

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MICHELLE WILEY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 1:10-cv-103-JAW
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social Security,¹)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises several issues: whether the administrative law judge impermissibly drew conclusions from the medical evidence; whether his decision is supported by substantial evidence; whether he appropriately assessed the plaintiff’s mental impairments; whether his hypothetical question to the vocational expert was erroneous; and whether he improperly used the Medical-Vocational Guidelines as a framework for decision-making. I recommend that the court affirm the commissioner’s decision.

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

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Carolyn W. Colvin is substituted as the defendant in this matter.
² 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 her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2), as amended January 1, 2013, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office and the commissioner to file a written opposition to the itemized statement. Oral argument was held before me on September 13, 2013, pursuant to Local Rule 16.3(a)(2)(D), 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.

Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff was insured for purposes of SSD only through June 30, 2011, Finding 1, Record at 823; that she suffered from mood disorder, attention deficit hyperactivity disorder (ADHD), substance abuse on opiate replacement therapy, and status post right arm injury, impairments that were severe but which, considered separately or in combination, did not meet or medically equal the criteria of any impairment listed in Appendix 1 to 20 C.F.R. Part 404, Subpart P (the “Listings”), Findings 3-4, *id.* at 823-34; that she retained the residual functional capacity (“RFC”) to perform light work, with no constant use of the hands, and limited to simple work, not with the public, Finding 5, *id.* at 825; that she could not perform any past relevant work, Finding 6, *id.* at 830; that, given her age (28 at the alleged date of onset), at least high school education, work experience, and RFC, and using the Medical-Vocational Guidelines set out in Appendix 2 to 20 C.F.R. Part 404, Subpart P (the “Grid”) as a framework for decision-making, there were jobs existing in significant numbers in the national economy that the plaintiff could perform, including cleaner, linen grader, and flagger, Findings 7-10, *id.* at 830; and that, therefore, the plaintiff 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 opinion, March 9, 2012, Finding 11, *id.* at 831. The Appeals Council declined to review the decision, *id.* at 1-3, 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 evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain substantial evidence in support of the commissioner's findings regarding the plaintiff's RFC to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

I. Discussion

A. Use of the Hands

The plaintiff contends that the administrative law judge's limitation to "no constant use of the hands" in her RFC is fatally inconsistent with the medical evidence of record because he cited no expert opinion in support of this finding. Plaintiff's Itemized Statement of Errors ("Itemized Statement") (ECF No. 26) at 5. Therefore, she concludes, the administrative law judge could only have impermissibly "craft[ed] his RFC finding based only on his lay interpretation of the medical evidence and by substituting his lay judgment for that of the medical experts." *Id.* It is a basic precept of Social Security law that an administrative law judge is not qualified to assess RFC based on a bare medical record. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990).

The plaintiff's premise is incorrect. The administrative law judge discussed the medical evidence involving the plaintiff's upper extremities in some detail. Record at 828-29. He specifically mentioned the functional capacities evaluation performed by Ann Covey, a physical

therapist relied upon by the plaintiff in other contexts (Exhibit 19F) and its conclusion that the plaintiff could engage in “occasional grasping with the right hand and frequent grasping with the left hand.” *Id.* at 828. That is an accurate statement of Covey’s conclusions, *id.* at 1023, and, to the extent that it is inconsistent with the “no constant use of the hands” limitation assigned by the administrative law judge as to the plaintiff’s right hand, the administrative law judge stated his reasons for rejecting that limitation, *id.* at 828-29, including Covey’s observation that the plaintiff “provided submaximal effort” during the testing, *id.* at 1027, and the lack of a medical diagnosis of a hand impairment.

The plaintiff cites no other medical evidence in support of a further limitation on the use of her hands.³ In the absence of any such evidence, the administrative law judge’s RFC limitation is more favorable to the plaintiff than it should be, and any error accordingly is harmless. *See, e.g., Gonsalves v. Astrue*, No. 09-181-B-W, 2010 WL 1935753, at *6 (D. Me. May 20, 2010).⁴ In addition, the discussion in the opinion provides sufficient explanation of the administrative law judge’s conclusion in this regard. There is nothing in the record or the opinion to suggest that the administrative law judge improperly substituted his lay interpretation of medical evidence for that of a medical professional. Nothing further is required.

B. Capacity for Light Work

The plaintiff next faults the administrative law judge’s assertion that Covey’s assessment “placed her in the light exertional range of activities.” Itemized Statement at 7. Specifically, she asserts that light work requires a great deal of walking or standing, citing 20 C.F.R.

³ I note also that Covey is not an acceptable medical source, 20 C.F.R. §§ 404.1513(a) & 416.913(a). Accordingly, her report cannot serve as evidence of the existence of an impairment, but only as evidence of the limitations imposed by a medically determinable impairment. *See, e.g., Cummings v. Astrue*, No. 2:10-cv-453-DBH, 2011 WL 4566292, at * 4 (D. Me. Sept. 29, 2011).

