

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTOPHER M. MAURICE,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 01-221-P-H

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal, which follows a hearing and Appeals Council review that in turn followed a remand by the Appeals Council, raises several issues which are set forth in the following discussion. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

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 had not engaged in substantial gainful activity since September 26, 1996, the alleged date of onset of his disability, Finding 1, Record at 34; that the plaintiff met the disability insured status requirements of the Social Security Act on the alleged

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)(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 *(continued on next page)*

date of onset and through the date of the decision, Finding 2, *id.*; that he suffered from migraine headaches, moderate depression, mild disc degeneration at the T-11/T-12, T-12/L-1 and L-2/L-3 levels of the spine without herniation or canal stenosis, and chronic pain syndrome with symptom magnification, impairments which, alone or in combination, did not meet or equal the criteria of any impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Findings 3-4, *id.* at 34-35; that as a result of his impairments he was limited to the performance of work activity at the sedentary exertional level, eroded only by slight restrictions of activities of daily living, moderate difficulties in maintaining social functioning, and seldom experienced deficiencies of concentration, persistence and pace resulting in failure to complete tasks in a timely manner, Finding 7, *id.* at 35; that his allegations concerning pain, symptomatology and functional limitations imposed by his impairments were not fully credible to the extent inconsistent with the functional limitations included in Finding 7 and were inconsistent with the objective medical data, his described activities of living and the statements of his treating physicians, Finding 8, *id.*; that his impairments prevented him from returning to his past relevant work, Finding 9, *id.* at 35-36; that, given his age (25 on alleged onset date), education (associate degree) and lack of transferable skills, use of Rule 201.28 of Appendix 2 to Subpart P of 20 C.F.R. Part 404 (the “Grid”) as a framework for decision-making resulted in a finding that there existed in significant numbers in the national economy other jobs of a sedentary nature that he could be expected to perform, Findings 5-6, 10-11, *id.* at 35-36; and that, therefore, he had not been under a qualifying disability at any time since the alleged onset date, Finding 12, *id.* at 36. The Appeals Council, noting that it had considered specific additional evidence submitted after the administrative law judge’s decision was issued, declined to review the decision, *id.* at 8-9, making

March 21, 2002, 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.

it the final decision 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 review process, at which stage the burden 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 work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff alleges numerous errors in support of this appeal. He first contends that the administrative law judge erred by failing to find at Step 3 of the sequential review process that his psychiatric condition met or equaled Listing 12.04. Plaintiff's Corrected Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 9) at 2-5. Section 12.04 of the Listings sets forth the elements of affective disorders. In support of this argument, the plaintiff asserts that the administrative law judge "misquoted important testimony" from the medical advisor who participated in the hearing and "erroneously found that" the medical advisor opined that the plaintiff did not meet the criteria of section 12.04. *Id.* at 2, 3. In fact, the administrative law judge did not misquote the

physician's testimony nor was his finding concerning that testimony erroneous. The medical advisor testified as follows:

There are some comments in the evaluations about symptoms of depression. But, I think I would feel more comfortable if there was more updated data regarding what's going on with the situation. I — he may equal 12.04 and an element of 12.08, but I'm a little uncomfortable being flatfooted about it.

* * *

[W]hen you go through the reports, although they do talk and use these words, sometimes they don't go into great detail as far as the severity of the symptoms. And again, once they conclude their evaluations, again the GAF is between 50 and I think 55 or so. So, that, you know, I think there is a significant degree of these issues, but I think I'd like to have a little bit more updated information and more time spent by the examining person on the degree and severity of the symptoms.

Record at 61. This testimony cannot fairly be characterized as stating that the plaintiff met the criteria of section 12.04 of the Listings. It provides no support for an argument that the administrative law judge was required to find that the plaintiff met those criteria. The plaintiff offers no other citation to specific medical evidence in the record to support each of the required elements of section 12.04 of the Listings and accordingly he cannot succeed on his Step 3 argument.

The plaintiff next contends that the administrative law judge's Step 5 determination that he retained the capacity for sedentary work without significant non-exertional limitations lacks substantial evidentiary support for several reasons: the medical evidence establishes that he is unable to cope with the demands of a work environment; the administrative law judge was required and failed to seek clarification from the medical sources on this issue; the medical evidence shows far greater psychological limitations than those found by the administrative law judge; the administrative law judge failed to make specific factual findings to support his conclusions concerning the plaintiff's physical abilities; the administrative law judge violated the treating physician rule; the administrative law judge improperly drew conclusions directly from the medical records; and the administrative law

judge improperly relied on the Grid given the extent of the evidence concerning non-exertional impairments. Itemized Statement at 2-11.

