

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**WILLIAM McCALLISTER,** )  
 )  
 **Plaintiff** )  
 )  
 v. )  
 )  
 **JO ANNE B. BARNHART,** )  
 **Commissioner of Social Security,** )  
 )  
 **Defendant** )

**Docket No. 03-189-P-S**

**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 alleges inability to work as a result of chronic obstructive pulmonary disease (“COPD”), seizure disorder, depression and anxiety, and memory problems, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be affirmed.

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<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 August 20, 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.

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 medical evidence established that the plaintiff had COPD, epilepsy and an affective mood disorder, impairments that were severe but did not meet or equal any of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 3, Record at 17; that his statements concerning his impairments and their impact on his ability to work were not entirely credible, Finding 4, *id.*; that he lacked the residual functional capacity (“RFC”) to lift and carry more than twenty pounds or more than ten pounds on a regular basis, was able to stand and walk for up to forty-five minutes at a time for a total of four hours in an eight-hour workday, Finding 5, *id.*; that his capacity for the full range of light work was diminished by his inability to stoop more than occasionally, be exposed to temperature extremes, dust, fumes and chemicals or work at unprotected heights or around dangerous machinery, Finding 7, *id.* at 18; that he was able to understand and carry out simple instructions, with occasional detailed, non-complex instructions acceptable occasionally, *id.*; that although he was unable to perform the full range of light work, he was capable of making an adjustment to work existing in significant numbers in the national economy, Finding 11, *id.*; and that he therefore had not been under a disability at any time through the date of decision (February 21, 2003), Finding 12, *id.*<sup>2</sup> The Appeals Council declined to review the decision, *id.* at 6-7, 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).

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<sup>2</sup> Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through the date of decision, *see* Finding 1, Record at 17, there was no need to undertake a separate SSD analysis.

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 process, at which stage 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).

In addition, the plaintiff's statement of errors implicates another step in the decisional path: Step 3. At Step 3, 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(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).

In his statement of errors, the plaintiff enumerated six points of error, assailing the decision of the administrative law judge as: (i) contrary to the testimony of the vocational expert upon whom he purportedly relied, (ii) contrary to the medical evidence in omitting findings of memory lapses, seizures and cough syncope, (iii) relying on too few jobs at Step 5 to constitute significant numbers in the national economy, (iv) contrary to the medical evidence in finding an RFC for light work, (v) flawed in its credibility finding and (vi) affording inadequate consideration of the possibility that the plaintiff's condition met or equaled Listing 3.02. *See generally* Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 16). At oral argument, counsel for the plaintiff withdrew the fourth point of error, conceding its weakness, but continued to press the remaining five. For the reasons that follow, I find no reversible error.

## **I. Discussion**

### **A. Decision Contrary to Testimony of VE**

The plaintiff first complains that the administrative law judge ignored the "uncontroverted" testimony of the vocational expert, in response to a hypothetical question posed by his counsel, that a person with unpredictable seizures, memory lapses and cough syncope would be unable to perform the sole job proffered in response to the administrative law judge's hypothetical question, that of surveillance-system monitor. *See id.* at 2; Record at 74 (query to vocational expert whether an individual with "significant memory lapses and unpredictable seizure activity" and "possibly also episodes where he could actually pass out from coughing" could perform surveillance-system-monitor job).

Nonetheless, the vocational testimony as a whole was not "uncontroverted"; the vocational expert had opined that a person with the RFC ultimately found by the administrative law judge could perform the job of surveillance-system monitor. *Compare* Record at 71-73 *with id.* at 16. To the extent that the administrative law judge supportably determined RFC (which, as discussed below, I find that he did), he

permissibly credited the vocational-expert testimony elicited in response to his own hypothetical question. *See, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (responses of vocational expert are relevant only to extent offered in response to hypotheticals that correspond to medical evidence of record; “To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.”).<sup>3</sup> Thus, he committed no error in declining to accept vocational-expert testimony elicited in response to a hypothetical question that was contrary to the facts as he supportably found them.

### **B. RFC Contrary to Medical Evidence**

The plaintiff next asserts that the administrative law judge ignored or misconstrued the medical evidence concerning his claimed memory lapses, seizures and cough syncope (including treating-physician evidence), erroneously omitting all three conditions in posing his hypothetical question to the vocational expert. *See* Statement of Errors at 3-5. The administrative law judge’s decision, which (i) summarizes, but contains no reasoned analysis of, the evidence regarding the claimed seizures and cough syncope, *see* Record at 13-17, and (ii) minimizes the claimed memory loss largely on the basis of his own observations at hearing, *see id.* at 15-16 (“The claimant claims he suffers from memory loss, but could recall, when asked,

