

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEVEN JUDKINS,)	
)	
Plaintiff)	
)	
v.)	Civil No. 93-48 B
)	
DONNA E. SHALALA,)	
Secretary of Health)	
and Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION ¹

This Social Security Supplemental Security Income and Disability appeal raises the question whether substantial evidence supports the Secretary's findings that the plaintiff's back impairment does not restrict him from performing a full or wide range of sedentary work available in the national economy and that application of the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. 404 (the "Grid"), directs a conclusion that he is not disabled. The plaintiff alleges that the Secretary erred in failing to consider objective medical evidence when evaluating his subjective complaints of disabling pain and in discrediting his allegations of pain based upon his failure to seek medical treatment.

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) 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 October 22, 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.

administrative law judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since May 10, 1987 and met disability insured status requirements as of that date, Findings 1-2, Record p. 25; that he has a back impairment stemming from marked degenerative disc disease at the L-4/L-5 level of his spine but 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"), Findings 3-4, Record p. 25; that he is unable to perform his past relevant work, Finding 8, Record p. 25; that he has the residual functional capacity to perform at least a full or wide range of sedentary work, Finding 5, Record p. 25; that, "[t]o the extent [his] allegations regarding the pain he experiences and his functional limitations indicate that he regards himself as incapable of performing a full or wide range of sedentary work activity, those allegations are found to be greatly out of proportion to the minimal objective medical evidence in [the] record, and not fully credible to the extent alleged," Finding 10, Record p. 26; and that, based on an exertional capacity for sedentary work, his age (35), education (ninth grade) and vocational background (semi-skilled, non-transferrable), application of Rule 201.25 of the Grid directs a finding that he is not disabled, Findings 6-9, 11-12, Record pp. 25-26. The Appeals Council declined to review the decision, Record pp. 4-5, 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 and Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The plaintiff suffers from marked degenerative disc disease at the L4/L5 level of his spine. Record p. 18, 142. Since 1984, he has undergone two back surgeries for problems with his L4/L5 vertebrae. *Id.* at 130. First, on July 15, 1984, the plaintiff underwent chemonucleolysis² to treat a ruptured disc. *Id.* On May 10, 1987, after having fallen down some stairs at work, he underwent a lumbar laminectomy to repair a ruptured disc, again at the L4/L5 level. *Id.* at 44, 132.

The plaintiff testified that he has a very limited ability to sit, stand or walk for prolonged periods due to severe lower back pain. *See* Record p. 39-42. He stated that he cannot lift anything without experiencing pain. *Id.* at 39. He asserted that this back pain is what currently prevents him from returning to work. *Id.* He testified that he is unable to perform any chores around the house. *Id.* at 48. The plaintiff rated his back pain as fluctuating between a five and a nine on an increasing scale from one to ten. *Id.* at 51. The plaintiff takes a hot bath every day to help ease the pain in his back. *Id.* at 45. Apparently, non-prescription pain medications do not help relieve the pain. *Id.* at 21. The plaintiff testified that the pain prevents him from sleeping undisturbed and interferes with his ability to pay attention. *Id.* at 46, 51-52. He stated that he needs to use a cane when he goes upstairs. *Id.* at 47.

Despite the plaintiff's testimony as to his physical limitations, the Administrative Law Judge

² Chemonucleolysis is a procedure which involves the injection of a dissolving enzyme into the herniated disc. *See Taber's Cyclopedic Medical Dictionary* 272 (14th ed. 1981).

concluded that he was capable of performing a full or wide range of sedentary work and, by application of the Grid, deemed not disabled.³ Record p. 23-24. In determining that the plaintiff retained a residual functional capacity to perform a wide range of sedentary work, the Administrative Law Judge rejected his testimony as to pain and physical limitations on two grounds. First, he ruled that "[t]here is very little objective medical evidence in this record to support his subjective complaints." Record at 21. Second, he concluded that the plaintiff's "allegations are not credible to anywhere near the extent alleged." *Id.* at 23. The plaintiff alleges that the Administrative Law Judge erred in making both these determinations. I will deal with each of them in turn.

Objective Medical Evidence

The Administrative Law Judge noted that the plaintiff's complaints of pain were "unsupported by objective medical data." Record p. 23. He cited to the report of Carl W. Irwin, M.D., a neurological surgeon, who conducted a consultative examination of the plaintiff in October 1991. *Id.* at 21. Based upon his clinical examination, Dr. Irwin observed that the plaintiff's alleged degree of incapacity was unsupported by the physical findings. *Id.* at 141. His concluding comments read in full as follows:

X-rays of the lumbar spine are being obtained and that report will be appended. Although this claimant alleges profound functional impairment, I find nothing on examination to really support this degree of incapacity. While not denying he has some pain, this does not seem to be manifested in the usual ways, and there's certainly no muscle spasm except when he is required to carry out bending. He has indicated his own functional impairments above, but I can really not state that these functional limitations are confirmed by his physical findings at the present time.

