

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>WAYNE WALLACE,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 93-145 B</b>
	)	
<b>DONNA E. SHALALA,</b>	)	
<b>Secretary of Health</b>	)	
<b>and Human Services,</b>	)	
	)	
<b>Defendant</b>	)	

**REPORT AND RECOMMENDED DECISION <sup>1</sup>**

This Social Security Supplemental Security Income and Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff can perform work of a light exertional level existing in significant numbers in the national economy. The plaintiff contends that the Administrative Law Judge, without the benefit of a medical assessment, improperly concluded that he retains the residual functional capacity for light work.

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 Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since October 20, 1986, Finding 1, Record p. 16; that he met disability insured

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<sup>1</sup> This action is properly brought under 42 U.S.C. 405(g) and 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 26, 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 December 14, 1993 pursuant to Local Rule 26(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.

status requirements as of that date, but continued to meet those requirements only through the close of 1986, Finding 2, Record p. 16; that prior to the close of 1986 he suffered from "very minimal, early bulging of the L-3/L-4 and the L-4/L-5 intervertebral discs" and "a herniated intervertebral disc at the lumbosacral level centrally and to the right, displacing the right S-1 nerve root posteriorally." Finding 3, Record p. 16; that he does not have an impairment or combination of impairments which meets or equals any listed in Appendix 1 to Subpart P, 20 C.F.R. 404 (the "Listings"), Finding 4, Record p. 17; that prior to the close of 1986 he lacked the residual functional capacity to return to his past relevant work, which involved medium to heavy exertional levels, Finding 9, Record p. 17; that prior to the close of 1986 he was limited to work activity of a light exertional level with the added restrictions that he was "capable of no more than occasional climbing, balancing, stooping, bending, kneeling, crouching, and crawling." Finding 7, Record p. 17; that the plaintiff's allegations about his functional limitations were "out of proportion to the relatively minimal objective medical evidence, not fully credible to the extent alleged, and inconsistent with his described activities of daily living." Finding 8, Record p. 17; that prior to the close of 1986 he possessed the capacity to perform the job of watchman (I), a position which exists in significant numbers in the regional and national economy, Finding 11, Record pp. 17-18; and that he therefore was not disabled, Finding 12, Record p. 18. The Appeals Council declined to review the decision, Record pp. 3-4, 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 of the evaluative process to show the plaintiff's ability to do other work in the national economy. 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 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 claims that he injured his lower back on October 20, 1986. Record p. 83. He first sought medical treatment on October 29, 1986 at the emergency room of a local hospital. *Id.* at 111. There he was diagnosed as suffering from a lower back strain. *Id.* An x-ray of his spine showed "[e]arly narrowing of the lumbosacral interspace" and "lumbar muscle spasm." *Id.* at 112. The treating physician recommended bedrest on a firm mattress, hot soaks and massages, no work for three days and prescription medications (Valium and Motrin). *Id.* at 111. On November 12, 1986 the plaintiff returned to the emergency room. Record p. 110. He complained that his symptoms had been getting worse. *Id.* He admitted that he had not followed up with his family doctor, as previously instructed. *Id.*; *see id.* at 111. On examination, the plaintiff displayed a poor ability to walk on his toes. *Id.* at 110. He also displayed radicular symptoms in the back of his right thigh. *Id.* The treating physician diagnosed the plaintiff's condition as right sciatica, mild in degree, resulting from a ruptured disc. *Id.* He was instructed to take his medications as directed, continue his bedrest and follow-up with his family doctor by the next day. *Id.* Medical records of any follow-up visits do not appear in the record. The next documented medical treatment the plaintiff received was a CT scan of his lumbar spine on February 13, 1987. *Id.* at 113. The CT scan showed "very minimal early bulges of L3-L4 and L4-L5 discs" and "[a] herniated intervertebral disc at L5-

S1." *Id.*

Since his CT scan in February 1987, the plaintiff has received no medical treatment for his back condition, at least none that I can glean from the present record. Although he has not obtained medical treatment for over five years, the plaintiff testified at the administrative hearing that his back causes him constant, numbing pain. Record p. 39, 44. The plaintiff currently takes no pain medication for his back, however, other than an occasional aspirin or over-the-counter back pill. *Id.* at 45. He stated that he can tolerate the pain so long as he avoids strenuous work or significant postural movements. *Id.* at 41-42. He claims that he must lie down after doing any strenuous activity. *Id.* at 49, 53. The plaintiff testified that his back is relatively the same today as it was at the end of 1986 and that the pain has not become any worse since then. *Id.* at 26, 39, 103.