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<sup>3</sup> In this connection, the plaintiff further complains that the administrative law judge did not justify the fundamental premise that he could work an eight-hour day, noting that a Disability Determination Services (“DDS”) non-examining psychologist, Dr. Peter Allen, described him as “mentally capable of routine work for two-hour blocks of time, within his physical limits.” *See* Statement of Errors at 2; Record at 331. It is not clear whether Dr. Allen meant by this to suggest that the plaintiff was incapable of working an eight-hour day; however, even assuming *arguendo* that he did, the evidence on the point was conflicting, with another DDS non-examining psychologist, David R. Houston, Ph.D., noting no such limitation. *See* Record at 259-72. Thus, the administrative law judge committed no error in declining to embrace the limitation noted by Dr. Allen. *See, e.g., Rodriguez*, 647 F.2d at 222 (“The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.”).

events such as his children’s parent-teacher conferences or choral activities.’), leaves a great deal to be desired.

Nonetheless, counsel for the commissioner contended at oral argument, and I am persuaded, that the Record contains substantial evidence in support of the administrative law judge’s findings (express and implicit) discounting the claimed impact of these three conditions. Hence, there is no reversible error. *See, e.g., Bryant ex rel. Bryant v. Apfel*, 141 F.3d 1249, 1252 (8th Cir. 1998) (“We have often held that [a]n arguable deficiency in opinion-writing technique is not a sufficient reason for setting aside an administrative finding where . . . the deficiency probably ha[s] no practical effect on the outcome of the case.”) (citations and internal quotation marks omitted).

I discuss each of the three claimed conditions in turn:

1. Seizures. At oral argument, counsel for the plaintiff posited that the record as a whole, including a written statement provided by the plaintiff’s mother-in-law, corroborated his claim of unpredictable seizures. However, the plaintiff’s mother-in-law’s statement was provided on December 12, 2001. *See* Record at 155. Both the plaintiff and his wife acknowledged at hearing (held on January 2, 2003) that he had been placed on new medication that more effectively controlled his seizures, *see id.* at 52, 68 – an acknowledgement corroborated by the medical evidence of record, *see e.g., id.* at 312 (physical RFC assessment dated April 23, 2002 by DDS non-examining physician Iver C. Nielson, M.D., stating: “clmt [claimant] says sz [seizures] are not under control with Rx [treatment], however, med records state they are controlled”) (emphasis in original), 334-35 (neurologic reevaluation records covering the period from January through May 2002 – the most recent such records in evidence – noting that plaintiff had suffered a small seizure in January and three seizures in May after he had forgotten to take his medication), 341 (June 17, 2002 note of Lewis Golden, M.D., stating that plaintiff “claims that he is not having frequent

seizures now”).<sup>4</sup> Inasmuch as the Record supports a finding that the plaintiff’s seizures were well-controlled with his new medication, the administrative law judge committed no reversible error in omitting to factor seizure episodes into the plaintiff’s RFC or describe them to the vocational expert.

2. Cough Syncope. The plaintiff variously testified that he had “passed out many times from coughing” and that his coughing could cause him to get very dizzy, come close to passing out and a “few times . . . actually pass out.” *Compare id.* at 45 *with id.* at 48. Nonetheless, as counsel for the commissioner pointed out at oral argument, this claim finds little support in the medical evidence. The plaintiff’s counsel identified one medical record referencing the cough-syncope claim, *see* Statement of Errors at 5; however, that document mentions only occasional syncope and, in any event, takes the form of a recordation of the plaintiff’s subjective report rather than an observation or diagnosis, *see* Record at 196 (letter dated January 11, 2001 from Jonathan B. Zuckerman, M.D., to Susan Shaw, D.O., stating: “In addition, [plaintiff] has had a recurrent cough which on some occasions leads to posttussive emesis or syncope.”). The administrative law judge accordingly committed no reversible error in neglecting to factor cough syncope into either the plaintiff’s RFC or the hypothetical question he propounded to the vocational expert.

3. Memory Lapses. At hearing, the plaintiff testified that he suffered from memory lapses—for example, that he did not remember holidays, places he had been or events with his children. *See id.* at 51. The administrative law judge conducted his own test of the plaintiff’s memory, pressing him as to whether he remembered his children’s parent-teacher conferences and extracurricular events. *See id.* at 52-61. He then relied on his own hearing observations to discredit the claimed memory lapses, omitting any analysis of

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<sup>4</sup> The plaintiff’s wife also testified at hearing that he had suffered perhaps five or six seizures over the prior several (*continued on next page*)

a detailed neuropsychological assessment performed by Christine Barth Ramsay, Ph.D., on December 5, 2001. *See id.* at 15-16, 224-35. Arguably, assessment of whether the plaintiff actually suffered from memory lapses was beyond the ken of the administrative law judge, as a layperson. *See, e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (although an administrative law judge is not precluded from “rendering common-sense judgments about functional capacity based on medical findings,” he “is not qualified to assess residual functional capacity based on a bare medical record”).