With respect to the claim that the administrative law judge was required to seek clarification from medical sources or otherwise to further develop the record concerning the plaintiff's mental condition, the plaintiff merely argues that "if the judge had any questions regarding the severity of Mr. Maurice's condition as reflected in the records of the treating psychiatrists, he was specifically obligated to seek clarification," and "[a]lternatively, the ALJ could have obtained a further consultative exam." Itemized Statement at 5. There is nothing in the administrative law judge's opinion that suggests that he had any questions concerning the psychiatrists' records, nor did counsel for the plaintiff point to any inherent ambiguities or relevant but inconclusive passages in those records when asked to do so at oral argument, other than the "lack of clarity" in the testimony of the medical advisor at the hearing. *See Perez v. Chater*, 77 F.3d 41, 47-48 (2d Cir. 1996). There is not "lack of clarity" in that testimony; the medical advisor merely noted that he would have liked more information from certain sources in the record. Record at 60-61. Nor does the record reveal evidentiary gaps with respect to those reports that result in prejudice to the plaintiff. *See, e.g., Mandziej v. Chater*, 944 F. Supp. 121, 130 (D. N.H. 1996). Accordingly, the plaintiff has demonstrated no need for the administrative law judge to seek clarification from the unspecified "treating psychiatrists" nor for him to obtain a consultative psychiatric examination. *See* 20 C.F.R. §§ 404.1512(e) & (f), 404.1517, 416.912(e) & (f), 416.917.

The "treating physician rule" is set forth at 20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2):

Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a

treating source's opinions 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.

The plaintiff contends that the administrative law judge's "failure to even discuss, to say nothing of credit" the view of Dr. Ross and Dr. Totta "that Mr. Maurice is completely disabled by his physical and psychological problems . . . violates the treating physician rule." Itemized Statement at 9, n.10. Of course, the determination that a claimant is disabled is reserved to the commissioner; a statement by a physician that a claimant is "disabled" is not determinative. 20 C.F.R. §§ 404.1527(e), 416.927(e). Thus, there can be no requirement that an administrative law judge "credit" such statements. The physicians' "views" cited by the plaintiff in support of his argument on this point are both isolated conclusory statements presented on prescription forms, providing in their entirety as follows:

Christopher is 100% disabled due to medical/conditions.

Record at 335 (Dr. Ross, dated March 18, 1998)

This man is functionally disabled due to physical and psychological problems.

Id. at 360 (Dr. Totta, dated December 14, 1998). There are no other medical records whatsoever from Dr. Totta in the administrative record. It is thus impossible to determine whether he was in fact a treating physician, and, in the absence of any information about the basis for Dr. Totta's opinion, the administrative law judge committed no error in failing to discuss it. If the plaintiff means to argue that Dr. Ross's opinion must be given controlling weight, no physician's opinion of issues reserved to the commissioner must be so treated. If he means to argue that the administrative law judge had no reason to reject Dr. Ross's opinion on this issue, he is incorrect. The administrative law judge's opinion refers repeatedly to Dr. Ross's records, which are Exhibit 12F. *Id.* at 24, 25, 26, 27, 28. Many of the

clinical findings reported by Dr. Ross and cited by the administrative law judge are inconsistent with “100% disab[ility],” *e.g., id.* at 25 (third paragraph), 26 (second paragraph), 27 (last paragraph), 28 (first, second, fourth and fifth paragraphs). In addition, other medical evidence in the record and discussed by the administrative law judge is inconsistent with Dr. Ross’s conclusion. Under these circumstances, the administrative law judge did not err when he impliedly rejected Dr. Ross’s conclusion that the plaintiff was totally disabled in March 1998.

The plaintiff’s contentions that “the conclusion is inescapable that although RFC is a medically based conclusion, the ALJ in this case arrived at it directly from the medical evidence and without the benefit of any medical opinion supporting it,” Itemized Statement at 8, and that “the ALJ apparently attempted to substitute his own evaluation of the medical evidence together with a negative finding regarding the claimant’s credibility for positive medical evidence to meet the Commissioner’s step five burden,” *id.* at 9, are not supported by the record. While it is true that an administrative law judge, under most circumstances, is not qualified to interpret raw data in a medical record, *Manso-Pizarro*, 76 F.3d at 17, that is not what happened here. The administrative law judge cites the opinions of Dr. Fecko that the plaintiff was capable of sedentary work and of Dr. Malon that the plaintiff was capable of light work in the course of reaching his conclusion that the plaintiff had a residual functional capacity for sedentary work, a lower exertional level than light work. Record at 32-33, 35. To the extent that the plaintiff means to confine his argument concerning residual functional capacity to his mental limitations, *see* Itemized Statement at 8, such limitations are non-exertional and thus not relevant to the determination of the appropriate exertional level for residual functional capacity. The psychiatric evidence will be discussed below in connection with the plaintiff’s claims concerning psychological limitations.

