

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 the alleged onset of disability, Finding 2, Record at 22; that he had an impairment or combination of impairments that was 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, *id.*; that his allegations regarding his limitations were not totally credible, Finding 5, *id.*; that his residual functional capacity was limited by an inability to understand and carry out detailed instructions, Finding 7, *id.*; that he had no past relevant work, Finding 8, *id.*; that given his age (younger individual between the ages of 18 and 44), education (limited), lack of transferable skills and residual functional capacity, using Rule 204.00 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid") as a framework for decision-making, the plaintiff was not disabled, Findings 9-13, *id.* at 22-23; and that he accordingly 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 23. The Appeals Council declined to review the decision, *id.* at 6-8, making 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 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). The plaintiff also makes an argument based on Step 3, contending that his impairment met a specific Listing. At Step 3, a claimant bears the burden of proving that his 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 evidence (*i.e.*, symptoms, signs and laboratory findings) must match those described in the Listing for that impairment. 20 C.F.R. §§ 404.1525(d), 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).

Discussion

The administrative law judge's opinion notes that

[t]he claimant was previously found to be disabled beginning July 1, 1994 based on an application for Supplemental Security Income that he filed on July 29, 1994. He had alleged on that application that his disability began on January 1, 1992. His entitlement to Supplemental Security Income based on that application ended because he was a fugitive convicted felon.²

² In fact, it appears that the plaintiff was not a convicted felon, but that a warrant was out for his arrest on certain charges in Connecticut. Record at 68, 72-73, 145-46. That matter was resolved; the plaintiff was not sentenced to any term of incarceration. *Id.* at 133.

Record at 14. The current application was filed on March 27, 2000 and alleged an onset date of December 1, 1994, although his claim was processed as if his alleged date of onset were January 2, 1990, the plaintiff's twenty-second birthday. *Id.* at 13-14.

The plaintiff contends that the previous determination of disability was "because of his mental impairments," and that, given the lack of any determination that his mental impairments had improved since that time, the doctrine of collateral estoppel applies and he "continued to be eligible for benefits pursuant to the agency's decision of March 16, 1995." Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 7) at 10. He cites no authority in support of this contention, which would in any event not apply to his claim for childhood disability benefits.

The applicable statute provides:

No person shall be considered an eligible individual . . . for purposes of this subchapter with respect to any month if during such month the person is —

(A) fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the person flees, for a crime, or an attempt to commit a crime which is a felony under the laws of the place from which the person flees

42 U.S.C. § 1382(e)(4)(A). The implementing regulation provides, in relevant part:

If benefits are otherwise payable, they will be resumed effective with the first month throughout which the individual is determined to be no longer fleeing to avoid such prosecution, fleeing to avoid such custody or confinement after conviction, or violating a condition of his or her probation or parole.

20 C.F.R. § 416.1339(c). From all that appears in the record, therefore, the plaintiff was entitled to resumption of his SSI benefits as soon as he presented the document dated March 27, 2000 from the clerk of the Superior Court in New London, Connecticut indicating that the charges had been resolved. Record at 133.

At oral argument, counsel for the commissioner argued that the initial phrase of 20 C.F.R. § 416.1339(c) — “[i]f benefits are otherwise payable” — means that claimants whose benefits have been “suspended” must reapply for a new determination of eligibility for benefits when the claimant is no longer a “fleeing felon,” because some other basis for ineligibility may have arisen in the interim.³ The title of 20 C.F.R. § 416.1339 is “Suspension due to flight” and subsection (b)(1) of that regulation begins “Suspension of benefit payments.” Subsequently, counsel for the commissioner notified the court that the commissioner no longer took this position, which reads the word “suspension” out of the regulation, but rather agreed that once a claimant subject to the “fleeing felon” rule satisfies the commissioner that he or she no longer has that status, payment of benefits should resume. This change in the commissioner’s position was not accompanied by any explanation of the fact that the plaintiff in this case was nonetheless apparently required to re-apply for the benefits which he had previously been awarded. Counsel for the commissioner also argued that the doctrines of estoppel or *res judicata* could not be applied in this case because the plaintiff had also filed a new application for childhood disability benefits. The fact that the plaintiff filed a new application for an entirely different type of benefits has no bearing on the question whether the commissioner was entitled to require the plaintiff to reapply for SSI benefits and then to deny that application without any evidence of improvement in the plaintiff’s impairments that gave rise to the commissioner’s earlier decision to award such benefits. The fundamental unfairness inherent in the commissioner’s treatment of the plaintiff in this case is obvious; whether it infringes the doctrine of estoppel or that of *res judicata* may be a point for fine legal debate, but does not change the outcome. In *Drummond v. Commissioner of Soc. Sec.*, 126 F.3d 837 (6th Cir. 1997), the court used *res judicata* as

