

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH A. DICKINSON,)

Plaintiff)

v.)

Docket No. 02-258-P-H

JO ANNE B. BARNHART,)

Commissioner of Social Security,)

Defendant)

REPORT AND RECOMMENDED DECISION¹

The plaintiff in this Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises several questions: whether the residual functional capacity assigned by the commissioner is supported by substantial evidence, whether the commissioner relied improperly on certain regulations, whether the commissioner improperly assumed that the plaintiff had transferable skills, whether the commissioner properly evaluated the medical evidence and whether the commissioner properly evaluated the plaintiff’s credibility. I recommend that the court vacate the commissioner’s decision.

¹ This action is properly brought under 42 U.S.C. §§ 405(g) and 1381(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.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920, *Goodermote v. Secretary of Health & Human Servs.*, 69 F.3d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from an impairment or combination of impairments that were severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Findings 3-4, Record at 20; that the plaintiff's allegations concerning his limitations were not totally credible, Finding 5, *id.*; that the plaintiff had the residual functional capacity to lift and carry up to 10 pounds, to sit without restriction and stand and/or walk at least two hours in an eight-hour work day, to perform frequent balancing and occasional climbing, kneeling, crouching, crawling, stooping, reaching and handling, with limitations on his ability to reach in all directions, handle, or be exposed to temperature extremes, dust, humidity/wetness, fumes, odors, chemicals and gasses, Finding 7, *id.*; that the plaintiff was unable to perform any of his past relevant work, Finding 8, *id.*; that, given his age (younger individual), education (high school equivalent), transferable skills and residual functional capacity for a significant range of sedentary work, use of Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid") as a framework for decision-making resulted in the conclusion that there was a significant number of jobs in the national economy that he could perform, including cashier, information clerk, order clerk and receptionist, Findings 9-13, *id.* at 20-21; and that the plaintiff therefore was not under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 14, *id.* at 21. The Appeals Council declined to review the decision, *id.* at 8-9, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Commissioner 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. Commissioner 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 Step 5, 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(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 first attacks the administrative law judge's finding that he had a residual functional capacity for "a significant range of sedentary work," Record at 20, without any reference to his treating physician's conclusion that his fatigue "limit[s] patient's ability to work full 8/day — 40 hour work week," *id.* at 237; Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 5) at 3-5. The administrative law judge's decision does mention this statement by Marc Brickman, D.O., Record at 16, but he does not discuss this limitation in connection with his assessment of the plaintiff's residual functional capacity, or in any other context. It is the commissioner's policy that "[o]rdinarily, RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis. A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." Social Security Ruling 96-8p ("SSR 96-8p"), reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (Supp. 2003) at 143.

In assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related activity the individual can perform based on the evidence available in the case record. The adjudicator must also explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved.

* * *

The RFC assessment must always consider and address medical source opinions.

If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain why the opinion was not adopted.

Id. at 149-50. In this case, the assignment of a residual functional capacity for “a significant range of sedentary work,” limited by certain restrictions other than fatigue, Record at 20, is thus inconsistent with Dr. Brickman’s finding concerning fatigue, yet the administrative law judge offers no explanation for his rejection of this limitation. If it is assumed that the administrative law judge rejected Dr. Brickman’s conclusion, the other medical evidence in the record cannot be said to be inconsistent with Dr. Brickman’s finding and accordingly there is no substantial evidence to support such an implied rejection. The only assessment of physical residual functional capacity performed by a state-agency reviewer in this case does not mention fatigue as affecting the plaintiff’s capacity, and might be construed to reject any such limitation by specifying that the plaintiff could sit, stand or walk for 6 hours in a normal work day, Record at 223, but that report is dated seven months before Dr. Brickman’s report, *id.* at 229, 237.² See *Frankl v. Shalala*, 47 F.3d 935, 938 (8th Cir. 1995).

