

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ROGER E. CARR, JR.,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>No. 1:11-cv-153-NT</i>
)	
CAROLYN W. COLVIN,)	
<i>Acting Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the question of whether the administrative law judge supportably found the plaintiff capable of performing work existing in significant numbers in the national economy before June 13, 2010. 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 Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the insured status requirements of the Social Security Act through December 31, 2012, Finding 1, Record at 23; that he suffered from chronic obstructive pulmonary disease (COPD), an impairment that was severe but did not meet or medically equal the criteria of any impairment listed in

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), 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, and the commissioner to file a written opposition to the itemized statement. Oral argument was held before me on December 16, 2015, 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.

Appendix 1 to 20 C.F.R. Part 404 Subpart P (the “Listings”), Findings 3-4, *id.* at 23-24; that he had the residual functional capacity (“RFC”) to perform the full range of sedentary work, Finding 5, *id.* at 24; that he was unable to perform any past relevant work, Finding 6, *id.* at 26; that, considering his age (a younger individual aged 45-49 before June 13, 2010, the established disability onset date, *id.* at 22, and closely approaching advanced age thereafter), education (at least high school), work experience, and RFC, and applying the Medical-Vocational Rules found in Appendix 2 to 20 C.F.R. Part 404, Subpart P (the “Grid”), before June 13, 2010, there were jobs existing in significant numbers in the national economy that he could perform, Findings 7-10, *id.* at 26-27; and that he, therefore, had not been disabled from September 7, 2007, the alleged onset date, through June 13, 2010, Finding 12, *id.* at 27. The Appeals Council declined to review the decision, *id.* at 1-2, making the decision 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 his 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. Social Security Ruling 83-20

The plaintiff first faults the administrative law judge for allegedly failing to follow the dictates of Social Security Ruling 83-20 ("SSR 83-20") by failing to obtain the testimony of a medical expert at his hearing. Specifically, he relies on the following language from SSR 83-20:

With slowly progressive impairments, it is sometimes impossible to obtain medical evidence establishing the precise date an impairment became disabling. Determining the proper onset date is particularly difficult when, for example, the alleged onset and the date last worked are far in the past and adequate medical records are not available. In such cases it will be necessary to infer the onset date from the medical and other evidence that describe the history and symptomatology of the disease process.

* * *

In some cases, it may be possible based on the medical evidence to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination, *e.g.*, the date the claimant stopped working. How long the disease may be determined to have existed at a disabling level of severity depends on an informed judgment of the facts in the particular case. This judgment must have a legitimate medical basis. At the hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred. If there is information in the file indicating that additional medical evidence concerning onset is available, such evidence should be secured before inferences are made.

SSR 83-20, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* at 51.

With respect to the plaintiff's date of onset, the administrative law judge said the following:

[R]ecords dated October 2009 from treating source Penny DeRaps, F.N.P., show that the claimant had shortness of breath with activity (Exhibit 19F), and cardiologist's records from November 2009 show that the claimant denied dyspnea while at rest, which suggests that the claimant had the ability to do sedentary work (Exhibit 17F). Dr. Dixon's notes from January 2010 describe the claimant as "moderately active" (Exhibit 14F). Hospital records from April 2010 show that the

claimant complained of “moderate” dyspnea that was worsened by exertion and improved by sitting upright, which refutes the notion that the claimant was presumptively disabled from all work by COPD and tends to support a finding that he was able to do sedentary work (Exhibit 31F).

Record at 24. The administrative law judge further explained:

Although the claimant alleges that he became disabled in September 2007, there is no evidence that he sought treatment for any medical problems after February 2007 until May 2008 (Exhibit 8F). Pulmonary function testing done in May 2008 revealed only “mild airway restriction. The claimant told Nurse DeRaps that he had been taking medications that were not prescribed for him (Exhibit 8F); however, they were apparently working well enough that he did not feel the need to seek medical attention until eight months after he allegedly became disabled. Furthermore, records dated June 2008 show that the claimant reported that his breathing had not been good since he ran out of Spiriva and Advair due to his lack of insurance, which implies that these medications had been effective in controlling his COPD symptoms (Exhibit 8F).

