

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>CLARK W. RICE, JR.,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
v.	)	<i>Docket No. 07-39-P-S</i>
	)	
<b>MICHAEL J. ASTRUE,</b>	)	
<i>Commissioner of Social Security,</i>	)	
	)	
<i>Defendant</i>	)	

**REPORT AND RECOMMENDED DECISION<sup>1</sup>**

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the question whether the administrative law judge failed to assign the proper weight to a physician’s assessment of the plaintiff’s residual functional capacity and to accurately assess his mental impairment. I recommend that the commissioner’s decision be affirmed.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. §§ 404.150, 416.920; *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 suffered from the severe impairments of chronic obstructive pulmonary disease (“COPD”), attention deficit disorder, personality disorder and the residuals of left hip replacement, none of which, taken individually or in

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<sup>1</sup> 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)(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.

combination, met or medically equaled the elements of any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Findings 3-4, Record at 15-16; that he retained the residual functional capacity to lift and carry 20 pounds occasionally and 10 pounds frequently, to stand and/or walk for 30 minutes at a time up to a total of 2 hours in an 8-hour work day, to sit for 1 hour at a time up to a total of 6 hours in a work day, to occasionally operate controls with his left foot, balance, stoop, kneel and climb ramps and stairs but never to crouch, crawl or climb ropes or ladders, Finding 5, *id.* at 16; that he must avoid concentrated exposure to temperature extremes, dust, fumes, chemicals, vibration, dampness, uneven walking surfaces and hazards such as unprotected heights, *id.*; that he could understand and carry out instructions consistent with special vocational preparation (“SVP”) level 4 work, make simple work-related decisions, occasionally interact with the public, coworkers and supervisors and maintain a competitive, goal-oriented work pace, *id.* at 16-17; that he was unable to perform any past relevant work, Finding 6, *id.* at 18; that given his age (younger individual), education (high school graduate), and residual functional capacity, use of Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the “Grid”) as a framework for decision-making supported a finding that there were jobs in significant numbers in the national economy that the plaintiff could perform, Findings 7-10, *id.* at 18-19; and that the plaintiff therefore had not been under a disability, as that term is defined in the Social Security Act, at any time from the alleged date of onset through the date of the decision, Finding 11, *id.* at 20. 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); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual functional capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

### **Discussion**

The plaintiff relies heavily on a "Physical Residual Functional Capacity Assessment" form filled out by David N. Markellos, M.D., Record at 364-70, after the administrative law judge requested at the hearing that the surgeon who performed the plaintiff's hip replacement surgery fill out such a form, *id.* at 439, contending that the administrative law judge should have given the form controlling weight with respect to exertional limitations, Assignment of Errors ("Statement of Errors") (Docket No. 10) at [1]-[8].<sup>2</sup> The administrative law judge noted that he did not "accord controlling weight" to this opinion because Dr. Markellos was not the plaintiff's treating source and because the assessment was not supported by substantial medical evidence. Record at 18. Dr. Markellos noted on the form that he had "never examined [the plaintiff] and [did] not know his present symptoms" and that his conclusions were "based on examining [the plaintiff's] clinical file"

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<sup>2</sup> Counsel for the plaintiff is reminded that this court's local rules require the pages of all memoranda of law to be numbered. Local Rule 7(e).

as “his treating orthopedist has retired.” *Id.* at 369-70. The treating orthopedist, Dr. David F. Paul, was a member of the same group practice as was Dr. Markellos. *Id.* at 370.

The limitations assigned by Dr. Markellos differ from those adopted by the administrative law judge only in that Dr. Markellos said that the plaintiff could stand and/or walk for a total of less than 2 hours in an 8-hour work day, *id.* at 365, while the administrative law judge said that he could stand and/or walk for up to a total of 2 hours in this period of time, *id.* at 16, and in that Dr. Markellos further said that the plaintiff could sit for less than 6 hours in an 8-hour work day, *id.* at 365, while the administrative law judge found that he could sit up to a total of 6 hours, *id.* at 16.

Even if, as the plaintiff asserts, Statement of Errors at [1]-[4], Dr. Markellos may be considered a treating medical source, the administrative law judge was not required to give his opinion as expressed on the form controlling weight, contrary to the plaintiff’s subsequent assertion, *id.* at [8]. The applicable regulation on this point provides, in relevant part: “If we find that a treating source’s opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.” 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). Dr. Markellos’s opinion on these two points is in fact inconsistent with other substantial evidence in the case record, specifically, the report of Stephen Doane, M.D., who examined the plaintiff on December 14, 2004 for the Maine Disability Determination Services and found that the plaintiff could not stand or sit for more than 30 minutes at a time, with no total upper limit for an eight-hour work day. Record at 334-36. The administrative law judge expressly adopted these findings and those of Charles E. Burden, M.D., a state-agency reviewing physician who incorporated Dr. Doane’s findings into the physical residual functional capacity assessment that he completed on December 30, 2004 in which he found precisely the

standing, walking and sitting limitations adopted by the administrative law judge . *Id.* at 18, 337-44.