Based on the descriptions of his daily activities and physical capabilities, all of which related back to 1986, *see id.*, the Administrative Law Judge concluded that, despite his back impairment, prior to the close of 1986 the plaintiff was able to perform the exertional requirements of light work except for limitations on climbing, balancing, stooping, bending, kneeling, crouching and crawling, *id.* at 14. The Administrative Law Judge posed a hypothetical to a vocational expert, Sharon Greenleaf, containing these postural restrictions. *Id.* at 56. Although stating that these restrictions would significantly limit the job base of available light work, the vocational expert testified that the plaintiff could work as a messenger or watchman (I) given those restrictions. *Id.* at 57. The vocational expert testified that these jobs existed in various numbers in the local, regional and national economies.<sup>2</sup> *Id.* Finding that the job of watchman (I) existed in significant numbers, the Administrative Law Judge thus concluded that the plaintiff was not disabled prior to the close of 1986. *Id.* at 15.

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<sup>2</sup> Specifically, the vocational expert testified that the job of messenger had 40 positions in Maine, 500 in New England and 5,000 in the entire nation. Record p. 57. She also testified that the job of watchman (I) had 250 positions in Maine, 5,000 in New England and about 10,000 in the entire nation. *Id.* The Administrative Law Judge concluded that the job of watchman (I) existed in significant numbers in the regional and national economies. Finding 11, Record p. 17-18. The plaintiff does not dispute this finding.

The plaintiff claims that the Administrative Law Judge improperly concluded that he retains the residual functional capacity to perform a range of light work. Specifically, the plaintiff contends that the Administrative Law Judge impermissibly assigned a residual functional capacity of light work based on his interpretation of the raw medical data. The plaintiff also asserts that the Administrative Law Judge inappropriately rejected his allegations of pain, given the lack of any affirmative evidence contradicting his testimony.

The regulations promulgated by the Secretary define "light work" as follows:

*Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing or pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. 404.1567(b), 416.967(b). In Social Security Ruling 83-10, the Secretary further refined the definition of light work:

"Frequent" means occurring from one-third to two-thirds of the time. Since frequent lifting or carrying requires being on one's feet up to two-thirds of a workday, the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time. The lifting requirement for the majority of light jobs can be accomplished with occasional, rather than frequent, stooping. Many unskilled light jobs are performed primarily in one location, with the ability to stand being more critical than the ability to walk.

Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, at 29 (1992). In short, the full range of light work requires an ability to stand or walk for about six hours out of an eight-hour workday, occasional lifting of twenty pounds, frequent lifting of ten pounds and

occasional stooping. *Id.*

The United States Court of Appeals for the First Circuit has made clear that an administrative law judge, as a lay person, is not qualified to assess a claimant's residual functional capacity based on a bare medical record. *See, e.g., Perez v. Secretary of Health & Human Servs.*, 958 F.2d 445, 446 (1st Cir. 1991); *Berrios Lopez v. Secretary of Health & Human Servs.*, 951 F.2d 427, 430 (1st Cir. 1991); *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990). In such a situation, the Secretary must obtain an assessment from a physician casting the medical findings in functional terms. *Perez*, 958 F.2d at 446; *Gordils*, 921 F.2d at 329. This requirement does not mean, however, that the an administrative law judge ``is precluded from rendering common-sense judgments about functional capacity based on medical findings, as long as the [administrative law judge] does not overstep the bounds of a lay person's competence and render a medical judgment." *Gordils*, 921 F.2d at 329. An administrative law judge does not overstep the bounds of lay competence so long as his assessment of functional ability does not extend beyond a consideration of the rather modest physical requirements for sedentary work. *See id.* Because of its more demanding exertional requirements, an administrative law judge may not exercise his lay judgment as to a claimant's residual functional capacity for light work and above. *See id.*