Nonetheless, I am again persuaded that any error was harmless. Although Dr. Ramsay found that the plaintiff manifested “[d]ifficulties retrieving newly-learned information . . . with both verbal and visual information . . . more responsive to cueing in the visual domain,” and had “test results [that] appear to be consistent with mild focal deficits in skills typically localized to the left temporal area of the brain[.]” Record at 234, she placed his general intellectual functioning and his working memory in the “superior” to “high average” range, *see id.* at 230. In addition, two DDS non-examining psychologists, both of whom had the benefit of Dr. Ramsay’s report, omitted any mention of memory-lapse difficulties. Dr. Houston assessed the plaintiff as suffering from an organic mental disorder and an anxiety-related disorder that he judged non-severe, making no specific comment on memory lapses. *See id.* at 259-72 (Psychiatric Review Technique Form (“PRTF”) completed on January 11, 2002 by Dr. Houston). And Dr. Allen assessed the plaintiff as suffering from an affective disorder and an anxiety-related disorder that he considered severe, *see id.* at 315-28 (PRTF completed on May 7, 2002 by Dr. Allen), 329-32 (Mental Residual Functional Capacity

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months and “[i]t’s still unpredictable[.]” Record at 67-68; however, there is no medical evidence of record corroborating her testimony covering that time period.

Assessment completed on May 7, 2002 by Dr. Allen), but offered no comment about memory lapses other than to note Dr. Ramsay's finding: "working memory in superior range[,]" *id.* at 327.<sup>5</sup>

Any error committed in the course of the administrative law judge's consideration and discussion of the plaintiff's claimed memory lapses accordingly was harmless.

### **C. Numbers of Jobs Statewide Insufficient**

The plaintiff next posits that the existence of 376 jobs statewide is insufficient to constitute a significant number of jobs, for purposes of Step 5, either on its face or in this instance, given that the plaintiff was subject to driving limitations as a result of unpredictable seizures. *See* Statement of Errors at 5-6. The vocational expert testified that there were 372 surveillance-monitor jobs in Maine and 50,955 in the national economy. *See* Record at 72-73. Raw numbers in this ballpark have been found "significant." *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).

In assessing the significance of the number of jobs available to a claimant, it is indeed appropriate to factor in commuting difficulties when the claimant's condition makes it impossible, or extremely difficult, for him to commute. *See Lopez Diaz v. Secretary of Health, Educ. & Welfare*, 585 F.2d 1137, 1140 (1st

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<sup>5</sup> While Dr. Golden observed that "[t]he more striking symptomatology has been changes in [the plaintiff's] memory," (continued on next page)

Cir. 1978) (“When . . . the claimant asserts that his locomotive disabilities render it impossible, or extremely difficult, for him to physically move his body from home to work, the claim, it seems to us, is of a different nature. His ‘commuting problems’ are no longer extrinsic to his disabilities; they are a direct consequence of them.”). However, in this case, the plaintiff acknowledged at hearing that no restriction has been placed upon his driver’s license and that he does still drive occasionally. *See* Record at 40-43. At oral argument, counsel for the plaintiff argued that, at the least, his fear of driving should be taken into account. However, a simple fear of driving – as opposed, perhaps, to a diagnosed phobia – clearly is not the type of commuting barrier contemplated by the First Circuit in *Lopez Diaz*.

#### **D. Credibility Determination Flawed**

The plaintiff next contends that the administrative law judge’s credibility finding is unsupported by substantial evidence. *See* Statement of Errors at 7-9. I find no reversible error. The administrative law judge, observed, in relevant part:

The claimant testified that he stopped work, not due to medical reasons, but because he supposedly owed back child support and the State was going to garnish his entire paycheck. The claimant’s driver’s license has no restrictions on it as one would expect with a seizure disorder. The claimant testified that he does very little driving. The claimant claims he suffers from memory loss, but could recall, when asked, events such as his children’s parent-teacher conferences or choral activities. Overall, the claimant’s responses while testifying were evasive and vague at times and left the impression that the claimant may have been less than entirely candid.

Record at 15-16. The plaintiff takes particular issue with the findings regarding his claimed memory lapses and his reasons for stopping work. *See* Statement of Errors at 8-9. However, his testimony, particularly in the context of the discussion of his memory of school and other events, fairly can be characterized as vague

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Record at 173, he noted: “He says that he has very little trouble remembering things day to day and that his daily routine is not difficult for him to accomplish. However, he does have isolated periods of decreased memory[,]” *id.* at 173-74.

or evasive, *see, e.g., id.* at 53-55 (colloquy between plaintiff and administrative law judge regarding his memory of his attendance at his children’s parent-teacher conferences), and the administrative law judge’s finding that he stopped work not as a result of medical reasons but for fear that the State would garnish his paycheck is, on the whole, accurate, *see id.* at 24-27.<sup>6</sup> I therefore discern no basis on which to disturb the administrative law judge’s credibility finding. *See Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) (“The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.”).

