

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE NEWENHAM, JR.,)

Plaintiff)

v.)

JO ANNE B. BARNHART,)
Commissioner of Social Security,)

Defendant)

Docket No. 03-165-B-W

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the questions whether the administrative law judge determined the appropriate residual functional capacity for the plaintiff and whether he properly evaluated the plaintiff’s testimony concerning pain. I recommend that the court affirm the decision of the commissioner.

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 an impairment or combination of

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 April 28, 2004, 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.

impairments that were severe but did not meet or equal any of those listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Findings 3-4, Record at 19; that the plaintiff’s allegations regarding his limitations were not totally credible, Finding 5, *id.*; that the plaintiff had the residual functional capacity for light work involving no reading or writing, Finding 7, *id.* at 20; that he was unable to perform any of his 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, use of Rule 202.23 from Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the “Grid”) as a framework for decisionmaking led to the conclusion that there were a significant number of jobs in the national economy that the plaintiff could perform, Findings 9-13, *id.*; 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.* 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 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 contends that “the ALJ has failed to demonstrate through affirmative evidence that the Plaintiff in fact would have the RFC indicated in his first and second hypothetical[.]” questions to the vocational expert. Statement of Specific Errors (Docket No. 6) at 4. He suggests, without citation to the record, that the third hypothetical question “most corresponds to the medical record.” *Id.* The administrative law judge’s first and second hypothetical questions to the vocational expert assumed the residual functional capacity “indicated in Exhibit 7F.” Record at 308-09. Exhibit 7F is a Physical Residual Functional Capacity Assessment form filled out by a non-examining state-agency consultant physician. Record at 238-45. The plaintiff agrees that this assessment represents a residual functional capacity for light work. Statement of Specific Errors at 1-2. The administrative law judge’s third hypothetical question to the vocational expert assumed all of the physical limitations to which the plaintiff testified; it did not refer to any medical evidence or assessment in the record. Record at 310.

The commissioner’s decision with respect to residual functional capacity may be based on the report of a non-examining medical professional when the record shows that the non-examining professional reviewed the records of treating and examining medical professionals with some care. *Berrios Lopez v. Secretary of Health & Human Servs.*, 951 F.2d 427, 431 (1st Cir. 1991). In this case, the record demonstrates that the non-examining physician did just that. Record at 245. In the complete absence of any citations to entries in the plaintiff’s medical records that are inconsistent with this physician’s

conclusions, the plaintiff cannot possibly be entitled to remand on the ground that the administrative law judge's assessment of his residual functional capacity lacks evidentiary support.

The plaintiff suggests that the administrative law judge's conclusion that his complaints of chest pain were not fully credible was in error because the physician who prepared Exhibit 7F "stated unambiguously that, 'The symptom(s) is attributable, in your judgment, to a medically determinable impairment.'" Statement of Specific Errors at 3. The physician did state that the plaintiff's medical records "support[] chest pain," Record at 243, but this statement is included in a report that establishes the very residual functional capacity adopted by the administrative law judge. Accordingly, the only possible conclusion is that this physician included chest pain as a factor in reaching his assessment, which was adopted by the administrative law judge. At oral argument, counsel for the plaintiff contended that the state-agency physician could not have had knowledge of the effect of the plaintiff's chest pain on the plaintiff's ability to perform work activities without examining him, so that the administrative law judge was required to give the plaintiff's testimony in that regard separate consideration. He cited no authority in support of this position. If this argument were a correct characterization of Social Security law and procedure, administrative law judges could not rely on most assessments by non-examining state-agency physicians, none of whom examine claimants. It is the plaintiff's responsibility to present all of the information he wishes to be considered to the commissioner; that includes the reasonable requirement that he present evidence of the effect of his claimed pain on his ability to perform basic work activities before the hearing is held. After all, hearings are not held in all cases. Social Security regulations and case law have long made evident the possibility that the commissioner may rely on assessments performed by physicians who do not examine the claimant, under certain delineated circumstances. The plaintiff's attempt to overturn this line of authority cannot succeed on the showing made.

The plaintiff argues that “this matter should be remanded . . . for further consideration and psychological testing based on the question of literacy,” Statement of Specific Errors at 4, but the administrative law judge “assumed [the plaintiff to be] illiterate,” Record at 18, and listed as jobs that the plaintiff could perform, *id.* at 19, those which the vocational expert testified would be available in response to the hypothetical question that assumed illiteracy, *id.* at 309-10. The plaintiff could not possibly gain anything by further consideration of “the question of literacy;” he was assumed to be functionally illiterate by the decision. At oral argument counsel for the plaintiff contended that he was pressing this argument to the extent that a residual functional capacity including the restriction that no reading or writing be involved in any jobs that the plaintiff could perform, as set forth in the administrative law judge’s opinion, *id.* at 20, “is not the same as functionally illiterate,” the term used in the hypothetical question posed to the vocational expert, *id.* at 309. However, he was unable to identify anything in the administrative record or any other authority to support a conclusion that the two terms did not address essentially the same condition. The plaintiff takes nothing by this argument.

Conclusion

For the foregoing reasons, I recommend that the commissioner’s decision be **AFFIRMED**.

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 30th day of April, 2004.

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

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