

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MARVIN AUSTIN,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 1:15-cv-127-JHR
)	
CAROLYN W. COLVIN,)	
<i>Acting Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

MEMORANDUM 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. The plaintiff seeks remand on the bases that the administrative law judge erroneously found him capable of performing the job of hand packager and failed to supply good reasons for rejecting an opinion of treating physician Kimberly Saunders, D.O. See Plaintiff’s Itemized Statement of Errors (“Statement of Errors”) (ECF No. 13) at 3-5, 10-12.² I agree that remand is warranted on the basis of the first point of error. Accordingly, I vacate the commissioner’s decision and remand this case

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 18, 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. The parties have consented to have me conduct all proceedings in this matter, including the entry of judgment. ECF No. 19.

² At oral argument, the plaintiff’s counsel withdrew additional arguments that the administrative law judge’s determinations of the plaintiff’s mental and physical residual functional capacity (“RFC”) were unsupported by substantial evidence. See Statement of Errors at 5-10.

for further proceedings consistent herewith. For the benefit of the parties on remand, I briefly discuss the remaining point of error, which does not independently warrant remand.

Pursuant to 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, 2011, Finding 1, Record at 19; that he had severe impairments of hearing loss, anxiety, and back pain, Finding 3, *id.* at 20; that he had the RFC to perform a full range of work at all exertional levels but with the following nonexertional limitations: he could never climb ladders, ropes, or scaffolds, could occasionally climb ramps and stairs, could never crawl, could not work at unprotected heights, would be limited to occupations that did not require fine hearing (*i.e.*, only occasional hearing), could perform simple, routine, repetitive tasks that required only occasional decision-making and occasional changes in the work setting, and could not interact with the public, Finding 5, *id.* at 21; that, considering his age (45 years old, defined as a younger individual, on his alleged disability onset date, August 7, 2006), education (at least high school), work experience (transferability of skills immaterial), and RFC, there were jobs existing in significant numbers in the national economy that he could perform, Findings 7-10, *id.* at 24; and that he, therefore, had not been disabled from August 7, 2006, through the date of the decision, October 17, 2013, Finding 11, *id.* at 25. The Appeals Council declined to review the decision, *id.* at 1-3, 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. Vocational Expert Testimony

The administrative law judge asked a vocational expert present at the plaintiff's hearing to assume a hypothetical claimant who, among other things, had "some communication limitations where he would be limited to occupations that do not require fine hearing." Record at 66. The vocational expert asked for a "clarification" of the hearing limitation, inquiring whether he could "assume that it would involve just occasional hearing[.]" *Id.* at 67. The administrative law judge responded, "Oh, yes." *Id.* The vocational expert testified that, "with that level of functioning, there's one job that I can come up with that would involve . . . those restrictions[,] and that would be that of packager, hand[.]" *Id.*

The administrative law judge relied on that job at Step 5 to find the plaintiff capable of performing other work existing in significant numbers in the national economy. *See id.* at 24.

The plaintiff contends that, for two reasons, this was error: the job is rated as having a loud noise level, which would be inappropriate for a hearing-impaired individual who has to be able to

hear at least occasionally (defined as up to one-third of the time), and, in any event, the administrative law judge erroneously addressed his hearing difficulties in terms of frequency rather than clarity, volume, and degree of background noise. *See* Statement of Errors at 3-4; *see also* *Dictionary of Occupational Titles* (U.S. Dep't of Labor 4th ed. rev. 1991) § 920.587-018 (packager, hand).

He argues that this case is analogous to *Staples v. Astrue*, Civil No. 08-200-B-W, 2009 WL 232496 (D. Me. Jan. 29, 2009) (rec. dec., *aff'd* Feb. 19, 2009), in which this court vacated and remanded an adverse decision when the administrative law judge found a reading deficit but assessed limitations addressing the frequency, rather than the quality, of the claimant's reading ability. *See* Statement of Errors at 5.

The commissioner rejoins that those arguments fail because the job of hand packager comports with the RFC found by the administrative law judge, requiring the ability to hear only occasionally, that RFC is supported by the opinion of agency nonexamining consultant Lawrence P. Johnson, M.D., who found that the plaintiff could perform work that did not require precise hearing, which the administrative law judge defined as requiring only occasional hearing, and there is no evidence of any greater limitation, including any proscription against loud noise. *See* Defendant's Opposition to Plaintiff's Statement of Errors ("Opposition") (ECF No. 15) at 2-4.

