

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

EARL G. HOPKINS,

Plaintiff

v.

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

Defendant

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Docket No. 07-40-P-S

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises the question whether substantial evidence supports the commissioner’s determination that the plaintiff, who alleges that he is disabled by foot, ankle, back and shoulder pain and problems reading and writing, was capable of performing work existing in significant numbers in the national economy on or before his date last insured of March 31, 2002. I recommend that the decision of the commissioner be affirmed.

The plaintiff applied for both SSD and Supplemental Security Income (“SSI”) benefits. *See* Record at 15. Eligibility for SSD (unlike that for SSI) hinges in part on acquisition of insured status. *See, e.g., Chute v. Apfel*, No. 98-417-P-C, 1999 WL 33117135, at *1 n.2 (D. Me. Nov. 22, 1999) (rec. dec., *aff’d* Dec. 20, 1999) (“To be eligible to receive SSD benefits the plaintiff had to have been

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 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.

disabled on or before her date last insured . . .; however, eligibility for SSI benefits is not dependent on insured status.”). 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 insured for SSD purposes only through March 31, 2002, Finding 1, Record at 20; that his allegations regarding his pain and other restrictions were reasonably supported by the medical evidence, and considered reasonably credible, for the period since March 16, 2003 but not for the period prior thereto, Finding 5, *id.*; that from February 12, 2000 through March 15, 2003 he retained the physical and mental residual functional capacities to perform a full range of unskilled sedentary work, Finding 8, *id.* at 21; that he was not disabled for purposes of SSD on or before expiration of his insured status on March 31, 2002, Finding 10, *id.*; and that he had been under a disability for purposes of SSI since March 16, 2003 but not prior thereto, Finding 11, *id.* The Appeals Council declined to review the decision, *id.* at 7-10, 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(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 residual functional capacity ("RFC") to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

In his Statement of Errors, the plaintiff complains that the administrative law judge (i) mishandled the medical evidence in several respects and (ii) relied on flawed vocational-expert testimony to meet the commissioner's Step 5 burden. *See generally* Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 8). At oral argument, the plaintiff's counsel acknowledged – as is clear from the Record – that the administrative law judge had not in fact relied on vocational testimony to reach his Step 5 determination with respect to the period prior to March 16, 2003. Rather, with respect to that time period, the administrative law judge relied exclusively on Rules 201.24 and 201.25 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid"). *See* Record at 19-20. The plaintiff's counsel then asserted, for the first time at oral argument, that errors in determining his client's RFC undermined reliance on the Grid and that the administrative law judge failed to apply Social Security Ruling 83-20 ("SSR 83-20") to determine the onset date of disability. Counsel for the commissioner contended that the plaintiff waived his Grid argument by omitting it from his Statement of Errors; however, she conceded that a finding that the RFC determination was unsupported by substantial evidence potentially had repercussions for the propriety of application of the Grid. With respect to the newly minted SSR 83-20 argument, she asserted that the ruling on its face is inapplicable inasmuch as the administrative law judge already had determined a specific date of onset: March 16, 2003.

For the reasons that follow, I conclude that (i) the plaintiff's points regarding mishandling of the medical evidence, as articulated in his Statement of Errors, do not warrant reversal and remand,

(ii) the plaintiff waived his arguments concerning application of the Grid and SSR 83-20 and, (iii) in any event, the Grid and SSR 83-20 arguments fail on the merits.

I. Discussion

A. Asserted Mishandling of Medical Evidence

In his Statement of Errors, the plaintiff assails the administrative law judge's handling of the medical evidence on several fronts, complaining that he erred in:

1. Drawing a negative inference from the plaintiff's sporadic medical treatment from 1998 to 2000 without even considering the plaintiff's explanation that he lacked Medicaid or any other way to pay for that treatment. *See* Statement of Errors at 2-4.

2. Failing to (i) take into account the plaintiff's IQ, (ii) consider whether, in part as a result of that IQ, the plaintiff met Listing 12.05C or (iii) develop the record adequately by sending the plaintiff for further testing to verify whether the set of IQ scores of record were valid. *See id.* at 4-6.

3. Concluding that the plaintiff was capable of a full range of unskilled sedentary work prior to March 16, 2003. *See id.* at 4-5.