³ If some other basis for ineligibility has arisen while the payment of benefits was suspended, the commissioner has the
(continued on next page)

the framework for its analysis of a similar situation. In that case, the commissioner had in the course of evaluating an earlier application filed by the plaintiff determined that she retained a residual functional capacity for sedentary work. *Id.* at 838. In dealing with a later application, without finding that her condition had improved since the time of the earlier application, the commissioner determined that she had a residual functional capacity for medium work. *Id.* at 839. The court held that “[a]bsent evidence of an improvement in a claimant’s condition, a subsequent ALJ is bound by the findings of a previous ALJ.” *Id.* at 842. Given the language of the statute and regulation at issue here, this reasoning applies equally to this plaintiff.

With respect to the plaintiff’s new claim for childhood disability benefits, he must show that he has been continuously disabled since before he attained the age of 22, on January 2, 1990. Record at 14. The administrative law judge “assumed” that, despite average monthly earnings in 1990 that indicated that the plaintiff might have been engaged in substantial gainful activity in that year and therefore not entitled to benefits, that work was a series of unsuccessful work attempts, which would not deprive the plaintiff of eligibility.⁴ *Id.* at 14-15. The administrative law judge found that the plaintiff’s only severe impairments were a cognitive disorder and obesity.⁵ *Id.* at 15. Both psychiatric technique review forms completed by state-agency reviewers in this case indicate that there is insufficient evidence to establish a mental impairment before the plaintiff attained the age of 22. *Id.* at 217, 226, 239. The plaintiff’s statement of errors does not address his claim for childhood disability benefits separately from his SSI claim, perhaps because the

authority to terminate benefits, after following the appropriate procedures. *See, e.g.*, 20 C.F.R. §§ 416.204, 416.989, 416.990.

⁴ However, this assumption appears to be inconsistent with the administrative law judge’s later observation that “[t]he clearest evidence that the claimant has some capacity to work” includes that fact that “[h]e was working during the year in which he attained age 22.” Record at 20.

⁵ At oral argument, counsel for the plaintiff did not identify medical evidence in the record that would support a finding (*continued on next page*)

administrative law judge's opinion bases its denial of that claim on the same finding that provides the basis for denial of his SSI claim — a finding that the plaintiff was not disabled at any time up to the date of the opinion. However, the administrative law judge did note the conclusions of the state-agency reviewers that there was insufficient evidence to establish a mental impairment before age 22, *id.* at 18, and, coupled with the lack of medical evidence of a severe physical impairment existing before that date, the administrative law judge's decision with respect to eligibility for childhood disability benefits may be upheld independently of the outcome with respect to the plaintiff's SSI claim.

I will address the plaintiff's other arguments with respect to his SSI claim for review by the court should it be determined that the plaintiff was properly required to re-apply for such benefits rather than merely having his previously-granted benefits reinstated. The administrative law judge stated at the hearing held after the Appeals Council had remanded the current claim as follows:

What I'm going to find here is that Mr. Nieves met a listing. That's clear from the record. He was severe. He met a 12.05C, continues to meet a 12.05C. The problem is, just like you said, his earnings from 2000 and 2001. I'll have to think about that. So that's how it works. Clearly Mr. Nieves was a 12.05C and continues to be a 12.05C. What muddies the water is — it means, Mr. Nieves, that you was [sic] disabled and you're — we're going to undo all of that except the problem is that we have some muddy waters here. You know, the waters are kind of muddy after you went back to work in 2000 to May 2001.

* * *

[W]e're taking you back because you're actually disabled under 12.05C.

Record at 75-77. Section 12.05 of the Listings deals with mental retardation; subsection C requires “[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.” Yet the administrative law judge in his opinion found that the plaintiff's only severe mental impairment was a cognitive disorder, *id.* at 15; he

that any severe physical impairment existed before January 2, 1990.

found that the plaintiff did not meet Section 12.05(C) of the Listings because the administrative law judge was “not convinced” that the full scale IQ of 70 found on testing in April 2000 “is valid,” and because there was no medical evidence of any other impairment that imposed a significant limitation of function, *id.* at 19. The latter part of this conclusion is inconsistent with the administrative law judge’s finding of the existence of a cognitive disorder as a severe impairment. The reports of the state-agency reviewers support the conclusion that mental retardation and a cognitive disorder are separate impairments. Record at 219-221; 239. Indeed, the psychiatric review technique form itself lists them separately. *Id.* at 239.