⁴ At oral argument, counsel for the plaintiff asserted that *Gonsalves* is distinguishable because, in that case, there was no evidence to support a more limited RFC, while there is such evidence in this case. As I have stated, the plaintiff has not identified that evidence, and my review of the record evidence is to the contrary.

§§ 404.1567(b) and 416.967(b), while Covey limits her to standing for only 1-2 hours per workday. *Id.* That argument ignores the fact that Covey also found that the plaintiff could walk for 4 to 5 hours in a workday, Record at 1023, and, when combined, the two limitations provide the ability to walk or stand “off and on” for a total of approximately six hours in a workday, the standard set by Social Security Ruling 83-10, which is cited by the plaintiff. Covey’s overall assessment is not inconsistent with the requirements of light work. There is no error in this regard.

The plaintiff mentions, very briefly, that Covey also found that she was capable of working only five to six hours per day. Itemized Statement at 7; Record at 1023. Any argument that this observation is meant to support has not been made, and accordingly is waived. *Gray v. Barnhart*, No. 04-207-B-W, 2005 WL 1923523, at *7 (D. Me. Aug. 9, 2005).⁵

C. Mental Impairments

The plaintiff contends that a limitation to “simple work, not with the public” does not correspond to her “actual [mental] deficits.” Itemized Statement at 9. She asserts that a limitation to simple or unskilled work “does not adequately account for [a] moderate . . . limitation in concentration, persistence or pace[.]” citing case law from other jurisdictions. *Id.* She cites a form created by her lawyers and filled out by her treating psychiatric registered nurse, Record at 1136, saying that her treating sources (plural) reported marked limitations in three specific areas under the heading “Understanding and Memory.” However, the form asks only for a check mark following a listed work-related quality that the provider believes is markedly

⁵ The plaintiff also asserts that, because the administrative law judge’s RFC assessment was “inconsistent” with that of Covey, the only evidence she cites, he was required to seek additional expert medical advice. Itemized Statement at 8. Neither of the cases she cites in support of this contention, *Baxter v. Astrue*, Civil No. 07-cv-200-SM, Report and Recommendation (D.N.H. May 8, 2008) (unpublished), and *Rivera-Figueroa v. Secretary of Health & Human Servs.*, 858 F.2d 48 (1st Cir. 1988), actually supports this argument, which, if adopted, would add yet another layer of fact-finding and delay to a process that already takes considerable time. It remains the claimant’s burden to provide medical evidence of her alleged impairments and their resulting limitations.

limited or precluded by an impairment, symptom, or medication. *Id.* It is not possible to indicate any intermediate levels of impact on the form. The form completed by the nurse practitioner, an unacceptable medical source, is co-signed by a physician, *id.* at 1137, but there is no indication in the medical records from that provider that this physician ever examined the plaintiff or that he or she is a psychiatrist, rather than a general practitioner or a specialist of another sort.

As the plaintiff notes, Itemized Statement at 10, William DiTullio, the psychologist to whom the plaintiff was referred by her lawyer for a single-visit evaluation, found that she was “markedly limited” in almost every category listed on the attorney’s form. Record at 1030-34. The administrative law judge rejected these assessments for several reasons. With respect to Dr. DiTullio he said:

Dr. DiTullio examined the claimant once, in preparation for her disability hearing. He then submitted a mental residual functional capacity finding the claimant with marked limitations in most areas of mental functioning. However, the form used by Dr. DiTullio is skewed towards findings of marked limitations or activity precluded by the claimant’s mental impairments. The form does not allow for findings of mild or moderate limitations, thereby forcing the practitioner into a false dichotomy of either no or marked impairments. In addition, Dr. DiTullio’s report appears based solely on the claimant’s subjective complaints and is not supported by medical evidence. . . . He further fails to mention the claimant[’s] continued use of marijuana casting doubt on the validity of the evaluation.

Id. at 829.

As to the form filled out by the nurse practitioner, the administrative law judge noted:

It is the same, skewed checklist form as that filled out by Dr. DiTullio. She opined the claimant would have marked limitation in attending work on a regular and continuing basis due to depression and attention deficit hyperactivity disorder (Ex. 25F). However, the undersigned gave this check off form little weight as it is flawed in the same way as discussed above[,] e.g., it is skewed toward assessing only marked limitation and does not offer a choice for mild or moderate functioning limits (Ex. 25F).

In addition, the claimant has not engaged in either consistent medication or therapy for depression despite a four-year history of being advised to do so. This undermines the claimant's credibility in her complaints of the severity of depression. Further, the claimant has determined that the medication Vyvance helps her symptoms of Attention Deficit Hyperactivity Disorder and has been in no adjunctive treatment for the disorder other than medications.

