

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN MULHOLLAND,)	
)	
Plaintiff)	
)	
v.)	Civil No. 90-0237 B
)	
LOUIS W. SULLIVAN, M.D.,)	
Secretary, United States Department)	
of Health & Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION ¹

This Social Security Supplemental Security Income ("SSI") and Disability appeal raises the question whether substantial evidence supports the Secretary's finding that plaintiff John Mulholland retains the ability to perform a full range of sedentary work despite severe cardiopulmonary illnesses.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' ' 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the

¹ This action is properly brought under 42 U.S.C. ' ' 405(g), 1383(c)(3). The Secretary 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 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 24, 1991 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since December 31, 1985 and met disability insured status requirements as of that date, Findings 1-2, Record p. 16; that he "has severe cardiac and respiratory disease as well as mild arthralgias of unknown cause and a mild intellectual deficit" but does not have an impairment or combination of impairments that meets or equals the listings in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Finding 3, Record p. 16; that his allegations of pain and incapacity were "markedly exaggerated" and his testimony not credible, Finding 4, Record p. 16; that he "has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for inability to lift and carry more than 10 pounds, to perform jobs requiring complex mental processes and the need to avoid pulmonary irritants[.]" Finding 5, Record p. 16; that he was unable to perform past relevant work as a cook, Finding 6, Record p. 16; that his "residual functional capacity for the full range of sedentary work is reduced by the need to avoid pulmonary irritants[.]" Finding 7, Record p. 16; that the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the "Grid") would direct a conclusion of not disabled, Finding 11, Record p. 17; that the plaintiff's nonexertional limitations were not significant enough to alter the conclusion directed by the Grid, Finding 12, Record p. 17; and that accordingly the plaintiff was not disabled, Finding 13, Record p. 17. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the Secretary. 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 Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' ' 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the

conclusions 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).

Because the Secretary determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Secretary at Step Five to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. ' ' 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record therefore must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting his ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The plaintiff contends that the Secretary committed reversible error in (1) ignoring the side effects of his medications, *see* Statement of Specific Errors at 3-5, and in (2) posing a hypothetical question to the vocational expert that did not reflect the Secretary's own finding that the plaintiff needed to "avoid" pulmonary irritants, *see id.* at 5-6.

A. Side Effects of Medication

Prior to his hearing the plaintiff submitted a list of current medications, among them Flexeril three times daily to control muscle spasms. Record pp. 35, 502. He also testified that he was taking Tylenol with codeine twice a day. *Id.* p. 38. Asked about the side effects of his medications, he responded, "Well, it kind of like makes me sleepy. You know, I'm tired all the time." *Id.* p. 36. The plaintiff attributed his side-effect fatigue specifically to Flexeril. *Id.* pp. 36-37. He also testified that he tries to nap every day, although it was unclear from his testimony whether he does so because of pain or because of drowsiness caused by medications. *Id.* pp. 36-37, 39.

Under cross-examination, the medical adviser testified that an interaction between Flexeril and codeine "might" cause fatigue, stating, "Fatigue resulting from interaction between some of the six different medications might, might -- or has the potential for let's say the feeling of a need for a rest in the middle of the day." *Id.* p. 54. However, the medical adviser offered his opinion that this side effect would not interfere with sedentary work. *Id.* The vocational expert testified under cross-examination that drowsiness causing a worker to be off task and pace would cause "trouble" with unskilled sedentary work and that drowsiness requiring a nap during work hours would rule such work out. *Id.* p. 58.

The Secretary may not ignore the issue of the side effects of medication simply because the claimant's testimony comprises the only evidence of record that such side effects exist. *Figueroa v. Secretary of Health, Educ. & Welfare*, 585 F.2d 551, 553-54 (1st Cir. 1978). The Administrative Law Judge in this case did seek the help of experts, as recommended by *Figueroa*; however, the plaintiff argues that the medical adviser's testimony cannot constitute substantial evidence because the physician ventured out of his area of expertise in offering his gratuitous opinion that the side effect at issue would not preclude sedentary work. I disagree. At oral argument, counsel for the Secretary argued persuasively that the medical adviser remained within the bounds of his expertise in drawing conclusions as to the plaintiff's functional capacity based on his medical limitations. The medical adviser was familiar with, or at least informed of, the requirements of sedentary work. *See* Record p. 53. He was qualified to express an opinion on the impact of the side effects on sedentary work, just as he was qualified to assess the effect of medical limitations on capacity to lift, walk, etc. The Administrative Law Judge, in turn, acted within his province in apparently choosing to credit the testimony of the medical adviser and to discredit the testimony of the plaintiff and the vocational expert. *See, e.g., Ortiz v. Secretary*, 890 F.2d 520, 523 (1st Cir. 1989).

B. Hypothetical Question to Vocational Expert

The Administrative Law Judge found that, "[b]ecause of the claimant history of respiratory disease, it is advisable that he avoid pulmonary irritants, such as smoke, fumes or gasses." Record p. 15; *see also* Finding 5, Record p. 16. The plaintiff complains that, given the necessity to "avoid" pulmonary irritants, the Administrative Law Judge erred in asking the vocational expert whether jobs were available for a person who could perform sedentary work in "a relatively clean atmosphere." Record pp. 56-57.

The word "avoid" means, *inter alia*, "to keep away from; stay clear of" *Webster's Third New International Dictionary* 151 (1981). I agree with the plaintiff that the hypothetical question did not accurately convey the Administrative Law Judge's own finding as to this particular nonexertional limitation. One conceivably could work in a "relatively clean atmosphere" in which contact with pulmonary irritants, such as co-workers' or customers' cigarette smoke, would not be avoided. The vocational expert's answer to the hypothetical therefore cannot be relied upon as substantial evidence of the insignificance of this limitation. *See, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) ("in order for a vocational expert's answer to a hypothetical question to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities.")

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for the proper assessment of whether the plaintiff's need to avoid pulmonary irritants significantly compromised his capacity to perform the full range of sedentary work.

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 at Portland, Maine this 1st day of August, 1991.

*David M. Cohen
United States Magistrate Judge*