Contrary to the plaintiff's assertion, this is not a case where the Administrative Law Judge improperly determined that the plaintiff retained the residual functional capacity for light work based on medical findings. True, the Secretary never obtained a medical assessment of the plaintiff's residual functional capacity.<sup>3</sup> A medical assessment of residual functional capacity is unnecessary, however, when, as here, the claimant testifies or acknowledges that he possesses the

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<sup>3</sup> Given the paucity of medical evidence surrounding the plaintiff's back injury, a medical assessment of the plaintiff's condition for the relevant time period was impossible. *See, e.g.,* Record p. 109. The only medical reference related to work is the plaintiff's assertion that his family physician advised him to avoid strenuous work. *Id.* at 86.

physical capabilities to perform the exertional requirements of a given range of work. *See* 20 C.F.R. 404.1545(a), 416.945(a). Thus, despite the absence of a medical assessment of residual functional capacity, the plaintiff's extensive accounts of his physical capabilities and activities permitted the Administrative Law Judge to infer that he could meet the exertional requirements of light work. *See* Record pp. 13-14, 16.

First, the plaintiff testified to exertional capabilities sufficient to satisfy the minimum requirements for the light category of work.<sup>4</sup> He stated that he could probably lift twenty pounds, having recently lifted a fifteen to twenty pound VCR. *Id.* at 48. He has no problem lifting a gallon of milk. *Id.* He can probably stand or walk for up to forty-five minutes at a time, although he has more problems with standing than with walking. *Id.* at 46. He can sit an hour or more before he has to get up and walk around. *Id.* at 47. He could probably sit for one hour and stand up for five minutes and sit for an hour again, without any strenuous activity. *Id.* at 51. He could probably repeat that process three to four times a day. *Id.* Though a close call, these exertional capabilities, plus simple math, probably suffice to meet the minimum requirements of light work. 20 C.F.R. 404.1567(b), 416.967(b); Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, at 29 (1992).

When read in conjunction with the descriptions of his daily activities, however, the record conclusively supports a determination that the plaintiff retained the exertional capabilities to perform a range of light work. In his written opinion the Administrative Law Judge recounted the litany of physical activities the plaintiff stated he could perform despite his back condition. Record p. 16. The plaintiff testified that he can remain active for up to four hours. *Id.* at 27. He can rake, shovel and mow the lawn. *Id.* at 27, 35. He takes the trash to the dump. *Id.* at 35. He can put up

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<sup>4</sup> I note that light work is defined in terms of a range of work. 20 C.F.R. 404.1567(b), 416.967(b); Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, at 29 (1992). The regulations and rulings set forth the requirements for a full or wide range of light work, as opposed to a medium or average range. *See id.*

plastic windows in the fall. *Id.* He paints around the windows and does other repairs or chores around the house. *Id.* at 32, 36. He changes the oil and greases his car. *Id.* at 42. He goes for walks and fishes. *Id.* at 33, 34. He can drive fifty miles at a stretch. *Id.* at 34. Together with his asserted physical capabilities, the plaintiff's own accounts of his daily activities support a finding that he retains the exertional capability to perform light work except for frequent climbing, balancing, stooping, bending, kneeling, crouching and crawling.<sup>5</sup> Although the assistance of a medical expert in making this determination would have been preferred, viewing the evidence in its totality, I conclude that the Administrative Law Judge's residual functional capacity finding is nevertheless supported by substantial evidence.

As for limitations stemming from pain, *see* 20 C.F.R. 404.1569a, 416.969a, the plaintiff stated that back pain is the main limitation on what he can do on a daily basis. Record p. 39. He testified that his back pain requires him to lie down every afternoon when he does something "strenuous" in the morning. *Id.* at 53-54. He described the pain as a constant five to six on an increasing scale of one to ten. *Id.* at 44. He reported that his back aches day and night, seven days a week. *Id.* at 103.

The Administrative Law Judge rejected the plaintiff's allegations that the pain was as limiting as he described and that it forced him to lie down every afternoon. Record pp. 14, 16. The Administrative Law Judge found that his allegations of debilitating pain were inconsistent with his described daily activities. Finding 8, Record p. 17. Additionally, relying on the absence of medical treatment and a need for pain medication, the Administrative Law Judge determined that his claim that he needs to lie down every afternoon was implausible. Record p. 14.