At oral argument, counsel for the commissioner took the position that Dr. Brickman’s finding of a limitation due to fatigue was not supported by the medical evidence and that the administrative law judge’s

² Contrary to the plaintiff’s argument, the fact that the state-agency reviewer assigned a residual functional capacity for light rather than sedentary work does not mean that his report “does not provide support for sedentary work capacity.” Itemized Statement at 5 n.2. A capacity for light work is considered to include the capacity for sedentary work. 20C.F.R. (continued on next page)

failure to explain his rejection of the limitation accordingly did not constitute reversible error. However, the limitation due to fatigue is reasonably supported by the following entries in the medical records: Record at 208, 212-13, 216, 219-20. As noted in *Rose v. Shalala*, 34 F.3d 13, 16-18 (1st Cir. 1994), chronic fatigue may not be dismissed merely because it is difficult to identify an underlying physical cause for the condition. The physicians in this case tried many tests and courses of medication in an unsuccessful attempt to diagnose the plaintiff's condition. The fact that the fatigue, noted by several physicians as well as Dr. Brickman, was not amenable to explanation through testing does not permit the commissioner to disregard it. At a minimum, the administrative law judge was required, under the circumstances, to explain his rejection of this limitation imposed by the plaintiff's treating physician.³

This deficiency makes it unnecessary to consider the plaintiff's numerous additional claims of error, but I will discuss them briefly for the benefit of the commissioner should the court adopt my recommendation that this case be remanded.

The plaintiff contends that the administrative law judge did not evaluate Dr. Brickman's records properly. Itemized Statement at 12-15. To the extent that this argument differs from his contention that the administrative law judge improperly failed to state his reasons for rejecting Dr. Brickman's fatigue limitation, discussed above, no error in his evaluation of Dr. Brickman's records that would require remand in this case is apparent.

§§ 404.1567(b), 416.967(b).

³ Counsel for the commissioner also argued, without citation to authority, that Dr. Brickman had treated the plaintiff for too short a period of time to justify according his report the weight given to that of a treating physician under applicable regulations. I see nothing in the regulations that defines the treating relationship by a minimum period of time. Sections 404.1527(d)(2)(i) and 416.967(d)(2)(i) merely list as one of the factors affecting the weight to be given a treating physician's opinion the length of the treatment relationship and the frequency of examination. Here, Dr. Brickman's records demonstrate treatment from September 2000 through July 2001, Record at 139, 146, that he saw the plaintiff ten times during this period, *id.* at 139-46, and his opinion is dated April 24, 2002, *id.* at 237. This is sufficient time and a sufficient number of examinations to allow credit to be given to Dr. Brickman's conclusions.

Counsel for the plaintiff repeats in this case, as he does in virtually every Social Security appeal of the numerous such appeals that he presents regularly to this court, the assertion that the administrative law judge failed to develop the record appropriately. Itemized Statement at 15-18. As I have said in virtually all of those cases, nothing in the record suggests that the administrative law judge did not understand any of the medical reports or why any of the physicians reached the conclusions that they reported, that the records contained any conflict or ambiguity that must be resolved by a physician, that the records lacked necessary information or otherwise did not appear to be based on medically acceptable clinical and laboratory diagnostic techniques, 20 C.F.R. §§ 404.1512(e)(1), 416.912(e)(1), and the plaintiff has failed to identify any gaps in the information provided in any medical report necessary to a reasoned evaluation of his claim, *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991). Nothing in SSR 96-2p, upon which the plaintiff relies, Itemized Statement at 16, requires a different conclusion on this point.

Counsel for the plaintiff also repeats verbatim the argument concerning the administrative law judge's assessment of the plaintiff's credibility and allegations of pain that he makes in virtually every Social Security appeal he presents to this court. Itemized Statement at 18-21. The administrative law judge in this case adequately discussed his evaluation of these factors in this case. Record at 17.

The plaintiff does present two further issues that are unique to his case. He contends that the administrative law judge could not use the Grid even as a framework for decision-making under the circumstances of this case⁴ and that administrative law judge improperly found that he had transferable skills when "the V[ocational] E[xpert] gave no testimony regarding transferable skills or education providing for

⁴ Much of the discussion of this issue in the Itemized Statement appears to deal with resort to the Grid as the basis for the administrative law judge's decision, rather than use of the Grid as a framework for decision-making. The administrative law judge in this case clearly used the Grid only as a framework, a distinct approach in Social Security practice and law, and case law dealing with its direct application is accordingly inapposite.

direct entry into skilled work nor did the ALJ make such a finding.” Itemized Statement at 7-8. Use of the Grid as a framework is governed by 20 C.F.R. §§ 404.1569a(d) and 416.969a(d), both of which provide:

When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and other demands of jobs other than the strength demands, we consider that you have a combination of exertional and non-exertional limitations or restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than strength demands, we will not directly apply the rule of appendix 2 based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

SSR 83-14 provides further guidance:

A particular additional exertional or nonexertional limitation may have very little effect on the range of work remaining that an individual can perform. The person, therefore, comes very close to meeting a table rule which directs a conclusion of “Not disabled.” On the other hand, an additional exertional or nonexertional limitation may substantially reduce a range of work to the extent that an individual is very close to meeting a table rule which directs a conclusion of “Disabled.”