Emergency room records pertaining to a complaint of low back pain in November 2008 show that the claimant’s review of systems was otherwise negative, which would not be expected if he had been experiencing disabling breathing problems for over a year (Exhibit 7F). The claimant’s lungs were noted to be clear upon repeated physical examinations, including those done in July, October and December 2008; October and November 2009; and February, May and July 2010 (Exhibits 5F, 7F, 8F, 14F, 19F, 27F). Pulmonary function testing done in January 2009 indicated that the claimant’s lung disease was “moderate” (Exhibit 13F). Treating source records describe his COPD as “stable” in September 2009 (Exhibit 13F). Records from October 2009 show that Dr. Dixon felt that the claimant’s symptoms of chronic bronchitis were primarily related to ongoing cigarette use (Exhibit 14F). Social Security regulations provide that disability benefits may be denied based on the failure to follow prescribed treatment intended to restore one’s functional capacity (20 CFR 404.1530 and 416.930). Treating sources repeatedly advised the claimant to stop smoking immediately as a means of reducing his respiratory problems, yet he did not do so until, allegedly, May 2010. As mentioned above, despite his symptoms and continued smoking, the claimant’s shortness of breath was indicated to be activity-related in October 2009 and April 2010 (Exhibits 19F, 31F), and he was described as “moderately active” in January 2010 (Exhibit 14F). Primary care records from September 2012, pertaining to a complaint of abdominal pain, show that the claimant denied dyspnea at that time (Exhibit 39F).

Id. at 25. Turning to the plaintiff's treating pulmonologist, Dr. Dixon, the administrative law judge opined:

As for the opinion evidence, no weight is given to Dr. Dixon's opinion that the claimant has been unable to sustain a full range of sedentary work since September 2007 (Exhibit 25F), as that assessment is not supported by the contemporaneous medical evidence, as discussed above. The undersigned notes that Dr. Dixon expressed puzzlement over the amount of rescue medications that pharmacy records suggested were needed by the claimant over the past years, which indicates doubt about the impression of the severity of the claimant's breathing problems conveyed by those records.² Furthermore, while Dr. Dixon approved the claimant's use of an oxygen tank in May 2010, he did not foresee its ongoing necessity, and the record is not clear as to whether that device was ever prescribed or deemed medically necessary for the claimant (Exhibit 24F). Primary care records dated October 2012 indicate that the claimant had, "by mistake," left home without his oxygen tank, which raises doubt about the necessity for the device (Exhibit 39F). Furthermore, those records show that the claimant reported he was "in general doing ok with breathing issues," which is at odds with his allegation that he has been subject to disabling respiratory problems that have precluded even the performance of sedentary work since 2007. Little weight is assigned to the State agency medical consultants' opinions that the claimant can do a wide range of medium (Exhibit 6F) or light work (Exhibit 9F), as the evidence persuades the undersigned that the claimant's activity-related shortness of breath limits him to sedentary exertion.

Id. at 26.

This extensive discussion of the medical evidence before June 13, 2010, contradicts the plaintiff's contention that the medical evidence contains so many ambiguities that only expert testimony would allow the administrative law judge to conclude that his COPD was not severe before that date. The plaintiff mentions some evidence that would support a contrary finding, Itemized Statement at 7-8, but the existence of such evidence does not require the administrative law judge to consult a medical expert. It is the job of the administrative law judge to resolve

² The plaintiff argues that this statement "is precisely the type of opinion which SSR 83-20 states must come from a medical advisor at a hearing when the medical evidence as to the onset date is ambiguous." Itemized Statement at 8. I have concluded that the medical evidence about the severity of the plaintiff's COPD before the onset date chosen by the administrative law judge is not ambiguous. In addition, the statement is well within the scope of an educated lay person's ability to evaluate the medical evidence at issue.

conflicting evidence. *Brown v. Astrue*, No. 2:10-cv-27-DBH, 2010 WL 5261004, at *3 (D. Me. Dec. 16, 2010). So long as there is substantial evidence to support his conclusion, as there is here, a court cannot overturn that conclusion. SSR 83-20 cannot reasonably be read to require expert testimony whenever there is conflicting medical evidence in the record that bears on the date of onset of a disability.