I consider each sub-point in turn, concluding that none warrants reversal and remand for further proceedings:

1. Failure To Seek Treatment. The plaintiff claimed that he had been unable to work since February 2000. *See* Record at 16. The administrative law judge was unpersuaded, observing: "While careful consideration has been given to the claimant's subjective complaints, . . . the limited extent of medical treatment he required, and the lack of objective evidence of any significant, prolonged restrictions prior to March 16, 2003, weigh heavily against his contention that he has been unable to work since February 2000." *Id.* at 20. As the plaintiff points out, *see* Statement of Errors

at 2-3, the administrative law judge neglected to mention his explanations that he had not sought treatment because he could not afford to do so, *see* Record at 19-20; *see also id.* at 116-17, 119 (statements by plaintiff in Reconsideration Disability Report dated September 8, 2001 that he had not been able to see physician or obtain pain medication since filing of his application on April 30, 2001 because he could not afford to do so and could not get Medicaid), 195 (notation by Disability Determination Services (“DDS”) consultative examiner Albert P. Shems, M.D., in report dated July 11, 2001 that plaintiff had said “[h]e was given Celebrex for a while which has helped him quite a bit but he has not taken it recently because he does not have Medicaid and he cannot afford it”).² As the plaintiff observes, *see* Statement of Errors at 2-3, Social Security Ruling 96-7p obliges an administrative law judge to consider a claimed excuse for failure to seek treatment before drawing a negative inference therefrom. The ruling provides, in relevant part:

[T]he individual’s statements may be less credible if the level or frequency of treatment is inconsistent with the level of complaints, or if the medical reports or records show that the individual is not following the treatment as prescribed and there are no good reasons for this failure. However, the adjudicator must not draw any inferences about an individual’s symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment. The adjudicator may need to recontact the individual or question the individual at the administrative proceeding in order to determine whether there are good reasons the individual does not seek medical treatment or does not pursue treatment in a consistent manner. The explanations provided by the individual may provide insight into the individual’s credibility.

Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service Rulings* 1983-

²The plaintiff also points to a February 16, 2000 progress note in which Jan Whitworth, PA-C, noted that she had given him samples of Relafen 750 for treatment of a back sprain in addition to a Flexeril prescription “[a]s he has no money until Friday[.]” *See* Statement of Errors at 3; Record at 233. While this note corroborates that the plaintiff’s finances were tight, it does not demonstrate that, as of that date, he was avoiding seeking care based on inability to pay for it.

1991 (Supp. 2007) (“SSR 96-7p”), at 140. The administrative law judge therefore erred in not discussing the plaintiff’s proffered explanations.

Nonetheless, the error in this case was harmless. As counsel for the commissioner noted at oral argument, the Record on the whole indicates that the plaintiff was able to obtain care when he required it. He sought medical treatment for various ailments prior to May 1, 2001, when he was recorded as having failed to show up for a scheduled appointment, *see* Record at 227-33, and again in and after December 2001, *see id.* at 219-25. His complaints of lack of Medicaid coverage were made in July and September 2001, during the May-November 2001 treatment gap. *See id.* at 116-17, 119, 195. The Record therefore indicates that the plaintiff failed to seek treatment based on lack of coverage/inability to pay only during that time frame. In any event, the administrative law judge pointed not only to the plaintiff’s sporadic medical visits but also to lack of objective medical evidence of significant, prolonged restrictions during the period prior to March 16, 2003. *See id.* at 20; *see also, e.g., id.* at 216 (notation by Whitworth on December 6, 2002 that plaintiff had “pretty much full range of motion of his shoulder[,]” with tendonitis of the left shoulder much improved with an injection of cortisone, and “essentially a normal LS spine film,” although x-rays showed an “old fracture of his heel” and he did have a bit of deformity and lack of range of motion in left foot). The administrative law judge’s credibility findings for the period prior to March 16, 2003 therefore remain entitled to deference. *See, e.g., Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) (“The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.”).

2. **IQ Findings.** The plaintiff next takes the administrative law judge to task for failing to take into consideration his IQ scores, consider whether he met Listing 12.05C or develop the

record further by sending him for a second round of IQ testing. *See* Statement of Errors at 4-6. I discern no error.