Ironically, the commissioner's defense of the administrative law judge's approach highlights its fatal flaw: *the administrative law judge* defined Dr. Johnson's limitation as requiring only occasional hearing. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (Although an administrative law judge is not precluded from "rendering commonsense judgments about functional capacity based on medical findings," he or she "is not qualified to assess residual functional capacity based on a bare medical record."). The

administrative law judge's translation of this limitation to address frequency, rather than quality, of hearing is neither a common-sense judgment nor supported by substantial evidence.

In assessing the limitation at issue, Dr. Johnson took into account an April 21, 2008, Eastern Maine Medical Center audiological evaluation that revealed a mild to moderately severe sensorineural hearing loss in the right ear and a mild to severe sensorineural hearing loss in the left ear. *See* Record at 279, 283-84. The audiologist noted:

Word recognition was excellent for the right ear, at 96%[,] and good for the left ear, at 80%, when words were presented at a comfortable listening level of 70 dBHL. [The plaintiff's] word recognition scores decreased to 32% for the right ear and 40% for the left ear when the presentation level was decreased to 50 dBHL to approximate the level of normal conversational speech. Based on today's findings, [the plaintiff] would be expected to experience significant difficulty hearing and understanding speech at a normal conversational level, without the use of amplification.

Id. at 284. In addition, as the plaintiff's counsel pointed out at oral argument, in a section of Dr. Johnson's RFC assessment in which he was asked to address whether (i) the plaintiff's symptoms were attributable to a medically determinable impairment, (ii) the symptoms' severity or duration was disproportionate to their expected severity or duration, and (iii) the symptoms' severity and alleged effect on function was consistent with the total medical and nonmedical evidence, including statements by the claimant and others, Dr. Johnson responded:

The clt. [claimant] states the nerve deafness is on the inside of his eardrum which causes his balance to be messed up. He notes he is unable to hear very much w/o [without] his hearing aids. When he wears them things are so magnified that he gets agi[.]tated and can't concentrate.

Id. at 281. He thereby seemed to accept those allegations.

Nothing in the underlying audiology report or Dr. Johnson's opinion that the plaintiff was precluded from performing work that required precise hearing, such as that of police dispatcher, *see id.* at 279, suggests that the plaintiff's impairment would be addressed by temporal limitations.

To the contrary, the only reasonable interpretation is that the plaintiff could not perform a job requiring precise hearing *for any length of time*. The administrative law judge's assessed hearing restriction, accordingly, is unsupported by the medical evidence or common sense.

The error is not harmless. The vocational expert did not understand the restriction as phrased, and relied on the administrative law judge's clarification that the hypothetical claimant could perform a job requiring only occasional hearing. *See id.* at 67.

As the plaintiff argues, *see* Statement of Errors at 5, this case is analogous to *Staples*. In *Staples*, an administrative law judge found a claimant limited to no more than an hour of reading, seemingly meaning to credit the claimant's testimony as to his reading difficulties. *See Staples*, 2009 WL 232496, at *5. However, the court "agree[d] with the [claimant] that his testimony raise[d] a serious issue not just as to the length of time for which he could read but also as to the quality of his reading skills." *Id.* The claimant's testimony, if credited, indicated that his language skills were below those required for the two jobs on which the administrative law judge had relied to find him not disabled at Step 5. *See id.* Thus, "remand [was] required for further proceedings clarifying the extent of the [claimant's] reading and writing deficits and considering whether, in view of those deficits as clarified, he was capable as of his date last insured of performing work existing in significant numbers in the national economy." *Id.*³

The same is true here. Remand is warranted to obtain clarification as to the extent of the plaintiff's hearing limitation and reconsideration of whether, as that limitation is clarified, he was

³ The commissioner attempts to distinguish *Staples* on the basis that, in *Staples*, the court credited the claimant's testimony that his limitations were different from those the administrative law judge assessed, while in this case, the plaintiff has not credibly testified, or pointed to any credible evidence, that his hearing was more limited than assessed by the administrative law judge. *See* Opposition at 4 & n.1. The commissioner misconstrues *Staples*. The court did not credit the plaintiff's testimony. Rather, it found that the administrative law judge evidently credited the plaintiff's testimony but then failed to reflect that testimony accurately in his RFC determination, assessing temporal, rather than substantive, limitations. *See Staples*, 2009 WL 232496, at *5. Similarly, in this case, the administrative law judge credited the Johnson RFC opinion but failed to reflect it accurately in his RFC determination, mischaracterizing it as reflecting temporal, rather than substantive, limitations.