### **E. Step 3 Finding Erroneous**

In his Statement of Errors, the plaintiff contended that the administrative law judge erred in failing to find that his impairments met or equaled Listing 3.02. *See* Statement of Errors at 9-10. At oral argument, his counsel conceded that his COPD did not meet Listing 3.02 given his FEV<sub>1</sub> of 1.7, *see id.* at 9; Record at 343, and his height of between five feet, nine-and-half and five feet, ten inches tall, *see* Record at 34. *Compare* Listing 3.02(A) (person who is sixty-eight to sixty-nine inches tall must have an FEV<sub>1</sub> equal to or less than 1.45, while a person who is seventy to seventy-one inches tall must have an FEV<sub>1</sub> equal to or less than 1.55, to meet relevant portion of Listing (pertaining to COPD)).

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<sup>6</sup> As the plaintiff points out, *see* Statement of Errors at 8-9, he testified that a child-support battle with the State caused him to stop working as a taxi driver in approximately 1998 (initially because the State took away his driver’s license and later because he feared wage garnishment) but that he did not return to work once the matter was resolved in his favor because by May 2000 (his claimed date of onset) he had become too sick to do so, *see* Record at 24-27, 30-33. Still, the administrative law judge reasonably found that the plaintiff’s non-disability related reasons for stopping work raised a red flag as to whether he subsequently was unable to resume work as a result of disability. *See, e.g.*, Record at 27 (comment by administrative law judge that “I’m a little worried about a guy who will just stop working altogether even though they can work.”).

Nonetheless, his counsel contended at oral argument that insufficient attention was devoted to the possibility that his impairments may have equaled the Listing, a proposition for which she cited Social Security Ruling 96-6p (“SSR 96-6p”). SSR 96-6p provides, in relevant part:

[A]n administrative law judge and the Appeals Council must obtain an updated medical opinion from a medical expert [regarding the issue of equivalence to a Listing] in the following circumstances:

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- ? When additional medical evidence is received that in the opinion of the administrative law judge or the Appeals Council may change the State agency medical or psychological consultant’s finding that the impairment(s) is not equivalent in severity to any impairment in the Listing of Impairments.

SSR 96-9p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2004), at 131-32. The plaintiff’s counsel pointed out that subsequent to completion of RFC assessments by two DDS medical experts (Dr. Nielson and Robert Hayes, D.O.), the plaintiff was re-tested by Dr. Golden, who reported a worsening of his condition. *See* Record at 251-58 (RFC assessment by Dr. Hayes dated January 10, 2002), 307-14 (RFC assessment by Dr. Nielson dated April 23, 2002), 343 (progress note by Dr. Golden dated July 2, 2002).

I am unpersuaded. In his July 2, 2002 progress note, Dr. Golden wrote, in relevant part:

[The plaintiff] came back mostly to review his cigarette smoking and repeat pulmonary functions. Unfortunately, he has continued to lose pulmonary function. His FEV<sub>1</sub> and vital capacity both dropped somewhat in the last year compatible with the accelerated rate of cigarette smoking. His FEV<sub>1</sub> is 1.7 which is 45% of predicted. I have spoken to him about this and that the prognosis for him having independent living without daily and habitual symptoms within 5 years is very small. He understands this and finds this frightening.

He feels like he is very committed to stopping smoking at this point.

*Id.* at 343. At oral argument, the plaintiff’s counsel made much of the fact that his test score in July 2002 was only forty-five percent of that predicted and that his prognosis for living symptom-free was noted at that

time to be small. Nonetheless, earlier testing that was available to the DDS physicians revealed similar low performance relative to the predicted level. *See, e.g., id.* at 165 (progress note dated June 19, 2001 by Dr. Golden reporting that plaintiff's ventilatory capacity was only forty-six percent of predicted),<sup>7</sup> 314 (notation by Dr. Nielson of DDS of same). And while the plaintiff's prognosis for living without daily and habitual symptoms within five years of the July 2002 visit was noted to be very small, the plaintiff was not reported at that time to be living with daily symptoms. Thus, I find no error in the administrative law judge's failure to obtain updated medical-expert opinion on the issue of Listing equivalence.

## II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner 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 26th day of August, 2004.

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

### Plaintiff

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<sup>7</sup> The Record indicates that "ventilatory capacity" refers to the FEV<sub>1</sub>. *See* Record at 166 (showing that plaintiff's FEV<sub>1</sub> of 1.82 recorded on June 19, 2001 was forty-six percent of predicted).

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V.

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