The administrative law judge did not neglect to consider the IQ scores in question; on the contrary, he duly noted that, in October 2003, DDS consulting examiner Edward Quinn, Ph.D., had examined the plaintiff, administering tests that resulted in a verbal IQ score of 66, a performance IQ score of 68 and a full-scale IQ score of 64, which Dr. Quinn considered to be an underrepresentation of the plaintiff's abilities. *See* Record at 18, 205, 207. He further observed: "Although the IQ scores at that time were of 'Listing-level' severity, the psychologist felt those scores understated the claimant's abilities, as he was sad and lethargic, had not attended special education classes, and could read a newspaper." *Id.* at 19; *see also id.* at 205-07. No error was committed in rejecting the notion that the plaintiff met Listing 12.05C, which requires "[a] valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function[.]" Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), § 12.05C. Dr. Quinn made clear he did not consider the scores obtained to be valid. *See* Record at 205-07.

Nor did the administrative law judge abuse his discretion in failing to order a second consultative examination for purposes of retesting the plaintiff's IQ. As an initial matter, the plaintiff, who was represented by counsel, did not request such a retest. "In most instances, where appellant himself fails to establish a sufficient claim of disability, the Secretary need proceed no further." *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991); *see also, e.g., Hawkins v. Chater*, 113 F.3d 1162, 1167-68 (10th Cir. 1997) ("[I]n a counseled case, the ALJ may ordinarily require counsel to identify the issue or issues requiring further development. In the absence of [] a request by counsel, we will not impose a duty on the ALJ to order a consultative examination unless the

need for one is clearly established in the record.”) (citation omitted). In any event, the plaintiff has not shown that his case was prejudiced by failure to retest, which might again have produced invalid results or, perhaps, valid results at a higher (non-Listing) level. *See Faria v. Commissioner of Soc. Sec.*, No. 97-2421, 1998 WL 1085810, at *1 (“Reversal due to an ALJ’s alleged failure to develop the record is only warranted where such failure is unfair or prejudicial.”) (citation and internal punctuation omitted); *Kane v. Heckler*, 731 F.2d 1216, 1220 (5th Cir. 1984) (claim of failure to develop full and fair record, like claim that hearing has been held in absence of waiver of right to counsel, requires showing that Social Security applicant “was prejudiced as a result of scanty hearing. She must show that, had the ALJ done his duty, she could and would have adduced evidence that might have altered the result.”).

3. Supportability of RFC Finding. In his Statement of Errors, the plaintiff finally appears to take issue as a general matter with the administrative law judge’s finding that he was capable of the full range of unskilled sedentary work prior to March 16, 2003. *See* Statement of Errors at 3-5. This claim is without merit.

With respect to the plaintiff’s physical capacity, DDS non-examining consultants and one of the plaintiff’s own treating physicians deemed him capable of lifting up to at least twenty pounds, sitting for at least six hours in an eight-hour workday and standing and walking for at least two hours in an eight-hour workday, *see* Record at 267, 273 (RFC evaluation by DDS non-examining consultant Robert Hayes, D.O., dated September 25, 2001), 289, 295 (RFC evaluation by DDS non-examining consultant Iver C. Nielson, M.D., dated December 14, 2003), 315, 321 (RFC evaluation by Dr. Hayes dated March 24, 2004), 346-47, 349 (RFC evaluation by treating physician T. Kevin Finley, D.O., dated April 20, 2005), which is consistent with the physical demands of sedentary work, *see, e.g.*, 20 C.F.R. § 404.1567(a) (“Sedentary work involves lifting no more than 10 pounds

at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.”). *Id.*³

With respect to mental capacity, the administrative law judge relied on Grid rules that presupposed a claimant whose education had been “[l]imited or less” but who was “at least literate and able to communicate in English” and whose previous work experience was either unskilled or none or skilled or semiskilled but without transferable skills. *See* Record at 20; Rules 201.24 and 201.25 to Grid.⁴ The mental capacities generally required by competitive, remunerative unskilled work include (i) understanding, remembering and carrying out simple instructions, (ii) making judgments commensurate with the functions of unskilled work, for example simple work-related decisions, (iii) responding appropriately to supervision, co-workers and usual work situations and

³ Some of the DDS reviewers and Dr. Finley found that, apart from being restricted by virtue of his physical impairments to sedentary work, the plaintiff had additional physical limitations; for example, in 2001 Dr. Hayes found that the plaintiff could do no overhead work, *see* Record at 269, Dr. Nielson determined that the plaintiff could not engage in forceful push-pull with his left foot, *see id.* at 289, and Dr. Finley found that he could only occasionally balance, crouch and stoop, *see id.* at 347. In his Statement of Errors, the plaintiff makes no argument that the administrative law judge erred in not including any particular physical restriction in his RFC assessment or that any one or more of those restrictions would have prevented him from performing essentially the full range of sedentary work. *See generally* Statement of Errors. At oral argument, the plaintiff’s counsel suggested for the first time that the administrative law judge had erred in not taking into consideration his client’s shoulder pain. However, he did not explain how, if at all, factoring in shoulder pain would have altered his client’s RFC and/or undermined reliance on the Grid. This argument is waived for failure to include it in the Statement of Errors, *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), and, alternatively, for failure to develop it adequately, *see, e.g., Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) (“It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.”) (citation and internal quotation marks omitted).

