

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PAUL L. SILVER,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Civil No. 96-69-P-C</i>
)	
SHIRLEY S. CHATER,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises two issues: whether the Commissioner erred in finding that the plaintiff’s impairments did not meet or equal any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), and whether the Commissioner erred in determining that the plaintiff is capable of performing the full range of sedentary work, which led the Commissioner to conclude pursuant to Appendix 2 to Subpart B, 20 C.F.R. § 404 (the “Grid”) that the plaintiff is not disabled. The plaintiff contends that the Commissioner erred at Step Three of the evaluative process in finding that his

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 26, 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 December 9, 1996 pursuant to Local Rule 26(b) 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 do not meet the criteria of Listing 11.14, Peripheral Neuropathies,² and that the evidence does not support the Commissioner's finding at Step Five as to the plaintiff's residual functional capacity for sedentary work. I recommend that the court vacate the Commissioner's decision and remand the cause with directions to award benefits to the plaintiff.

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 met the disability insured requirements of the Social Security Act on December 27, 1990, the date he stated he became unable to work, but remained insured only through December 31, 1993, Finding 1, Record p. 28; that the medical evidence established that he had Charcot-Marie-Tooth disease and a lumbar strain, impairments that are severe but do not meet or equal the criteria of any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 3, Record p. 28; that his statements concerning his impairments and their impact on his ability to work were not credible, Finding 4, Record p. 28; that he lacked the residual functional capacity to lift and carry more than 15 pounds, stand or walk for prolonged periods, bend excessively, or pull or climb repeatedly, and that he was unable to perform his past relevant work, Findings 5-6, Record p. 29; that he had no significant non-exertional limitations, Finding 7, Record p. 29; and that, based on an exertional capacity for sedentary work, his age (34 at the time of hearing), his educational background (high school graduate) and his work experience, application of 20 C.F.R. § § 404.1569, 416.969, and §§ 201.28 and 201.29 of Table 1

² The Listing of Impairments, Appendix 1 to Subpart B, 20 C.F.R. § 404, describes physical and mental impairments in terms of specific medical criteria and functional limitations; if an impairment meets the requirements of any Listing, then it is considered to be disabling regardless of age, education or work experience. 20 C.F.R. §§ 404.1520(d), 404.1525(c), 416.920(d), 416.925(c).

to Appendix 2 of Subpart P of 20 C.F.R. § 404 directed a conclusion that the plaintiff was not disabled, Findings 8- 11, Record p. 29. The Appeals Council declined to review the decision, Record pp. 5-7, 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).

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 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).

The claimant carries the burden of proof at Step Three of the Commissioner's evaluative process. 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). In light of the finding unfavorable to the plaintiff at Step Three, and because the Commissioner also determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Commissioner at Step Five of the evaluative process to show the plaintiff's ability to perform 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 Commissioner'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).

Peripheral Neuropathy

The plaintiff first contends that the Commissioner erred at Step Three in finding that his impairments do not meet or equal Listing 11.14. This listing, concerning neurological impairments, provides: “*Peripheral neuropathies*. With disorganization of motor function as described in 11.04B, in spite of prescribed treatment.” Section 11.04B states: “Significant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C).” Section 11.00C notes that persistent disorganization of motor function

in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances (any or all of which may be due to . . . peripheral nerve dysfunction) which occur singly or in various combination, frequently provides the sole or partial basis for decision in cases of neurological impairment. The assessment of impairment depends on the degree of interference with locomotion and/or interference with the use of fingers, hands, and arms.

The plaintiff has Charcot-Marie-Tooth disease, which affects both of his feet. Record, pp. 24, 227. This hereditary disease causes peripheral neuropathy;³ it was diagnosed in the plaintiff in 1988. *Id.* at 226.

The plaintiff contends that the reports of T. Edward Collins, D.O., a neurologist to whom he was referred for consultation by George K. Gardner, D.O., his treating physician, *id.* at 192-99, and of the Maine Medical Center Muscular Dystrophy Clinic, *id.* at 211-220, establish that the Listing is met. Dr. Collins reported in December 1988 that the plaintiff had Charcot-Marie-Tooth disease,

³ Charcot-Marie-Tooth disease is defined as a progressive neural muscular atrophy characterized by progressive weakness of the distal muscles of the arms and feet. “The muscles atrophy, reflexes are lost, foot drop develops, and there is loss of cutaneous sensations.” *Taber’s Cyclopedic Medical Dictionary* 267 (14th ed. 1981). Ataxia is a failure or irregularity of muscular coordination. *Id.* at 135.