In addition, as the plaintiff points out, Statement of Errors at 3-4, the fact that the administrative law judge found that a severe mental impairment existed means that he was required to complete a psychiatric review technique form or to include the equivalent analysis in his opinion, 20 C.F.R. § 416.920a(e). Here, no form was completed by the administrative law judge. The decision shows the plaintiff’s significant history, as required by the rule, but cannot reasonably be construed as setting forth “the functional limitations that were considered in reaching a conclusion about the severity of the mental impairment,” and it certainly does not include “a specific finding as to the degree of limitation in each of the functional areas described in paragraph (c) of this section.” The plaintiff is entitled to remand of his SSI claim on this basis as well.

A further problem with the administrative law judge’s opinion is that, while it sets forth the medical evidence on the question of the plaintiff’s mental impairments in some detail, Record at 16-17, as well as the conclusions of the state-agency psychiatric reviewers, *id.* at 18, it does not present any reasons for rejecting the conclusions of all of these individuals that the plaintiff’s mental impairments imposed limitations more severe than an inability to understand and carry out detailed instructions, *id.* at 20. *See id.* at 210, 218, 227-29, 240, 246, 248-50. This omission is particularly perplexing in light of the reason given by the Appeals Council for remanding this claim: “The decision does not indicate the weight given to any medical

opinion,” and specifically mentioning the report of Martin Margulis, Ph.D., on the plaintiff’s mental impairments. Record at 289. The record does not contain substantial evidence contradicting these findings. The plaintiff is entitled to remand on his SSI claim for this reason as well.

The plaintiff also challenges the administrative law judge’s failure to comply in other ways with the instructions of the Appeals Council. Statement of Errors at 9. The remand order instructed the administrative law judge to, *inter alia*, obtain additional evidence concerning the plaintiff’s mental impairments,⁶ further evaluate his subjective complaints and provide a rationale in accordance with certain regulations and Social Security Ruling 96-7p, further evaluate the plaintiff’s mental impairments in accordance with the psychiatric review technique discussed above, obtain evidence from a medical expert and obtain evidence from a vocational expert, if warranted. Record at 290. I have already discussed the administrative law judge’s failure to comply with the third instruction. It appears that he also failed to follow the second and fourth of these specific instructions. However, counsel for the plaintiff has offered no reason why I should depart from my earlier recommendation on this issue.

Even if the administrative law judge had failed to comply with a mandatory directive of the Appeals Council as set forth in the order of remand in a manner that affected his conclusions concerning the plaintiff’s claim, . . . the better approach for a reviewing court is to examine the substance of the commissioner’s decision for compliance with the Social Security Act and the implementing regulations, rather than to focus on the administrative law judge’s compliance with all of the terms of an order of remand from the Appeals Council.

Savoy v. Massanari, 2001 WL 1502585 (D. Me. Nov. 26, 2001), at *3.

At oral argument, counsel for the commissioner contended that the plaintiff was not entitled to SSI benefits because the record shows that he engaged in substantial gainful activity in 2000 and 2001.

⁶ Counsel for the plaintiff stated at the hearing that this portion of the Appeals Council’s directive had been satisfied. (continued on next page)

However, the administrative law judge found that the plaintiff “has not engaged in substantial gainful activity since the alleged onset of disability.” Record at 22. The commissioner cannot disavow her own finding in an attempt to support her conclusion on appeal.

Given the number of reasons for remand of the plaintiff’s SSI claim already discussed, there is no need to reach the remaining issues raised by the plaintiff — sufficiency of the evidence to support the physical residual functional capacity assigned by the administrative law judge and failure to develop the record further with regard to the plaintiff’s credibility.

Conclusion

For the foregoing reasons, I recommend that the commissioner’s decision as to the plaintiff’s claim for childhood disability benefits be **AFFIRMED** and that the commissioner’s decision as to the plaintiff’s claim for SSI benefits be **VACATED** and **REMANDED** with instructions to reinstate the SSI benefits awarded to the plaintiff by the commissioner’s decision on his application filed on July 29, 1994 as of the date on which the commissioner was presented with the document that appears in the record at page 133.

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.

Record at 71.

Dated this 3rd day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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