Use of a vocational resource may be helpful in the evaluation of what appear to be “obvious” types of cases. In more complex situations, the assistance of a vocational resource may be necessary. The publications listed in sections 404.1566 and 416.966 of the regulations will be sufficient for relatively simple issues. In more complex cases, a person or persons with specialized knowledge would be helpful. State agencies may use personnel termed vocational consultants or specialists, or they may purchase the services of vocational evaluation workshops. Vocational experts may testify for this purpose at the hearing and Appeals Council levels.

Social Security Ruling 83-14, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (1992) at 45. “Where there is more than a slight impact on the individual’s ability to perform the full range of sedentary work, if the adjudicator finds that the individual is able to do other work, the adjudicator must cite examples of occupations or jobs the individual can do and provide a statement of the incidence of such work in the region where the individual resides or in several regions of the country.” Social Security Ruling

96-9p, *id.* (Supp. 2003) at 156. In this case, the administrative law judge complied fully with these requirements.⁵

With respect to transferable skills, the plaintiff offers no citation to authority to support his necessarily-implied contention that an explicit finding as to transferable skills, based on expert testimony, is a prerequisite to a finding that specific jobs noted in the Dictionary of Occupational Titles as having skilled or semi-skilled status may be performed by a claimant. Itemized Statement at 7-8, 11. The language of the rule cited by the administrative law judge, Record at 20, includes no such requirement.

We consider you to have skills that can be used in other jobs, when the skilled or semi-skilled work activities you did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. This depends largely on the similarity of occupationally significant work activities among different jobs.

* * *

Transferability is most probable and meaningful among jobs in which —

- (i) The same or a lesser degree of skill is required;
- (ii) The same or similar tools or machines are used; and
- (iii) The same or similar raw materials, products, processes, or services are involved.

20 C.F.R. §§ 404.1568(d)(1)-(2), 416.968(d)(1)-(2). Here, the vocational expert testified that the plaintiff's past relevant work included semi-skilled work as a stock clerk, cashier and shoe repairer and skilled work as a cook supervisor in a restaurant. Record at 50. The similarity between the work activities involved in semi-skilled or skilled jobs identified by the administrative law judge as jobs that the plaintiff could perform, cashier, order clerk, information clerk and receptionist, *id.* at 20-21, are obvious. Of the

⁵ The plaintiff relies on *Sykes v. Apfel*, 228 F.3d 259 (3d Cir. 2000), to argue that the administrative law judge was required either to rely on the testimony of a vocational expert or “give notice of the intention to take official notice of the fact that the claimant’s non-exertional impairments do not significantly erode the occupational base noticed in the grids and provide the claimant an opportunity to offer evidence and argument in opposition to this conclusion.” Itemized Statement at 10. Since the administrative law judge in this case did rely on the testimony of a vocational expert, *Sykes* is irrelevant, even if it were binding in this circuit.

three reported cases cited by the plaintiff in support of his argument on this point, one actually supports the decision in this case, *Fines v. Apfel*, 149 F.3d 893, 895 (8th Cir. 1998) (upholding decision where ALJ relied on testimony of vocational expert to find that claimant had acquired skills that could be transferred). The other two are distinguishable. In *Dikeman v. Halter*, 245 F.3d 1182, 1185-87 (10th Cir. 2001), the claimant's past relevant work and the jobs discussed by the vocational expert were not so similar as those in this case, and the degree of detail required by the court expands the regulatory language to a point to which this court should be reluctant to go in the absence of direction from the First Circuit. In *Terry v. Sullivan*, 903 F.2d 1273, 1276-78 (9th Cir. 1990), the issue was whether the administrative law judge was required to explain a conflict between the testimony of the vocational expert and the Dictionary of Occupational Titles. In this case, there is no conflict between the testimony of the vocational expert and the Dictionary of Occupational Titles with respect to the skill level assigned to each of the jobs at issue.

Conclusion

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

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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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

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