The administrative law judge was entitled to adopt those findings, for which there is evidentiary support in the record, instead of those of Dr. Markellos. Whether or not there is substantial medical evidence in the record to support Dr. Markellos's conclusions, as the plaintiff contends, Statement of Errors at [4]-[8], is irrelevant for purposes of this appeal.

In addition, the administrative law judge was correct in his conclusion that Dr. Markellos did not qualify as a treating source under applicable regulations, in which a treating source is defined as

your own physician, psychologist, or other acceptable medical source who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you. Generally, we will considered that you have an ongoing treatment relationship with an acceptable medical source when the medical evidence establishes that you see, or have seen, the source with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation required for your medical condition(s).

20 C.F.R. §§ 404.1502, 416.902. By his own admission, Dr. Markellos never examined the plaintiff.

Record at 369. The plaintiff asserts that Dr. Markellos was nonetheless his treating physician because he belonged to the same medical practice group as Dr. Paul, who was his treating orthopedist, and because Dr. Markellos assisted Dr. Paul, Record at 162, in the second surgery on the plaintiff's hip, Statement of Errors at [2]-[3]. Neither fact qualifies Dr. Markellos as a treating medical source under the regulation quoted above. As a member of Dr. Paul's practice group who had never himself examined the plaintiff, Dr. Markellos stood in no better position than the state-agency reviewing physicians who had available to them the plaintiff's "clinical file," Record at 370, and having assisted at one of the plaintiff's surgeries, standing alone, cannot have put Dr. Markellos in a position to know what the plaintiff's physical limitations were over four years later.

The plaintiff next argues that the administrative law judge "did not give sufficient weight" to his "mental health condition." Statement of Errors at [8]. Specifically, he relies on the report of a

neuropsychological consultation performed by Bennet S. Slotnick, Ph.D. for the Division of Vocational Rehabilitation of the Maine Department of Labor. *Id.* He cites two questions posed to the vocational expert at the hearing which he contends demonstrate that Dr. Slotnick's report required the administrative law judge to find him totally disabled; those citations are to pages 462 and 464 of the administrative record. *Id.* at 10. However, the vocational expert's response at page 462 of the record is to a question based on the representation of plaintiff's attorney that the plaintiff himself said that he would need a "substantial break" after spending two hours making a model airplane before beginning to make another, *id.* at 461-62, not on any observation or conclusion in Dr. Slotnick's report. The vocational expert's observation that, should the plaintiff perform poorly at work, the resulting increase in supervision, combined with the plaintiff's tendency toward frustration, could have a "negative impact," *id.* at 464, is not based, so far as I can tell, on Dr. Slotnick's report and in any event is not the equivalent of testimony that the plaintiff's mental problems "seriously interfere with his ability to interact and concentrate," Statement of Errors at [11]. Dr. Slotnick in fact recommended psychotherapeutic and vocational counseling, as well as medication that "would likely facilitate attentional faculties" and a job coach or mentor. Record at 228-29. He did not suggest that the plaintiff was unemployable; rather, he offered suggestions to make the plaintiff work "more effective[ly]." *Id.* at 229. Nothing in Dr. Slotnick's report is necessarily inconsistent with the administrative law judge's findings that the plaintiff's "psychiatric disorders mildly restrict his activities of daily living; cause moderate difficulties in his ability to maintain social functioning; and result in moderate difficulties in his ability to maintain concentration, persistence or pace[.]" *id.* at 16, nor his findings that the plaintiff "can understand and carry out instructions consistent with SVP . . . level 4 work; make simple, work-related decisions;

occasionally interact with the public, coworkers, and supervisors; and maintain a competitive, goal-oriented work pace[.]” *id.* at 16-17.<sup>3</sup>

### **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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<sup>3</sup> Dr. Slotnick assigned the plaintiff a Global Assessment of Functioning (GAF) of 60 (Axis V), Record at 229, which represents “[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflict with peers or co-workers).” American Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (4th ed., text rev. 2000). This is not inconsistent with an ability to work. See *Annaloro v. Barnhart*, Civil No. 03-252-P-C, 2004 WL 1529260 (D. Me. June 24, 2004), at \*3 (rec. dec., *aff’d* July 19, 2004).

V.

**Defendant**

**SOCIAL SECURITY  
ADMINISTRATION  
COMMISSIONER**

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