id.* at 165-66. The administrative law judge opted not to give the Just RFC opinion "controlling weight" on the basis that it was "not supported by the doctor's own findings nor by any other substantial medical evidence[,]" including treatment notes of Dr. Saddi. *Id.* at 16.

As a threshold matter, the Just RFC opinion postdates by almost a year the conclusion of the Contested Period and does not purport to be a retrospective opinion. *See id.* at 165-68. Thus, it is irrelevant to the question presented: whether the plaintiff is entitled to a rehearing with respect to his status during that period. In any event, the administrative law judge committed no error in discounting it. The Just opinion touched on the subject of RFC – a determination reserved to the commissioner with respect to which even opinions of a treating source are accorded no "special significance[,]" *see* 20 C.F.R. § 404.1527(e)(1)-(3), and are never entitled to controlling weight, *see, e.g.*, Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (Supp. 2006) ("SSR 96-5p"), at 122.

An opinion of a treating source touching on an issue reserved to the commissioner (such as RFC) is entitled to consideration based on six enumerated factors: (i) length of the treatment relationship and frequency of examination, (ii) nature and extent of the treatment relationship, (iii) supportability – *i.e.*, adequacy of explanation for the opinion, (iv) consistency with the record as a whole, (v) whether the treating physician is offering an opinion on a medical issue related to his or her specialty, and (vi) other factors highlighted by the claimant or others, 20 C.F.R. § 404.1527(d)(2)-(6); *see also, e.g.*, SSR 96-5p at 124 (“In evaluating the opinions of medical sources on issues reserved to the Commissioner, the adjudicator must apply the applicable factors in 20 CFR 404.1527(d) and 416.927(d).”). Nonetheless, the plaintiff does not cite, nor can I find, any First Circuit authority for the proposition that an administrative law judge must slavishly discuss each of these factors for consideration of a treating-source opinion to pass muster. Relevant regulations require only the provision of “good reasons in our notice of determination or decision for the weight we give your treating source’s opinion.” 20 C.F.R. § 404.1527(d)(2); *see also, e.g.*, SSR 96-5p at 127 (even as to issues reserved to the commissioner, “the notice of the determination or decision must explain the consideration given to the treating source’s opinion(s)”); Social Security Ruling 96-8p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2006) (“SSR 96-8p”), at 150 (an administrative law judge can reject a treating-source opinion as to RFC but “must explain why the opinion was not adopted”).

In this case, the administrative law judge explained why the Just RFC opinion was not adopted: It was not supported by Dr. Just’s own findings or by other medical evidence of record. *See* Record at 16. Those conclusions are supportable and constitute good reason for the rejection. Dr. Just, who offered no rationale for his RFC determination, *see id.* at 165-68, had recorded minimal objective findings of restriction or limitation during his examinations of the plaintiff, *see id.* at 111, 152-53. Dr. Saddi, as well,

recorded minimal objective findings on examination, *see, e.g., id.* at 116, 119, 121, noting on October 10, 2003 that, per the plaintiff, his low-back pain was worse when he sat or stood for a prolonged period but he otherwise was able to do routine work at home without much difficulty, including cooking, yard work and walking around the house, *see id.* at 116.

In short, the administrative law judge was not obliged to accept the Just RFC opinion; he was obliged to consider it and supply an explanation for the weight given it. He did exactly that.

2. White Opinion. Dr. White, an independent medical examiner, performed a one-time examination of the plaintiff in connection with a workers' compensation claim for the September 2002 work-related injury that he asserts precipitated his disability. *See Record* at 140.³ Dr. White opined that the plaintiff had “[n]o current functional work capacity[,]” although curiously he then stated: “Particularly, however, since a diagnosis has not been confirmed and maximal medical improvement has not been reached as appropriate interventional diagnostic and therapeutic procedures have not been performed, I would defer on establishing a current work capacity.” *Id.* at 142.

The plaintiff faults the administrative law judge for his failure even to address the White opinion. *See Statement of Errors* at 7-8. Any error in failing to articulate reasons for the implicit rejection of that opinion is harmless. As an initial matter, the plaintiff cites no authority for the proposition that any particular level of discussion is due the opinion of an examining (as opposed to a treating) source. *See id.* Second, Dr. White's opinion concerned the ultimate question whether the plaintiff was disabled— an issue reserved to the commissioner. *See 20 C.F.R. § 404.1527(e)(1).* Third, Dr. White's opinion is internally inconsistent. Fourth, Dr. White's opinion is inconsistent with substantial medical evidence of record (including objective

³ The plaintiff, then a highway construction flagger, had been walking into the woods to relieve himself when he stepped
(continued on next page)

findings on examination by Drs. Just and Saddi, discussed above). Fifth, and finally, a Disability Determination Services (“DDS”) non-examining reviewer, Iver C. Nielson, M.D., opined that Dr. White’s finding of lack of a functional work capacity was not fully supported by Dr. White’s own examination. *See* Record at 150. Accordingly, I discern no reversible error in the ignoring of the White opinion.

3. Effects of Obesity. The plaintiff finally faults the administrative law judge for failing to factor into his RFC determination effects of obesity, in contravention of SSR 02-1p. *See* Statement of Errors at 8-11. That ruling notes, in relevant part:

Obesity can cause limitation of function. The functions likely to be limited depend on many factors, including where the excess weight is carried. An individual may have limitations in any of the exertional functions such as sitting, standing, walking, lifting, carrying, pushing, and pulling. It may also affect ability to do postural functions, such as climbing, balance, stooping, and crouching. The ability to manipulate may be affected by the presence of adipose (fatty) tissue in the hands and fingers. The ability to tolerate extreme heat, humidity, or hazards may also be affected.