⁴ While the plaintiff takes pains to point out that his literacy level was “borderline at best[,]” Statement of Errors at 5, that makes no difference for purposes of the administrative law judge’s application of the Grid. “[T]he functional capability for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18-44 even if they are illiterate or unable to communicate in English.” Rule 201.00(h)(4)(i) to Grid.

(iv) dealing with changes in a routine work setting. *See* Social Security Ruling 96-9p, reprinted in *West's Social Security Reporting Service Rulings 1983-1991 (Supp. 2007)* (“SSR 96-9p”), at 160-61. The Record contains substantial evidence that prior to March 16, 2003 the plaintiff possessed at least those mental capacities. *See, e.g.*, Record at 207-08 (Quinn report finding plaintiff capable, despite possibly having some mild difficulties dealing with work stressors and difficulties with pace, of following work rules, relating to others appropriately, using appropriate gross judgment, functioning independently, completing simple job instructions and some detailed and complex job instructions, behaving in an emotionally stable manner and using appropriate social skills), 312 (mental RFC assessment of DDS non-examining consultant Charles Rothstein, Ph.D., dated October 15, 2003 finding plaintiff capable of performing simple tasks with simple instructions, consistent with his physical issues; focusing, concentrating and persisting on such tasks; relating to peers and supervisors; and adapting to simple changes, traveling, avoiding hazards and making simple plans).⁵

B. Belated Arguments: Grid and SSR 83-20

The plaintiff failed to include, in his Statement of Errors, arguments regarding the propriety of application of the Grid or the necessity of application of SSR 83-20. *See generally* Statement of Errors. Those arguments accordingly are deemed waived. *See, e.g., Farrin*, 2006 WL 549376, at *5. In any event, they fail on the merits. For reasons discussed above, the administrative law judge supportably found the plaintiff capable mentally, as well as physically, of performing the full range of unskilled sedentary work. Use of the Grid therefore was appropriate. *See, e.g., Ortiz v. Secretary*

⁵ Peter G. Allen, Ph.D., another DDS non-examining consultant, found insufficient evidence to assess the plaintiff’s mental functioning prior to his date last insured. *See* Record at 322. However, in a report dated March 26, 2004, he found that the plaintiff currently was able to understand and remember simple tasks and instructions; concentrate adequately, when motivated, to perform routine work for a normal workday/workweek within his physical limits; interact adequately with co-workers and supervisors, although less well with the general public; and not be upset by changes in routine, although he was better if there were no travel as part of his job. *See id.* at 338.

of Health & Human Servs., 890 F.2d 520, 527 (1st Cir. 1989) (administrative law judge permissibly relied on Grid when, “as to each of the ‘basic mental demands’ of unskilled work enumerated by the Secretary, a finding of no significant restriction was offered by at least one of [two] doctors” and therefore “the ALJ was justified in concluding that claimant’s dysthymia did not preclude performance of substantially the full range of unskilled work”).

As concerns SSR 83-20, the ruling on its face makes clear that there is no need to deduce onset of disability in cases in which, as a result of a trauma, the onset date is clear. *See* SSR 83-20, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991*, at 50 (“For disabilities of traumatic origin, onset is the day of the injury if the individual is thereafter expected to die as a result or is expected to be unable to engage in substantial gainful activity (SGA) (or gainful activity) for a continuous period of at least 12 months. . . . In disabilities of nontraumatic origin, the determination of onset involves consideration of the applicant’s allegations, work history, if any, and the medical and other evidence concerning impairment severity.”). In this case, the administrative law judge attributed onset of disability to a trauma – back pain and discomfort that commenced a day after the plaintiff moved a large freezer. *See* Record at 17-18, 215. The plaintiff’s onset date of disability thus already was clear.

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 12th day of October, 2007.

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

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