capable of performing work existing in significant numbers in the national economy. *See, e.g., Richardson v. Social Sec. Admin. Comm’r*, No. 1:10-cv-00313-JAW, 2011 WL 3273140, at * 11 (D. Me. July 29, 2011) (rec. dec., *aff’d* Aug. 18, 2011) (“At step 5, the burden shifts to the Commissioner to demonstrate that a significant number of jobs exist in the national economy that the claimant could perform. Ordinarily, the Commissioner will meet the step 5 burden, or not, by relying on the testimony of a vocational expert in response to a hypothetical question whether a person with the claimant’s RFC, age, education, and work experience would be able to perform other work existing in the national economy. At hearing the Commissioner must transmit a hypothetical to the vocational expert that corresponds to the claimant’s RFC.”) (citations and internal quotation marks omitted).

B. Treating Source Opinion

For the benefit of the parties on remand, I briefly consider the plaintiff’s remaining point of error, concluding that it does not independently warrant remand.

Dr. Saunders found the plaintiff markedly impaired by anxiety in numerous respects. *See* Record at 23, 694-95. The administrative law judge explained that he was “not persuaded by Dr. Saunder[s]’ conclusory statements, as they are against the weight of the overall medical record of evidence[,]” and, “despite the extremely limited range of functional restrictions, Dr. Saunders noted the [plaintiff’s] current medication had ‘helped him overall.’” *Id.* at 23 (citation omitted). The plaintiff argues that these were not “good reasons” for rejecting a treating source opinion, as required by 20 C.F.R. §§ 404.1527(c)(2) and 416.927(c)(2), in that (i) the administrative law judge failed to explain how Dr. Saunders’ opinion was against the weight of the medical evidence and (ii) the Saunders opinion never stated or implied that the plaintiff’s symptoms and limitations had ceased as a result of his medication use. *See* Statement of Errors at 10-11.

The plaintiff does not challenge the administrative law judge's first basis for according little weight to the Saunders opinion, and it is a valid one. *See, e.g., Bowker v. Commissioner, Soc. Sec. Admin.*, Civil No. 2:13-CV-122-DBH, 2014 WL 220733, at *3 (D. Me. Jan. 21, 2014) (administrative law judge supportably deemed treating physician's opinion "conclusory in that no basis for any of the opinions [wa]s given"); 20 C.F.R. §§ 404.1527(c)(3), 416.927(c)(3) ("The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight [the commissioner] will give that opinion. The better an explanation a source provides for an opinion, the more weight [the commissioner] will give that opinion.").

The second basis on which the administrative law judge rejected the Saunders opinion – that it was against the weight of the medical evidence – also constitutes a good reason for rejecting a treating source opinion. *See, e.g., Ramos v. Barnhart*, 119 Fed. Appx. 295, 296 (1st Cir. 2005) (administrative law judge properly gave little weight to treating source opinion that was "inconsistent with the bulk of the medical evidence"). The plaintiff complains that the administrative law judge failed to explain why he reached that conclusion, *see* Statement of Errors at 11; however, elsewhere in his decision, he noted that (i) the plaintiff had a history of anxiety, (ii) the record was replete with references to noncompliance with prescribed treatment, and (iii) his "anxiety appeared to be generally well controlled when he was compliant with treatment[.]" Record at 23. In addition, as noted above, agency nonexamining consultants, whose opinions the administrative law judge accorded substantial weight, found that the plaintiff had no severe mental impairment. *See, e.g., id.* at 84, 100, 285, 297.

Finally, with respect to the third basis, as a matter of common sense, the administrative law judge reasonably deemed Dr. Saunders' notation that medications had generally helped the plaintiff inconsistent with her opinion that he suffered from a number of marked limitations.

II. Conclusion

For the foregoing reasons, the commissioner's decision is **VACATED**, and the case is **REMANDED** for proceedings consistent herewith.

Dated this 15th day of January, 2016.

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