Id. He also found that the plaintiff “has full activities of daily living[,]” *id.*, that she “never got the treatment [for depression] she was recommended to get[,]” *id.* at 827, “was prescribed and discontinued multiple medications for her depression and discontinued them on her own because they were not effective[,]” *id.*, and Dr. Gates diagnosed borderline personality disorder at a consultative examination and thought that she would likely be a reliable worker although she might have some problems dealing with the public, co-workers, and supervisors. *Id.* The administrative law judge noted a lack of diagnosis or treatment for depression. *Id.* at 829.

This discussion, although somewhat short on explanation, as the defendant admits, Defendant's Opposition to Plaintiff's Itemized Statement of Errors (“Opposition”) (ECF No. 30) at 8, is sufficient under Social Security law and regulations. In addition, it is clear that Dr. Gates's report provided a basis for the limit on contact with the public that was included in the administrative law judge's RFC. To the extent that the record lacks medical evidence to support the restriction to “simple work,” this again appears to be an error in the plaintiff's favor, and thus harmless, on the showing made.

D. Step 5 Findings

The plaintiff argues that the administrative law judge's hypothetical question to the vocational expert at her hearing was “fundamentally flawed for all of the reasons discussed in detail, *supra.*” Itemized Statement at 11. I have rejected those arguments, and, thus, this contention fails as well.

The plaintiff next asserts that the Step 5 finding is flawed because the hypothetical questions was inconsistent with the ultimate RFC formulation, in that it limited the plaintiff to no more than occasional interaction with the public, Record at 874, while the RFC precludes any contact with the public. *Id.* at 825; Itemized Statement at 11. That observation is correct, so far as it goes. She also correctly concludes that a limitation that she “not [work] with the public,” would eliminate the flagger job which the vocational expert testified would be available to her. *See* Dictionary of Occupational Titles (“DOT”) (U.S. Dep’t of Labor rev. ed. 1991) § 372.667-022.

The plaintiff does not mention the two other jobs identified by the vocational expert, linen grader and cleaner. Record at 874. The DOT description of the cleaner job, while it states that contact with people is “not significant” does include “render[ing] personal assistance to patrons.” DOT § 323.687-014. That appears to make it inconsistent with an RFC precluding work with the public. The linen grader job, however, is different. That job is also described as having “not significant” contact with people, and the description of the job’s duties do not require any contact with the public. DOT § 361.687-022. This court has repeatedly stated that the availability of a single job existing in significant numbers in the national economy is sufficient for purposes of the Step 5 analysis. *See, e.g., Saucier v. Astrue*, No. 1:11-cv-411-NT, 2012 WL 5413372, at *6 (D. Me. Sept. 28, 2012).

The variance between the hypothetical question put to the vocational expert and the RFC assigned to the plaintiff by the administrative law judge with respect to contact with the public accordingly is harmless.⁶

⁶ I reject the argument of the defendant that the administrative law judge’s use of the phrase “not with the public” was “inadvertent,” and that he must have meant to use the terminology from his hypothetical question to the vocational expert in the RFC discussed in his opinion. Opposition at 11-12. The error here is not obviously a mere

This conclusion makes it unnecessary to consider the plaintiff's next argument, an assertion that the administrative law judge was precluded from using the Grid as a framework for decision-making because he did not determine the extent of erosion of the applicable occupational base caused by the work-related limitations from which he found the plaintiff suffered. Itemized Statement at 12-13. Here, the administrative law judge identified a specific job that was consistent with the RFC that he assigned to the plaintiff. Whether or not he could use the Grid as a framework is, therefore, irrelevant.

Finally, the plaintiff mounts an attack on the vocational expert's testimony about the numbers of each of the three identified jobs available nationally and regionally, because she testified that these numbers were "based on aggregate SOC or census code groupings rather than the specific DOT occupations that she [identified.]" Itemized Statement at 13. This argument has previously been made by the attorney representing the plaintiff here, and suffers here from the same infirmity it has had before. *See generally Decker v. Astrue*, No. 09-641-P-S, 2010 WL 4412142, at *3 (D. Me. Oct. 31, 2010) (use of Occupational Employment Quarterly as source for numbers of jobs upheld where vocational expert explained his experience and methodology); *Clark v. Astrue*, No. 2:11-cv-373-DBH, 2012 WL 2913700, at *5 (D. Me. June 28, 2012) (rejecting this challenge where claimant's attorney never asked vocational expert about basis for his opinion regarding extent to which particular limitation would affect job numbers).

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

scrivener's error. This court will not guess about what might have been in an administrative law judge's mind despite what is written in his opinion in the absence of much stronger evidence of unintentional error.

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 fourteen (14) days after being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) 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 30th day of September, 2013.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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