

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

BURTON HAGAR, JR.,

Plaintiff

v.

**MICHAEL P. ASTRUE,
Commissioner of Social Security,**

Defendant

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Docket No. 06-229-P-S

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the questions whether the residual functional capacity assigned to the plaintiff by the administrative law judge was supported by substantial evidence, whether he properly considered the assessments of residual functional capacity in the record, whether he failed to incorporate nonexertional impairments into the residual functional capacity he assigned, whether he was required to obtain testimony from a vocational expert and whether he complied with 20 C.F.R. §§ 404.1520a and 416.920a. I recommend that the commissioner’s decision 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.

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 October 5, 2007 pursuant to Local Rule 16.3(a)(a)(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.

1982), the administrative law judge found, in relevant part, that the plaintiff met the insured status requirements for Title II (SSD) only through March 31, 2000, Finding 1, Record at 22; that he suffered from chronic depression, degenerative joint disease of both knees and a history of alcohol and marijuana abuse, impairments that were severe but which, considered singly or in combination, did not meet or equal the criteria of any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Findings 3-4, *id.*; that the testimony of the plaintiff and his wife regarding pain and other limitations was not supported by the medical evidence and was not credible to the extent of establishing an inability to perform light, unskilled work, Finding 5, *id.*; that from January 1, 1999 through March 31, 2000 the plaintiff retained the physical and mental residual functional capacity to perform light, unskilled work, Finding 6, *id.*; that he could not return to his past relevant work, Finding 7, *id.* at 23; that prior to the expiration of his insured status the plaintiff remained capable of performing light and sedentary unskilled jobs that existed in significant numbers in the national economy and therefore was not disabled with the meaning of that term as used in Title II of the Social Security Act (SSA), Findings 8-9, *id.*; and that since the June 20, 2003 filing date of his application for SSI benefits, with two brief exceptions, the plaintiff retained the physical and mental residual functional capacity to perform unskilled, light work that existed in significant numbers in the national economy and accordingly was not disabled as that term is used in Title XVI of the Social Security Act at any time through the date of the decision, Findings 10-11, *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, 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), 1381(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 review 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. 136, 147 n.5 (1987); *Goodermote*, 647 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

I. SSD Benefits

At oral argument, counsel for the commissioner took the position that the plaintiff has presented this case to the court in an “entirely wrong analytical framework” because his two previous applications for both types of benefits, Record at 15, alleged the same date of onset of disability as the current application, meaning that the current application is actually nothing more than a request to reopen the previous SSD application and the previous SSI application for the period before the date of the current application in June 2003, *id.* at 18. Anything dated earlier than June 2003, counsel asserts, is not properly before this court for review.

However, the administrative law judge in this case, while finding that the plaintiff had not demonstrated “good cause” to warrant reopening of the prior applications, *id.* at 23, clearly also addressed both the SSD and the SSI claims on their merits, *id.* Ordinarily, the commissioner's decision not to reopen a prior determination is not reviewable by the courts. *Byam v. Barnhart*, 336

F.3d 172, 180 (2d Cir. 2003). But federal courts may review a decision where the commissioner has constructively reopened the case. *Id.* If the commissioner “reviews the entire record and renders a decision on the merits, the earlier decision will be deemed to have been reopened, and any claim of administrative res judicata to have been waived and thus the claim is subject to judicial review.” *Id.* (citations and internal punctuation omitted). Here, despite his statement that reopening was denied, the administrative law judge reviewed the entire record and decided both claims on their merits. Accordingly, the earlier applications were constructively reopened and the administrative law judge’s entire opinion is open to review by this court. *See also Kasey v. Sullivan*, 3 F.3d 75, 78 (4th Cir. 1993); *Brown v. Sullivan*, 932 F.2d 1243, 1246 (8th Cir. 1991).

The plaintiff was insured for SSD benefits only through March 31, 2000. He was therefore required to submit evidence of disability before that date. The administrative law judge found that the plaintiff was restricted to light to medium work at that time and could not return to his past medium-to-heavy work. Record at 18. He then applied Appendix 2 to Subpart P of 20 C.F.R. Part 404 (the “Grid”) and found that, given the plaintiff’s age at that time (a younger individual), education (high school), lack of transferable skills and residual functional capacity, the plaintiff was not disabled at that time for the purpose of SSD. *Id.* The plaintiff contends that, because the administrative law judge found his depression to be severe at the relevant time, his failure to incorporate any mental limitations into the residual functional capacity he assigned was reversible error. Plaintiff’s Itemized Statement of Errors (“Itemized Statement”) (Docket No. 10) at 2-3.