³ A vocational expert testified that there were significant numbers of sedentary jobs the plaintiff could perform that would allow him to stand up every half hour to stretch. *See Thomas v. Secretary of Health & Human Servs.*, 659 F.2d 8, 10-11 (1st Cir. 1981) (plaintiff able to perform sedentary work even though must stand briefly every half hour).

Id.

Subsequent to Dr. Irwin's clinical examination and report, however, the x-ray examination of the plaintiff's lumbar spine was completed. *See* Record p. 142. The radiologist's report concluded that the plaintiff suffered from "marked degenerative disc disease at L4 5." *Id.* The report notes that "[t]here is moderate narrowing at L4 5 of the disc space with associated sclerosis of the endplates and mild spondylotic lipping anteriorly." *Id.* Dr. Irwin's report makes no mention of the radiologist's findings, as his examination was apparently completed one day prior to the authentication of the x-rays. *See id.* at 139, 142 (compare dates).

The Secretary is required to consider all of a claimant's symptoms, including pain, when determining whether a claimant is disabled. 20 C.F.R. 404.1529(a), 416.929(a). In assessing whether pain restricts a claimant's ability to work, the Secretary must first determine whether there is a medically determinable physical impairment that could reasonably be expected to produce the pain. 42 U.S.C. 423(d)(5)(A); *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986); Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 653 (1992). When a claimant has such an impairment, the administrative law judge must then give full consideration to all of the available objective medical evidence that reflects on the impairment to evaluate the degree of functional limitation caused by pain. 42 U.S.C. 423(d)(5)(A); *Avery*, 797 F.2d at 21, 23; 20 C.F.R. 404.1529(c)(2), 416.929(c)(2); Social Security Ruling 88-13 at 655. Such objective medical evidence consists, in part, of laboratory findings like x-rays. 20 C.F.R. 404.1528(c), 416.928(c).

In rejecting the plaintiff's complaints of disabling pain, the Administrative Law Judge ruled that the objective medical evidence failed to support his allegations of severe, functional limitation. Record pp. 21, 23. In so ruling, the Administrative Law Judge relied on both the radiologist's report and Dr. Irwin's consultative examination report.⁴ *Id.* at 21-23. This is where the problem

⁴ The Administrative Law Judge also noted that there was no medical data relating to the plaintiff's alleged impairments for a period of more than four years after the date of the onset of his alleged disability. Record pp. 18-19. This issue will be addressed

lies. As the plaintiff argues, it is clear from Dr. Irwin's report that he did not have the opportunity to review the x-ray findings before drawing his conclusions. In his written opinion the Administrative Law Judge recounted the radiologist's findings and diagnosis before then discussing Dr. Irwin's clinical findings. *Id.* at 22. Despite the radiologist's opinion that the plaintiff suffered from marked degenerative disc disease, the Administrative Law Judge, referring to Dr. Irwin's clinical findings, concluded that the plaintiff's subjective complaints were "unsupported by objective medical data." *Id.* at 22-23. This he could not do. By concluding that the objective medical evidence failed to support the plaintiff's allegations of pain, the Administrative Law Judge necessarily rejected the radiologist's diagnosis as having no detracting impact on Dr. Irwin's clinical diagnosis. As a layperson, however, the Administrative Law Judge was not qualified to characterize the significance of the radiologist's report and diagnosis.⁵ See, e.g., *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 15 (1st Cir. 1986); *Figueroa v. Secretary of Health & Human Servs.*, 585 F.2d 551, 554 (1st Cir. 1978).

Because a full understanding of the radiologist's diagnosis is beyond the experience of a layperson, the Administrative Law Judge should have sought further medical evidence concerning its impact on the plaintiff's allegations of pain. See *Lugo*, 794 F.2d at 15; *Figueroa*, 585 F.2d at 554. Notably, the Secretary was unable to secure expert medical testimony for the plaintiff's hearing, as is the ordinary practice. See Record p. 33. In the absence of a medical expert, however, it was inappropriate for the Administrative Law Judge to make the medical judgment that there was no objective basis for the plaintiff's complaints of disabling pain based on the bare medical findings provided in the radiologist's report. See *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d

in the following section.

