

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**RAYMOND LOMBARD,** )  
 )  
 *Plaintiff* )  
 )  
 v. )  
 )  
 **JO ANNE B. BARNHART,** )  
 *Commissioner of Social Security,* )  
 )  
 *Defendant* )

**Docket No. 02-146-B-W**

**REPORT AND RECOMMENDED DECISION<sup>1</sup>**

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the question whether substantial evidence supports the commissioner’s determination that the plaintiff, who underwent a right lumbosacral discectomy and suffers from mild mental retardation and asthma, is capable of making a successful vocational adjustment to work existing in significant numbers in the national economy.

I recommend that the decision of the commissioner be vacated and the case remanded for payment of benefits.

---

<sup>1</sup> 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 October 27, 2003, 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.

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 was status post right lumbosacral discectomy, performed in January 2001 as treatment for a herniated disc at the lumbosacral level of the spine, and suffered from mild mental retardation and asthma, impairments that did not meet or equal the criteria of impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Findings 3 & 5, Record at 26; that he was educated through high school as a special education student and could not read or write, Finding 7, *id.*; that his impairments precluded him from returning to his past relevant work as a forklift driver, Finding 10, *id.* at 27; that Rule 202.16 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid"), used as a framework for decision-making in conjunction with the testimony of an impartial vocational expert, established that there existed, in significant numbers in the national economy, entry-level assembly jobs the plaintiff could be expected to perform despite his impairments, Finding 11, *id.*; and that he therefore had not been under a disability at any time through the date of decision, Finding 12, *id.*<sup>2</sup> The Appeals Council declined to review the decision, *id.* at 4-5, 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

---

<sup>2</sup> For purposes of SSD, the plaintiff remained insured through the date of decision. See Finding 2, Record at 26.

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 or her 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).

The instant appeal also implicates Step 3 of the sequential-evaluation process, at which stage a claimant bears the burden of proving that his or her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. §§ 404.1520(d), 416.920(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment the claimant's medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the listing for that impairment. 20 C.F.R. §§ 404.1525(a), 404.1528, 416.925(d), 416.928. To equal a listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. §§ 404.1526(a), 416.926(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §§ 404.1526(b), 416.926(b).

The plaintiff complains that the administrative law judge erred in determining that (i) his impairments did not meet Listing 12.05C and (ii) jobs exist in significant numbers that he could perform. *See* Statement of Specific Errors ("Statement of Errors") (Docket No. 9) at 1. At oral argument counsel for the commissioner conceded that, assuming *arguendo* the Listing 12.05C decision is unsupported by substantial

evidence, remand for payment of benefits is warranted.<sup>3</sup> I agree with the plaintiff that the administrative law judge's Listings analysis is flawed, warranting remand for payment of benefits.

## II. Discussion

Listing 12.05 provides in relevant part:

12.05 *Mental Retardation*: Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period: i.e., the evidence demonstrates or supports onset of the impairment before age 22.

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

\*\*\*

C. 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; . . . .

The administrative law judge found that the plaintiff met the requirements of subsection C. *See* Record at 20 (“The claimant . . . has well documented IQ scores in the range of 60 through 70. As discussed more fully below, he suffers from and [sic] a physical impairment imposing additional and significant work-related (non-mental) limitations of function.”). Nonetheless, he concluded that the plaintiff had failed to demonstrate the existence of deficits in adaptive functioning initially manifested during the developmental period, noting:

[A]t age 21 the claimant was employed and earning a good salary according to his earnings record, in spite of his inability to read or write and in spite of a poor academic record. He maintained a good work record for a considerable period of time thereafter. In fact there is no record of any measurement of his level of intellectual functioning prior to his attainment

---

<sup>3</sup> Counsel for the commissioner did not concede underlying error; to the contrary, he vigorously argued that the Listings determination was supported by substantial evidence.

of age 22. There is therefore no evidence upon which one could base a conclusion that he has deficits in adaptive functioning that were manifest before he reached age 22.

*Id.*<sup>4</sup> In so reasoning, the administrative law judge erred. In adopting the current wording of Listing 12.05C effective September 20, 2000, the commissioner made clear that a claimant need not adduce evidence of contemporaneous testing, or indeed any contemporaneous evidence at all, to meet the longitudinal requirement of Listing 12.05:

The final rules clarify that we do not necessarily require evidence from the developmental period to establish that the impairment began before the end of the developmental period. The final rules permit us to use judgment, based on current evidence, to infer when the impairment began. This is not a change in interpretation from the prior rules.