Palmer v. Colvin, No. 2:13-cv-194-NT, 2014 U.S. Dist. LEXIS 69151 (D. Me. Apr. 28, 2014), the only authority cited by the plaintiff, does not require a different result. In that case, the administrative law judge's decision was based on the lack of contemporaneous medical evidence that the impairment at issue was severe before the date last insured, *id.* at *11-*14, while here, as set forth in detail above, the administrative law judge cited significant contemporaneous medical evidence from the period between the alleged date of onset (September 7, 2007) and the date of onset that he adopted (June 13, 2010) that demonstrated that the plaintiff's COPD was not severe. This difference is significant. In the instant case, the plaintiff has not shown that the medical evidence concerning his COPD before June 13, 2010, was ambiguous to the degree that the administrative law judge could not resolve any conflicts in that evidence without the assistance of a medical advisor's testimony at the hearing.³

B. Dr. Dixon's Opinion

The plaintiff's second and only other argument is that he is entitled to remand because the administrative law judge wrongly failed to give the opinion of his treating pulmonologist, Dr.

³ At oral argument, counsel for the commissioner argued that there was no ambiguity as to the date of onset because the administrative law judge found the plaintiff to be disabled only because of the change in his age with application of the Grid. I need not reach this argument, but I note that it is supported by case law from other jurisdictions. *See, e.g., Hoke v. Astrue*, Civil Action No. 5:11-0643, 2013 WL 2368088, at *17 (S.D. W.Va. May 29, 2013) (change in age, to advanced age under the Grid, combined with response to treatment made date of onset neither ambiguous nor difficult to discern); *Watson v. Astrue*, No. 508-cv-446-Oc-GRJ, 2010 WL 750339, at *11 (M.D. Fla. Mar. 4, 2010) (date of onset not ambiguous where determined by application of Grid).

Andrew Dixon, controlling or greatest weight. Itemized Statement at 9-11. He refers to a letter dated June 29, 2010, from Dr. Dixon to his then-attorney, in which Dr. Dixon opines, based only upon pharmacy records, that the plaintiff's symptoms were "poorly controlled" from February 8, 2007, through September 18, 2009, and that he had suffered a "progressive significant decline in pulmonary function over the course of the last several years." Record at 611. Dr. Dixon first saw the plaintiff as a patient on October 19, 2009. *Id.* at 612.

Dr. Dixon checked a box on the form enclosed in his letter indicating that, in his opinion, the functional limitations that he assigned to the plaintiff had persisted since September 1, 2007. *Id.* at 616. However, he also said in that same document that the plaintiff was capable of sedentary work. *Id.* at 615. The plaintiff apparently believes that this is inconsistent with Dr. Dixon's check marks next to the statements the plaintiff "could not consistently complete a normal work day and work week without interruptions from physically based symptoms," could not "perform at a consistent pace without more than the minimum number and length of required rest periods," and would be absent from work about three days per month due to impairment or treatment. *Id.* at 613; Itemized Statement at 10.

The plaintiff cites Social Security Ruling 96-2p for the proposition that Dr. Dixon's opinions—although presumably not his opinion that the plaintiff was capable of sedentary work—were entitled to controlling weight because they come from a treating source who is a specialist, they are "well-supported" by "medically acceptable" clinical and laboratory diagnostic techniques, and they are not inconsistent with other substantial evidence in the record. Itemized Statement at 10. To the contrary, Dr. Dixon's retrospective opinion appears to be supported only by his review of pharmacy records, which are neither medically acceptable clinical nor medically acceptable laboratory diagnostic techniques, and his opinions are inconsistent with other substantial medical

evidence discussed by the administrative law judge in the lengthy, detailed portion of his opinion quoted above. His opinions are also inconsistent with the opinions of the state-agency medical consultants. *See generally* 20 C.F.R. §§ 404.1527(c)(2) & 416.927(c)(2).

The plaintiff contends that the administrative law judge was required to give Dr. Dixon's opinions at least "greatest weight," if not "controlling weight," because they are "consistent with the Plaintiff's treatment records from 2006 to Dr. Dixon's first date of treatment." Itemized Statement at 11. As I have already determined, this characterization of Dr. Dixon's opinions is incorrect. They are not consistent with all, or even most, of the earlier medical records, as the administrative law judge accurately determined. *See, e.g., Boyle v. Colvin*, Civil No. 2:13-cv-281-DBH, 2014 WL 3533474, at *2-*3 (D. Me. July 15, 2014).

II. 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 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 28th day of December, 2015.

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