In order to be found severe at Step 2 of the sequential evaluation process, a mental impairment must significantly limit the claimant’s ability to do basic work activities. 20 C.F.R. § 404.1520(c). “Basic work activities” that may be affected by a mental impairment include understanding, carrying out and remembering simple instructions; use of judgment; responding

appropriately to supervision, co-workers and usual work situations; and dealing with changes in a routine work setting. 20 C.F.R. § 404.1521(b). While the Step 2 severity requirement is “a *de minimis* policy, designed to do no more than screen out groundless claims,” *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986), a finding of severity at Step 2 may not simply be ignored when determining residual functional capacity at Step 4. Here, the administrative law judge noted that a psychologist who evaluated the plaintiff as a consultant in September 1999 concluded that he “had some difficulty relating to others, but was considered able to understand, concentrate, memorize and follow instructions, and behave within normal social conventions” and that the plaintiff

started counseling services in December 1999, for depression and anxiety He was prescribed medication and indicated it was helpful, and in March 2000 a psychiatrist reported the claimant’s depression was well controlled. State Agency physicians and psychologists who reviewed the record in September 1999 and March 2000 concluded that the claimant had no severe mental impairments[.]

Record at 17-18 (citations omitted). This recitation would appear to support a conclusion that the plaintiff’s depression was not severe at the relevant time, but that is not what the administrative law judge found. He clearly found, for both the plaintiff’s SSD claim and his SSI claim, that the depression was a severe impairment. Finding 3, *id.* at 22.

In *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520 (1st Cir. 1989), the First Circuit determined that use of the Grid as a framework for decision making is permissible “so long as the factual predicate (the claimant’s [mental impairment] does not interfere more than marginally with the performance of the full range of [light] work) is amply supportable[.]” *id.* at 526. At oral argument, counsel for the commissioner contended that the administrative law judge’s limitation of the plaintiff’s residual functional capacity to unskilled work, Record at 22-23, resulted from the finding that his depression was a severe impairment, that no vocational expert testimony was

required when the only mental limitation is a limitation to unskilled work and that use of the Grid under these circumstances is appropriate. The administrative law judge did find that the plaintiff's "mental impairments limit him to unskilled tasks." *Id.* at 21. In *Acosta v. Barnhart*, 114 Fed.Appx. 7, 2004 WL 2567937 (1st Cir. Nov. 12, 2004), the First Circuit held that a mental impairment that did not interfere more than marginally with the performance of a full range of unskilled work did not preclude exclusive reliance on the Grid, 114 Fed.Appx at 11, 2004 WL 2567937 at **3. That is what happened in this case.²

II. SSI Benefits

The plaintiff's discussion of his claim for SSI benefits in his statement of errors is often difficult to separate from his discussion of his SSD claim, but it appears that he makes a similar argument as to that claim: the administrative law judge "fail[s] to capture [his] mental limitations and continues to presume that these limitations will have no vocational impact." Itemized Statement at 3.³ But the administrative law judge did treat the plaintiff's mental impairment differently when considering the SSI claim. He recited separately the evidence relating to the SSI claim. Record at 18-19. He stated that he "parts company with the State Agency experts to some extent. The claimant's physical and mental impairments, while not incapacitating, certainly were 'severe' to the extent of imposing some work-related limitations[.]" *Id.* at 19. He found that the plaintiff's "mental impairments, primarily depression, limited him to unskilled, entry-level work, as [he] remained able

² I note that the administrative law judge wrongly states that the state-agency physician who completed Exhibit B-11F in March 2000 "concluded that the claimant . . . had no severe physical impairments or could perform light to medium exertion work." Record at 18. In fact, that physician established a limitation of 3 to 4 hours' standing and/or walking in an 8-hour workday, *Id.* at 244, which is not consistent with light or medium work, Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 29-30. The administrative law judge apparently rejected this conclusion in favor of other medical evidence in the record. His failure to make that clear in his opinion is a harmless error given the other medical evidence discussed in the opinion.