The effects of obesity may not be obvious. For example, some people with obesity also have sleep apnea. This can lead to drowsiness and lack of mental clarity during the day. Obesity may also affect an individual’s social functioning.

... In cases involving obesity, fatigue may affect the individual’s physical and mental ability to sustain work activity. This may be particularly true in cases involving sleep apnea.

SSR 02-1p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2006), at 256-57.

With respect to sleep apnea, the administrative law judge noted the plaintiff’s hearing testimony that “he lies down in the afternoon due to fatigue related to sleep apnea.” Record at 14. He found that the plaintiff had sleep apnea but deemed it non-severe, observing: “There are no sleep studies in evidence, no indication that he is undergoing treatment for sleep apnea, and no documentation of complaints of chronic

into a hidden hole and fell onto his right side. *See* Record at 140.

fatigue.” *Id.* At oral argument, counsel for the plaintiff posited that while, indeed, there are no sleep studies, no indication of treatment for sleep apnea and no documentation of complaints of chronic fatigue, the administrative law judge contravened the dictates of SSR 02-1p when he made no express finding whether the plaintiff’s hearing testimony concerning the effects of his sleep apnea was credible. This argument is without merit: It is sufficiently clear that the administrative law judge discredited that testimony for the supportable reasons given. Nothing in SSR 02-1p forecloses such an adverse credibility finding.

Further, to the extent the plaintiff complains that the administrative law judge failed to take into consideration other effects of his obesity, such as its impact on his ability to stand, *see* Statement of Errors at 9, his argument again falls flat. The administrative law judge found that, despite obesity, the plaintiff was capable of undertaking light work. *See, e.g.*, Record at 16 (“Dr. Saddi’s notes from October 2002 state that, despite obesity and pain, the claimant was able to stand for ‘many hours.’”) (citation omitted). Moreover, as counsel for the commissioner noted at oral argument, complained-of error in failing to take into consideration effects of obesity in accordance with SSR 02-1p has been adjudged harmless to the extent the RFC of an administrative law judge is consistent with that of a DDS reviewer who has, himself or herself, taken into account the impact of obesity. *See, e.g., Sienkiewicz v. Barnhart*, 409 F.3d 798, 803 (7th Cir. 2005) (“In his decision, the ALJ found that morbid obesity was one of Sienkiewicz’s medically determinable impairments, and he specifically mentioned her testimony that she could sit for no more than 40 minutes continuously. But as the ALJ observed, both of the consulting physicians who reviewed Sienkiewicz’s records opined that she could meet the requirements of light work by sitting for six hours in an eight-hour day, and no doctor ever suggested that any greater limitation was required.”); *Skarbek v. Barnhart*, 390 F.3d 500, 504 (7th Cir. 2004) (noting that remand for explicit consideration of claimant’s obesity would not be outcome-determinative when, *inter alia*, administrative law judge adopted limitations

suggested by specialists and reviewing doctors who were aware of claimant's obesity). In this case, as counsel for the commissioner observed, both Dr. Nielson and a second DDS non-examining reviewer, Lawrence P. Johnson, M.D., found the plaintiff capable of undertaking medium-exertional-level work despite his obesity – even heavier work than the administrative law judge found him capable of performing. *See* Record at 132-39, 144-51; *compare, e.g.*, 20 C.F.R. § 404.1567(c) (“Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds.”).

There thus was no reversible error in the administrative law judge's handling of the effects of obesity in determining RFC.⁴

II. Conclusion

For the foregoing reasons, I recommend that the Motion for Remand be **GRANTED**, the decision of the commissioner be **VACATED** and case be **REMANDED** with instructions to award the plaintiff benefits for the period from May 1, 2004 forward.

NOTICE

⁴ Relatedly, the plaintiff complains in his Statement of Errors that, in contravention of SSR 02-1p, the administrative law judge in effect penalized him for his obesity, emphasizing his alleged failure to lose weight. *See* Statement of Errors at 9-10 & n.9; *see also* Record at 15-16. SSR 02-1p does indeed suggest that an administrative law judge should not take into consideration failure to lose weight unless and until a claimant is found disabled. *See* SSR 02-1p, at 259-60 (“Before failure to follow prescribed treatment for obesity can become an issue in a case, we must first find that the individual is disabled because of obesity or a combination of obesity and another impairment(s).”). Consideration at Step 4 of failure to lose weight is reversible error when it results in an unfavorable adjustment to RFC. *See, e.g., Rush v. Barnhart*, 432 F.Supp.2d 969, 998 (D.N.D. 2006) (“[I]t is not clear from the ALJ's opinion whether he concluded Rush is presently capable of performing at the functional capacity he ultimately determined or whether he concluded she *would* be able to function at that level if she followed through (or if she had followed through) on the recommendations for exercise and weight loss that had been made. There is some language in the opinion that suggests the latter, and, if this also was ALJ's conclusion, this also was error without first considering the guidance of SSR 02-01p.”) (emphasis in original). Nonetheless, as noted above, in this case the RFC determination of the administrative law judge adequately reflects the impact of the plaintiff's obesity. Any error the administrative law judge committed in discussing the plaintiff's asserted failure to follow prescribed weight-loss treatment accordingly is harmless.

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 6th day of December, 2006.

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

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