⁵ Notably, at oral argument counsel for the Secretary indicated his reluctance as a layperson to interpret the meaning of "marked" degenerative disc disease.

327, 329 (1st Cir. 1990); *Lugo*, 794 F.2d at 15. Accordingly, I conclude that the Secretary's finding of non-disability is not supported by substantial evidence.

Plaintiff's Credibility

In addition to his rulings on the objective medical evidence, the Administrative Law Judge also concluded that the plaintiff's allegations of disabling pain were "not credible to anywhere near the extent alleged." Record p. 23. In making this credibility determination, the Administrative Law Judge noted Dr. Irwin's clinical findings that suggested the plaintiff was exaggerating his symptoms. *Id.* at 24. Throughout his opinion the Administrative Law Judge also noted the conspicuous lack of medical evidence over the past four years describing the plaintiff's condition.

Id. at 18-19, 21, 22, 24. Specifically, he stated as follows:

I was not impressed with his credibility, and I am strongly inclined to doubt that his symptoms and functional limitations were as severe as he maintains they have been. Otherwise he would have sought and received considerable medical treatment during the period of time he maintains he was disabled, especially during the periods of his incarceration when treatment would have been available to him without charge.

Id. at 24.

It is the responsibility of the Secretary to determine issues of credibility, to draw inferences from the evidence of record and to resolve 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). This determination, however, must be supported by substantial evidence and the administrative law judge must make specific findings as to the relevant evidence in determining that the plaintiff's testimony is not credible. *Id.* 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).

Failure to seek medical treatment is relevant in 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). However, before an administrative law judge may rely on a claimant's failure to seek medical treatment to discredit allegations of pain, he or she should consider whether the claimant's stated reasons for not seeking medical treatment were justifiable. *Thompson v. Sullivan*, 987 F.2d 1482, 1490 (10th Cir. 1993); *see also* 20 C.F.R. 404.1530(b), 416.930(b) (claimant must follow prescribed treatment unless "good reason").

The Administrative Law Judge determined that the plaintiff's testimony concerning his pain and its resulting limitations was not credible. Record p. 24. This determination was properly based, in part, on the clinical findings of Dr. Irwin and the Administrative Law Judge's own observation and evaluation of the plaintiff's demeanor at the hearing. *Id.*; *see also id.* at 140 ("When he is aware that he is to be tested regarding mobility, there is immediate stiffness of his entire back, and he claims total immobility of the entire spine. This does not seem to be a logical finding in view of his general mobility cited, I also note that the record contains a number of other discrepancies and inconsistencies regarding the plaintiff's asserted limitations that could diminish his credibility. *See, e.g., id.* at 41-42, 105, 139, 152-53 (inconsistent allegations of limitations on plaintiff's ability to sit, stand and walk). The Administrative Law Judge, as the trier of fact, was certainly permitted to question the plaintiff's credibility based on such inconsistencies, as it appears he did. *Id.* at 21, 24.

In addition to the inconsistent evidence of record, however, the Administrative Law Judge also discredited the plaintiff's testimony on the basis of his failure to seek medical treatment during

the period of time he maintains he was disabled. *Id.* at 24. According to the Administrative Law Judge, if the plaintiff's symptoms were as severe as he maintained, he would have obtained medical treatment. *Id.* Although the plaintiff claimed that the reason he did not seek medical treatment was his inability to afford it, *id.* at 41, 49, 50, the Administrative Law Judge rejected this excuse as not credible, *id.* at 24. The Administrative Law Judge noted that the plaintiff made no attempt to secure medical treatment while he was incarcerated in 1987 and 1990 when such treatment would have been available without charge.⁶ *Id.* At the hearing, the plaintiff provided no explanation for his failure to request medical treatment for his symptoms while incarcerated when such treatment would have been provided for free. Indeed, the record indicates that the plaintiff did see his neurologist at least once while imprisoned after falling out of a bunk bed. *Id.* at 138. Although this is a close call, and I would have preferred a fuller development of the Administrative Law Judge's basis for rejecting the plaintiff's proffered excuse, I cannot say that his decision was unreasonable in the absence of any explanation by the plaintiff as to why he did not seek free medical treatment for his symptoms while incarcerated. Consequently, because the Administrative Law Judge properly relied on inconsistent evidence in the record to discount the plaintiff's allegations of disabling pain, as was his prerogative, I conclude that his determination that the plaintiff's testimony was not credible is supported by substantial evidence.

Conclusion

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions

⁶ The record indicates that the plaintiff was imprisoned for two months in 1987 and one year in 1990. Record pp. 53-54.

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 3rd day of November, 1993.

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