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<sup>5</sup> The plaintiff asserted that he would have problems with bending or climbing or other postural manipulations. Record pp. 32, 42, 44-45, 54, 105. For instance, he stated that he cannot bend or move around like he used to. *Id.* at 103, 105. He did indicate, however, that he could do some bending and moving, as long as he did not do "a [w]hole lot at one time." *Id.* at 103. Crediting this testimony, the Administrative Law Judge accounted for these limitations and restricted the plaintiff's range of work accordingly, that is, work involving "no more than occasional climbing, balancing, stooping, bending, kneeling, crouching, and crawling." Finding 7, Record p. 17.

The Secretary, and not the courts, bears the responsibility for determining issues of credibility, drawing inferences from the evidence of record and resolving conflicts in the evidence. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). An administrative law judge is free to find that a claimant's testimony regarding his pain is not credible. *Da Rosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986). Failure to seek medical treatment is relevant "evidence" an administrative law judge may consider when evaluating the credibility of a claimant's pain allegations. *Irlanda Ortiz*, 955 F.2d at 769; 20 C.F.R.

404.1529(c)(3)(v), 416.929(c)(3)(v). When supported with specific findings, an administrative law judge's determination that a claimant's subjective complaints of pain are not credible is entitled to deference where the administrative law judge observed the claimant, evaluated his demeanor and considered how that testimony fit in with the rest of the evidence. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

I conclude that the Administrative Law Judge's determination that the plaintiff's subjective allegations of pain were not fully credible is supported by substantial evidence. Though the plaintiff suffers from an objective medical impairment that can reasonably be expected to produce pain, *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986), the record contains sufficient evidence from which the Administrative Law Judge, as was his prerogative, could properly infer that the plaintiff's subjective allegations were not credible. For example, despite complaints of constant pain, the plaintiff had not sought medical treatment for his back for almost five years by the time of the hearing. Indeed, the record in this case has only four pages of medical history relating to his back impairment. Record pp. 110-13. Moreover, the plaintiff has no sustained need for pain medication, prescription or otherwise. *Id.* at 45. Additionally, as the Administrative Law Judge found, the plaintiff's extensive accounts of his physical activities are inconsistent with his complaints of constant pain that forces him to lie down every afternoon. *Id.* at 15-16.

Finally, the plaintiff himself acknowledged that the pain is not as debilitating as he would like the Secretary to believe. He conceded that he could work with the pain that he currently experiences. *Id.* at 45. He also said that he is used to the pain and can ignore it. *Id.* at 53. As for the need to lie down, he testified that he could probably go through five days without lying down in the afternoon if he avoided strenuous activity in the morning. *Id.* at 54. In light of all the evidence, therefore, I conclude that the record contains substantial evidence from which the Administrative Law Judge, in his discretion, could determine that the plaintiff's pain was not as limiting as described and that his asserted need to lie down was implausible.<sup>6</sup>

In summary, I find that the record contains substantial evidence to support the Administrative Law Judge's determination that prior to the close of 1986 the plaintiff possessed the residual functional capacity to perform a range of light work except for no more than occasional climbing, balancing, stooping, bending, kneeling, crouching, and crawling. Additionally, I find that the record contains substantial evidence to support the Administrative Law Judge's determinations discounting the plaintiff's pain complaints and rejecting his asserted need to lie down. For the foregoing reasons, I thus recommend that the Secretary's decision be **AFFIRMED**.

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<sup>6</sup> The vocational expert testified that the plaintiff would not be able to perform any jobs, including the watchman or messenger jobs, if he was forced to lie down every afternoon. Record pp. 57-58. As the plaintiff pointed out at oral argument, if we credit the plaintiff's testimony, there are no jobs which the plaintiff can perform according to the vocational expert. However, the Administrative Law Judge specifically rejected the assertion that the plaintiff needs to lie down daily. As set forth above, the Administrative Law Judge's decision in this regard is supported by substantial evidence. Because the Administrative Law Judge rejected the plaintiff's asserted need to lie down, the vocational testimony on that matter is impertinent to the disability determination in this case.

**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 17th day of December, 1993.**

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**David M. Cohen  
United States Magistrate Judge**