\*\*\*

Comment: One commenter viewed the second paragraph of proposed listing 12.05 as requiring evidence of intelligence testing prior to age 18. The commenter offered several arguments why this would be difficult for adults to establish and why it would be preferable to use more recent information.

Response: We adopted the comment. We did not intend the second paragraph of proposed listing 12.05 to require intelligence testing (or other contemporary evidence) prior to age 18, but we believe that the proposed listing could be misinterpreted, even though it was the same as in the prior rules. The proposed listing, as in the prior rules, stated that the significantly subaverage general intellectual functioning with deficits in adaptive behavior must have been initially “manifested” during the developmental period. We have always interpreted this word to include the common clinical practice of inferring a diagnosis of mental retardation when the longitudinal history and evidence of current functioning demonstrate that the impairment existed before the end of the developmental period. Nevertheless, we also can see that the rule was ambiguous. Therefore, we expanded the phrase setting out the age limit to read: “i.e., the evidence demonstrates or supports onset of the impairment before age 22.”

---

<sup>4</sup> At oral argument, counsel for the commissioner acknowledged that there is no question that the plaintiff meets the criteria of subsection C, the only issue being whether his mental impairment existed prior to age 22.

Revised Medical Criteria for Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg. 50,746, 50,753, 50,772 (Aug. 21, 2000). Further, these comments clarify that to meet the longitudinal requirement a claimant need only establish that the impairment of mental retardation existed prior to age 22 – not that he or she had specific deficits in functioning prior to that time.<sup>5</sup>

In this case, the administrative law judge was presented with both contemporaneous and current evidence consistent with a finding that the plaintiff’s mental retardation existed prior to age 22. *See, e.g.*, Record at 138 (high-school record showing plaintiff was ranked No. 142 of 143 in high-school class); 217 (February 2002 psychological assessment of Brian Andrews, Ph.D., noting: “The scores obtained from this assessment are considered to be valid given [the plaintiff’s] presentation and known history. His intellectual impairment is a chronic condition that will significantly limit his capacity to function in an adaptive manner in a variety of settings including social and interpersonal function, and within work settings.”). Beyond this, the administrative law judge found that the plaintiff was a special education student through high school and cannot read or write. *See* Finding 7, *id.* at 26. He erred in failing to consider whether the plaintiff’s currently diagnosed condition of mental retardation could be inferred to have existed prior to age 22. Had he done so, the weight of the evidence would have pointed in only one direction: that it did.<sup>6</sup>

---

<sup>5</sup> As the plaintiff notes, *see* Statement of Errors at 4, for purposes of meeting the longitudinal requirement of Listing 12.05 some courts have gone so far as to establish a presumption, based on the notion that a person’s IQ remains fairly constant, that mental retardation diagnosed in adulthood existed prior to age 22, *see, e.g., Hodges v. Barnhart*, 276 F.3d 1265, 1268-69 (11th Cir. 2001); *Guzman v. Bowen*, 801 F.2d 273, 275 (7th Cir. 1986); *Branham v. Heckler*, 775 F.2d 1271, 1274 (4th Cir. 1985); *Durham v. Apfel*, 34 F. Supp.2d 1373, 1379-80 (N.D. Ga. 1998). This in my view is a sensible approach; however, inasmuch as appears, the First Circuit has not yet addressed this question, and there is no need to confront it in this case.

<sup>6</sup> At oral argument, counsel for the commissioner argued that there is evidence pointing the other way, notably (i) that the plaintiff initially claimed a back injury, not mental retardation, (ii) that he received As, Bs and Cs in high school, *see* Record at 138, and (iii) that he worked successfully for eighteen years, *see id.* at 105. Put in proper perspective, this evidence does not substantially support the administrative law judge’s longitudinal finding. As an initial matter, it is not surprising that a condition of mental retardation could go undiagnosed for some time. Indeed, that is precisely why the commissioner has clarified that no contemporaneous IQ evidence need be adduced. The plaintiff’s seemingly high to average grades must be counterpoised against the stark realities that he graduated second from the bottom of the class (*continued on next page*)

As conceded by counsel for the commissioner, such an error in the circumstances of this case warrants remand for payment of benefits. *See also Seavey v. Barnhart*, 276 F.3d 1, 11 (1st Cir. 2001) (“[T]he rule we adopt is that ordinarily the court can order the agency to provide the relief it denied only in the unusual case in which the underlying facts and law are such that the agency has no discretion to act in any manner other than to award or to deny benefits.”).<sup>7</sup>

## II. Conclusion

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

### NOTICE

---

and, as the administrative law judge found, was in special education and cannot read and write. Finally, as counsel for the plaintiff pointed out at oral argument, the plaintiff held only one job for his entire worklife: as a forklift driver for a tanning company. *See id.* at 105. Of course, an individual can have a history of illiteracy, special-education status and work as a forklift driver without being mentally retarded. However, in this case it is undisputed that the plaintiff’s current IQ scores qualify him as mentally retarded, and this history tends to corroborate the preexistence of that condition.