The plaintiff contends that he is entitled to remand because the administrative law judge failed to cite specific evidence in the record to support his conclusion that the plaintiff had no limitations on his ability to sit, stand, walk, bend, twist, climb, squat, kneel or crawl. *Id.* at 9. The plaintiff cites no authority in support of the proposition that the administrative law judge is required to specifically cite evidence from the record at the point in his opinion where he sets forth his conclusions, and I am aware of no such requirement in the regulations. As the plaintiff concedes, *id.* at 9-10, the administrative law judge refers to the report of William F. Boucher, M.D., in the body of his opinion, Record at 29, and that report does support his findings on this issue. The plaintiff argues that reliance on Dr. Boucher's report is "problematic in light of the later MRI findings of disc impingement at T7-T8 . . . which Dr. Fecko indicates probably cause the thoracic level pain," Itemized Statement at 9, but this argument necessarily implies that the administrative law judge was required to conclude from this raw medical data that the disc impingement caused limitations on the plaintiff's ability to sit, stand, walk, bend, twist, climb, squat, kneel or crawl. Such an exercise would constitute the very conduct by the administrative law judge that the plaintiff earlier and correctly argued is forbidden. There is no medical opinion in the record supporting the conclusion which the plaintiff advocates. The plaintiff is not entitled to remand on this basis.

The plaintiff's remaining arguments with respect to the Step 5 determination are related. He contends that the medical evidence does not support the administrative law judge's findings concerning psychological limitations and that the extent of the evidence of non-exertional impairments precludes the administrative law judge's reliance on the Grid. The administrative law judge's opinion discusses the psychological evidence in some detail. Record at 26-28. He completed a psychiatric review technique form ("PRTF") to accompany his opinion, in which he records slight restrictions of activities of daily living, moderate difficulties in maintaining social function, and "seldom"

deficiencies of concentration, persistence or pace. *Id.* at 39. He found that these limitations constituted “so little erosion of the claimant’s ability to perform an essentially full range of work activity of a sedentary exertional level” that the Grid could be used as a framework to warrant a finding that there existed work in the national economy which the plaintiff could perform. *Id.* at 34. To the extent that the plaintiff here relies on his characterization of the medical advisor’s testimony as stating that he met the Listing for affective disorders, Itemized Statement at 8, that characterization is incorrect for the reasons previously discussed. The plaintiff also cites, *id.* at 7 n.4, the PRTF completed by a non-examining psychologist for the state in February 1998 which found that the plaintiff would “often” have deficiencies of concentration, persistence or pace, Record at 196, and that he would be “moderately” limited in the ability to maintain attention and concentration for extended periods, the ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes and the ability to respond appropriately to changes in the work setting, *id.* at 198-99. The plaintiff also relies on his own testimony that he suffered from incapacitating migraines twice a week, each of which lasted two days. Itemized Statement at 10. The plaintiff cites no medical evidence in support of his contention that his migraines are inconsistent with a capacity for sedentary work, but the administrative law judge noted his reports of migraines to his treating physicians and the existence of a normal CT head scan. Record at 26. The administrative law judge apparently concluded that the migraines did not impose a significant limitation on the plaintiff’s ability to perform sedentary work due to the physicians’ reports of the plaintiff’s symptom magnification and his own evaluation of the plaintiff’s credibility. *Id.* at 28, 29-32.

There is evidence in the record that supports the administrative law judge’s entries on the PRTF that he completed. *E.g.*, *id.* at 179-87 (state agency non-examining PRTF dated September 1997). However, the administrative law judge’s failure to discuss the limitations in his own PRTF, as

well as the other psychological evidence, in connection with his conclusion that the plaintiff's mental limitations caused little or no erosion of his ability to perform sedentary work, *id.* at 34, is troubling. The Grid "can only be applied when claimant's non-exertional limitations do not significantly impair claimant's ability to perform at a given exertional level." *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994). "If a non-strength impairment, even though considered significant, has the effect only of reducing [the] occupational base marginally, the Grid remains highly relevant and can be relied on exclusively to yield a finding as to disability." *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). When the Grid is used as a framework, and the reduction of the occupational base is more than marginal, the testimony of a vocational expert is required. *Burgos Lopez v. Secretary of Health & Human Servs.*, 747 F.2d 37, 42 (1st Cir. 1984). The psychiatric evidence in the record, and the report of at least one of the two state-agency reviewers, suggest a reduction of the occupational base that would be more than marginal. *See generally* Social Security Rulings 85-15 & 85-16, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* at 343-56; *Heggarty v. Sullivan*, 947 F.2d 990, 996-97 (1st Cir. 1991). No vocational expert was consulted in this case. The plaintiff is entitled to remand for consideration of this issue only.

The plaintiff makes a final argument that must be addressed. He attacks the administrative law judge's conclusion concerning the credibility of his testimony, contending that the opinion fails to identify the basis for that conclusion and that the administrative law judge failed to comply with Social Security Ruling 96-7p. Itemized Statement at 11-17. I have already dealt with the plaintiff's assertion that the administrative law judge was required to seek further evidence concerning his mental limitations. To the extent that he means to suggest that the administrative law judge failed to comply with Ruling 96-7p in any other respect, he has not identified any such failure and none is apparent.

The opinion also sufficiently sets forth the basis for the administrative law judge's conclusion concerning the credibility of the plaintiff's testimony. Record at 28, 29-32.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further proceedings consistent herewith.

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 25th day of March, 2002.

David M. Cohen
United States Magistrate Judge

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