³ The itemized statement does not discuss any physical limitations with respect to the time period relevant to the SSI claim. Accordingly, any argument based on physical impairments or limitations has been waived with respect to this claim.

to understand, remember and carry out routine job instructions, maintain attention and concentration for routine tasks, and could relate appropriately to supervisors, coworkers and the public in routine work settings.” *Id.* The administrative law judge then apparently applied the Grid with respect to the SSI claim. *Id.* at 20, 22. This procedure was approved by the First Circuit in *Acosta*. In that case, the court held that exclusive reliance on the Grid is appropriate “so long as the claimant’s mental impairment does not interfere more than marginally with the performance of the full range of unskilled work.” 114 Fed.Appx. at 11 (citing *Ortiz*); *see also Rodriguez v. Barnhart*, 108 Fed.Appx. 657, 658 (1st Cir. 2004). The administrative law judge in the case at hand correctly reviewed the mental demands of unskilled work. *See id.* So long as there is substantial evidence in the record to support the administrative law judge’s findings in this regard, reliance on the Grid is not error. *Id.* That is in fact the case here. *See, e.g.*, Record at 335, 351, 401, 403, 424, 439, 441 (all of which are cited by the administrative law judge). The administrative law judge also set out, *id.* at 20-21, his reasons for rejecting the conflicting report of Brian Rines, Ph.D., a psychologist who saw the plaintiff twice at the request of his attorney, *id.* at 430.

To the extent that the plaintiff takes the position that the administrative law judge was required to consult a vocational expert on this issue, Itemized Statement at 6-7, the mental demands of unskilled work are set out in Social Security Ruling 85-15, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991*, at 347; no vocational expert is needed to identify those requirements. The First Circuit specifically held in *Acosta* that an administrative law judge could make this determination as a matter of common sense even in the absence of a mental residual functional capacity form filled out by a psychiatrist. 114 Fed.Appx. at 11. Such forms were filled out by the psychologists in this case.

The plaintiff's final argument is that the administrative law judge failed to comply with the special procedure for evaluating mental impairments set forth in 20 C.F.R. § 416.920a. Itemized Statement at 7.⁴ Specifically, the plaintiff asserts that his SSI claim must be remanded because the administrative law judge did not include in his decision "a specific finding as to the degree of limitation in each of the functional areas described in paragraph (c)" of 20 C.F.R. § 416.920a. *Id.* Section 416.920a(e)(2) does include this requirement. The functional areas to which it refers are activities of daily living; social functioning; concentration, persistence or pace; and episodes of decompensation. 20 C.F.R. § 416.920a(c)(3). The administrative law judge's opinion does address two of these areas directly, social functioning and concentration, persistence or pace; he writes that the plaintiff "remained able to understand, remember and carry out routine job instructions, maintain attention and concentration for routine tasks, and could relate appropriately to supervisors, coworkers and the public in routine work settings." Record at 19. No episodes of decompensation are presented in the records, Record at 351, 424, but the plaintiff's episodes of psychiatric hospitalization in 2003 and 2005 should probably be considered as such. The administrative law judge found that the plaintiff had recovered well after each hospitalization, Record at 19, 20, 22, and that for these brief periods the plaintiff did not have the residual functional capacity that he otherwise assigned, *id.* at 23. Under these circumstances, the administrative law judge's failure to discuss the single area of the plaintiff's activities of daily living cannot be considered an error requiring remand.⁵ *See Donaher v. Barnhart*, 2006 WL 2827651 (D. Me. Sept. 29, 2006), at *2-*4.

⁴ The itemized statement erroneously cites the regulation applicable to SSD claims.

⁵ The assertion of counsel for the commissioner at oral argument that this omission is harmless because these factors are used to determine whether an impairment is severe and the administrative law judge in this case found that the plaintiff's depression was severe is only partially correct. The factors, by the terms of the regulations, are used to determine "the degree of functional limitation resulting from the impairment(s)" which is then considered in determining whether the impairment is severe and, if so, whether it meets the criteria of any impairment included in the Listings and how it affects residual functional capacity. 20 C.F.R. § 416.920a(a)-(d).

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 12th day of October, 2007.

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

Plaintiff

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V.

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