“an hereditary form of peripheral neuropathy,” and that “[b]ecause of the weakness and muscle atrophy associated with this, he may have altered muscle strength and biomechanics which could conceivably affect his low back pain.” *Id.* at 192. In March 1988 Dr. Collins reported that this “probable inherited neuropathy would affect his gait and lead to some postural instability.” *Id.* at 195. However, Dr. Collins also stated in December 1988, in his most recent report in the record, that “I think the management of his case should be that of light duty work, and I definitely feel he has some work capacity at this time.” *Id.* at 192. The Clinic report from December 1993 notes the plaintiff’s report that he has “decreased balance and has been falling recently.” *Id.* at 217. On his first visit to the Clinic, in August 1991, the plaintiff reported to an occupational therapist that he was having difficulty walking. *Id.* at 213. The Administrative Law Judge noted these reports, *id.* at 24, as well as that of Richard L. Needleman, M.D., an orthopedic surgeon who operated on the plaintiff’s right foot on May 24, 1994, *id.* at 233, who indicated on the Medical Assessment of Ability to Do Work-Related Activities (Physical) dated June 6, 1994 that the plaintiff’s ability to stand and walk were affected by his impairment, but did not complete the portion of the form indicating how many hours per day the plaintiff could stand or walk, *id.* at 239, 241. Dr. Needleman also noted on this form that the plaintiff could never climb, balance, stoop, crouch, kneel or crawl. *Id.* at 240-41.

Contrary to the position taken by the Commissioner at oral argument, section 11.00C of the Listings does not require that the claimant have paresis or paralysis. He may also meet the requirements of the Listing through ataxia, a failure of muscle coordination. Similarly, the Administrative Law Judge’s conclusion that the plaintiff did not meet the requirements of the Listing because “there is no evidence that . . . any treating or examining practitioner has alluded to any

ongoing impairment which significantly affects his ability to walk at least for brief periods of time,” Record p. 24, is an unduly restrictive reading of the regulation.⁴ However, the medical evidence cited by the plaintiff to this point does not constitute uncontroverted evidence that his impairment meets the Listing. Dr. Collins found the plaintiff capable of light work in 1988. The Clinic notes simply convey the plaintiff’s own reports of symptoms. Dr. Needleman’s reports do not address the Listing factors.

The plaintiff next urges this court to rely on the report of Richard L. Sullivan, M.D., a neurologist practicing with Dr. Collins, that was submitted to the Appeals Council with plaintiff’s argument by letter dated June 14, 1995. *Id.* at 12-13. Dr. Sullivan examined the plaintiff on May 1, 1995, some two months after the Administrative Law Judge’s decision was issued, and found the plaintiff to be “permanently and totally disabled in view of his significant impairment of motor and sensory function in the upper and lower extremities causing significant impairment in coordination, strength, and sensation,” *id.* at 10, and stating specifically that the plaintiff met the requirements of Listing 11.14, *id.* at 8. A handwritten note on Dr. Sullivan’s June 23, 1995 letter to the plaintiff’s counsel reads: “addendum: In my opinion he was disabled as of December 1993. R. L. Sullivan.” *Id.*

The Commissioner contends that this court may not consider the Sullivan report, because it was submitted to the Appeals Council after the Administrative Law Judge’s decision was issued and because the Appeals Council declined to review that decision, citing *Eads v. Secretary of Health & Human Servs.*, 983 F.2d 815 (7th Cir. 1993), in which that court construed 20 C.F.R. §§ 404.970 and

⁴ The Administrative Law Judge’s alternate basis for his conclusion concerning the Listing, that “there is no evidence that [the plaintiff] has required any post-surgical medical attention,” Record p. 24, is simply incorrect. See, *e.g.*, *id.* at 47-48, 57, 266-67.

416.1470 to allow a reviewing court to consider such evidence only when the Appeals Council has accepted the case for review and made a decision on the merits. *Id.* at 817. The five other circuits that have considered this issue do not agree. *Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996); *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994); *Keeton v. Department of Health & Human Servs.*, 21 F.3d 1064, 1067 (11th Cir. 1994); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993); *Cotton v. Sullivan*, 2 F.3d 692, 696 (6th Cir. 1993). I find the reasoning of the courts in the majority on this issue to be persuasive.