<sup>7</sup> In the event that this recommended decision is not adopted and the case is remanded instead for further development, I note that I find the plaintiff’s second point of error to be without merit. The plaintiff identifies one limitation (the need to sit and stand at will) that he claims should have been taken into consideration pursuant to the criteria of *Hall v. Bowen*, 837 F.2d 272 (6th Cir. 1988), inasmuch as it impacts his ability to drive long distances. *See* Statement of Errors at 6. However, this limitation was presented to the vocational expert, *see* Record at 51-52, and she presumably took it into consideration when determining the number of jobs available that the plaintiff could still do. In any event, Social Security regulations make clear that it is immaterial whether work exists in the immediate area in which a claimant lives or a specific job vacancy exists for the claimant. *See* 20 C.F.R. §§ 404.1566(a), 416.966(a). To the extent the plaintiff argues that the raw numbers (three hundred jobs in Maine, about 1,000 in New England and about 5,000 nationwide) do not constitute “significant numbers” of jobs, *see* Statement of Errors at 6-7, Record at 52, I am unpersuaded. The plaintiff relies on citation of “raw numbers” cases from other jurisdictions cutting in his favor. *See* Statement of Errors at 6; *see also, e.g., Mericle v. Secretary of Health & Human Servs.*, 892 F. Supp. 843, 847 (E.D. Tex. 1995) (870 jobs in entire state of Texas not a “significant number” of jobs); *Waters v. Secretary of Health & Human Servs.*, 827 F. Supp. 446, 449 (W.D. Mich. 1992) (1,000 jobs in entire state of Michigan not significant). However, as counsel for the commissioner pointed out at oral argument, one can find “raw numbers” cases cutting the other way. *See, e.g., Jenkins v. Bowen*, 861 F.2d 1083, 1087 (8th Cir.1988) (500 jobs in region a significant number); *Allen v. Bowen*, 816 F.2d 600, 602 (11th Cir.1987) (174 positions in area in which plaintiff lived a significant number); *Mercer v. Halter*, No. Civ.A.4:00-CV-1257-BE, 2001 WL 257842, at \*6 (N.D. Tex. Mar. 7, 2001) (given plaintiff’s specialized skills, 500 jobs in Texas and 5,000 in national economy a significant number); *Nix v. Sullivan*, 744 F.Supp. 855, 863 (N.D. Ind. 1990), *aff’d*, 936 F.2d 575 (7th Cir. 1991) (675 jobs in region a significant number). The plaintiff fails to proffer any compelling reason why his “raw numbers” cases are more persuasive, and I perceive none.

*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 31st day of October, 2003.

---

David M. Cohen  
United States Magistrate Judge

**Plaintiff**

-----

**RAYMOND C LOMBARD**  
*TERMINATED: 04/03/2003*

represented by **DAVID A. CHASE**  
MACDONALD, CHASE &  
DUFOUR  
700 MOUNT HOPE AVENUE  
440 EVERGREEN WOODS  
BANGOR, ME 4401  
942-5558  
Email: eholland@macchasedufour.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

-----

**SOCIAL SECURITY  
ADMINISTRATION  
COMMISSIONER**

represented by **HUNG TRAN**  
OFFICE OF GENERAL COUNSEL  
SOCIAL SECURITY  
ADMINISTRATION  
JFK FEDERAL BUILDING  
ROOM 625

BOSTON, MA 02203  
(617)565-4277  
Email: hung.t.tran@ssa.gov  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JAMES M. MOORE**  
U.S. ATTORNEY'S OFFICE  
P.O. BOX 2460  
BANGOR, ME 04402-2460  
945-0344  
Email: jim.moore@usdoj.gov  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**PETER S. KRYNSKI**  
SOCIAL SECURITY DISABILITY  
LITIGATION - ANSWER SECTION  
OFFICE OF THE GENERAL  
COUNSEL  
5107 LEESBURG PIKE ROOM 1704  
FALLS CHURCH, VA 22041-3255  
(703) 305-0183  
*TERMINATED: 10/27/2003*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*