That does not end the inquiry, however. Dr. Sullivan's report may be considered, but only to the extent that "it relates to the period on or before the date of the administrative law judge hearing decision." 20 C.F.R. §§ 404.970(b); 416.1470(b). Dr. Sullivan examined the plaintiff after the date of the decision in this case, but his opinion extends retrospectively to December 1993, well before the date of the decision. Dr. Sullivan's specific opinion that the plaintiff meets the requirements of Listing 11.14, and that he met them as of December 1993, is uncontroverted in the record, supported by his findings, and may therefore not be disregarded. *Suarez v. Secretary of Health & Human Servs.*, 740 F.2d 1, 1 (1st Cir. 1984); 20 C.F.R. §§ 404.1527, 416.927.

Because the uncontroverted medical evidence establishes that the plaintiff's disorder met the definition in the Listing of Impairments for peripheral neuropathy, a remand with instructions for payment is required. *Suarez*, 740 F.2d at 2.

Sedentary Work

In the interest of completeness, I will address the plaintiff's claim concerning Step Five. The plaintiff contends that the Commissioner erred in determining that he could perform the full range

of sedentary work. The Commissioner's regulations define "sedentary work" as work that involves

lifting no more than 10 pounds at a time and occasionally lifting of carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. §§ 404.1567(a), 416.967(a). Sedentary work requires a capacity to sit for about six hours and to walk and stand for about two hours out of an eight-hour workday. Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, Rulings at 29 (1992).

The plaintiff testified that his arms and hands shake constantly, Record p. 39; that he can sit for 15 to 30 minutes before having to move due to low back pain, *id.* at 41; and that his walking "is real bad. I have the feeling going back to the pins, the shakiness, I'm unstable. It just feels like my legs are going to fall right off of me when I was walking," *id.* He "can't walk hardly at all without the crutches with this brace." *Id.* at 42. He thinks that he could not do a job working with his hands all day because "I would just be the same as I am right now, just constantly shake." *Id.* at 44-45. Dr. Gardner, the plaintiff's treating physician, stated in September 1994 that the plaintiff "would have difficulty on extended sitting." *Id.* at 269.

The Administrative Law Judge bases his finding that the plaintiff is capable of a full range of sedentary work on the statement of Dr. Gardner in February 1994 that the plaintiff can lift 15 pounds, *id.* at 221, and Dr. Needleman's checking of "NO" on the Medical Assessment of Ability to Do Work-Related Activities (Physical) Form in response to the question "Is sitting affected by the impairment?," *id.* at 240. The Administrative Law Judge discounted Dr. Gardner's later statement concerning the plaintiff's difficulty with sitting because it was not mentioned in his earlier report.

Id. at 26. The only evidence contradicting Dr. Gardner's statement concerning ability to sit for extended periods, a key element of sedentary work, *Thomas v. Secretary of Health & Human Servs.*, 659 F.2d 8, 10-11 (1st Cir. 1981), is Dr. Needleman's "statement." However, that statement concerns only the foot problems for which Dr. Needleman was treating the plaintiff, problems which could not be expected to affect his ability to sit. The Administrative Law Judge's reason for disregarding Dr. Gardner's statement regarding sitting capacity constitutes mere speculation which is unacceptable as the sole basis for a decision at Step 5. The Commissioner may not rely on a presumption of sitting ability sufficient to do sedentary work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

As noted above, the Commissioner has the burden of proof at Step Five to demonstrate that there are jobs in the national economy that the plaintiff can perform. The Grid is designed to enable the Commissioner to make this determination in a streamlined manner, without resort to testimony from a vocational expert, in appropriate circumstances. *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). The circumstances are not appropriate where, as is the case here, the evidence of non-exertional limitations indicates that such limitations are not *de minimis* regarding the plaintiff's ability to do sedentary work. *See Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994). The plaintiff's testimony regarding his hand tremors and his limited ability to sit is supported by uncontroverted medical evidence. Record pp. 180, 192, 195, 269. Resort to the Grid in this case was also inappropriate because a finding that the plaintiff is not disabled pursuant to sections 201.28 and 201.29 of the Grid requires substantial evidence that he is able to perform the full range of sedentary work. There is not substantial evidence in the record to support such a finding.

The Commissioner's decision in this case must be vacated, at either Step 3 or Step 5 of the sequential evaluation process. In accordance with *Suarez*, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff.

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 16th day of December, 1996.

David M. Cohen
United States Magistrate Judge