

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOSEPH VENTIMIGLIA,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 96-277-B
)	
JOHN J. CALLAHAN,)	
<i>Acting Commissioner of Social Security,¹</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION ²

This Social Security Disability (“SSD”) appeal raises several issues: whether the Commissioner erred in not requesting complete documentation from the physician and psychologist to whom the plaintiff was referred for consultative examination; whether the administrative law judge erred in finding the plaintiff’s testimony not entirely credible; whether the testimony of a vocational expert was required; and whether there is substantial evidence in the record supporting

¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security John J. Callahan is substituted as the defendant in this matter.

² This action is properly brought under 42 U.S.C. § 405(g). 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 June 23, 1997, 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.

the Commissioner's decision that the plaintiff has the residual functional capacity to perform a full range of work at the light exertional level. I recommend that the court affirm the decision of the Commissioner.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *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 had not engaged in substantial gainful activity since January 1, 1990, Finding 2, Record p. 59; that he has dorsolumbar dextroscoliosis, degenerative disc disease of the lumbosacral spine, a history of alcohol abuse, and an adjustment disorder with depressed mood, impairments that are severe but which do not meet or equal any of those listed in Appendix 1 to Subpart P, 202 C.F.R. § 404, Finding 3, Record p. 59; that his statements concerning his impairments and their impact on his ability to work are not entirely credible in light of his description of his daily activities, the degree of medical treatment required, and the reports of the treating and examining practitioners, Finding 4, Record p. 59; that he lacked the residual functional capacity to lift and carry more than 20 pounds, or more than 10 pounds on a regular basis, Finding 5, Record p. 59; that he was unable to perform his past relevant work, Finding 6, Record p. 59; that he had no significant non-exertional limitations which narrow the range of work he was capable of performing, Finding 7, Record p. 60; that, based on an exertional capacity for light work, his age, educational background and work experience, application of 20 C.F.R. § 404.1469 and Rules 202.13, 202.14 and 202.15 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") directs a conclusion that he is not disabled, noting that this conclusion would be reached without regard to the transferability of work skills, Finding 10, Record p. 60; and that, therefore, the plaintiff was not under a disability at any time prior to the administrative law judge's

decision on June 2, 1995, Finding 11, Record p. 60. The plaintiff submitted additional medical records to the Appeals Council, Record pp. 5-35,³ which declined to review the decision, Record pp. 3-4, making it the final determination of the Commissioner, 20 C.F.R. § 404.981; *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); *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).

I. The Consultants' Reports

Two consultants examined the plaintiff at the request of the state. Willard E. Millis, a psychologist, submitted a report dated October 28, 1994. Record at 156-59. David H. Starbuck, D.O., submitted a report dated December 2, 1994. *Id.* at 160-62. These reports, along with medical records submitted by the plaintiff, were reviewed by three medical consultants for the Commissioner who did not examine the plaintiff: Paul Brinkman, M.D., who completed a Residual Physical Functional Capacity Assessment form ("RFC form"), *id.* at 130-37; Peter G. Allen, Ph.D., who completed a Psychiatric Review Technique form ("PRTF"), *id.* at 139-46; and Darl R. Houston, Ph.D., who also completed the PRTF, *id.* at 147-54. The decision of the administrative law judge

³ While none of these records was apparently returned to the plaintiff's counsel in accordance with 20 C.F.R. § 404.976(b)(1), the chiropractors' records, Record at 23-33, clearly relate to a period after the date of the decision and therefore will not be considered by the court on this appeal.

refers only to the Millis and Starbuck reports.⁴

The plaintiff argues that he is entitled to remand and an award of benefits because these reports do not fully conform to the requirements of 20 C.F.R. § 404.1519n(c) and because the Commissioner did not request Millis to complete and file a PRTF, or Starbuck to complete and file an RFC form, requests which he asserts are required by 20 C.F.R. § 404.1519p(b). He argues that, had such forms been filed by the state consultants, the evidence in the record would have supported his subjective complaints of pain. Plaintiff's Itemized Statement of Specific Errors (Docket No. 3) at 5. Since the Millis report does not address the plaintiff's physical complaints, it is not likely that this consultant's completion of the review form would have added anything to the administrative law judge's consideration of the plaintiff's subjective complaints of pain. Dr. Starbuck concluded that the plaintiff suffered from chronic back pain and neck and shoulder pain. Record at 162. Dr. Brinkman, after reviewing Dr. Starbuck's report, states on his Assessment form that he would "give [patient] benefit of doubt for L[ower] B[ack] P[ain] even though 30 yr h[istory] of work w/ same." *Id.* at 137. Dr. Brinkman limited frequent lifting to 25 pounds and climbing, stooping, crouching and crawling to one-third of the time. *Id.* at 131-32. The decision finds the plaintiff's limit for regular lifting to be 10 pounds. *Id.* at 59, Finding 5.

The regulations require that consultative reports be "adequate" and complete. 20 C.F.R. § 404.1519p(a)(1) & (b). The administrative law judge apparently found the reports to be adequate. The Millis report meets the standards of 20 C.F.R. § 404.1519n(c) and must be considered complete.

⁴ There are two PRTFs and one RFC form, completed by the reviewing medical sources, in the record. Record at 130-37, 139-54. These are sufficient to meet the requirement for completion of such forms by the commissioner's consultants. 20 C.F.R. § 404.1520a(d). There is no regulatory requirement that each state agency consultant also complete such a form at the administrative law judge level. *Id.*

The Starbuck report does not include the statement about what the plaintiff can still do despite his impairments that is required by 20 C.F.R. § 404.1519n(c)(6). However, that information is in the record in the records of Andrea Groft, a physician's assistant, which were submitted to the Appeals Council,⁵ as well as in Dr. Brinkman's review, which was available to the administrative law judge. Ms. Groft's assessment was completed 28 days after the date of the decision, but may fairly be said to relate to the period before the date of the decision.

The lifting limitation adopted by the administrative law judge is consistent with that recommended by Ms. Groft. The climbing and bending limitations in Dr. Brinkman's review are consistent with those in Ms. Groft's report. The only inconsistencies are Ms. Groft's limitations on walking to one to two hours in a work day, standing to one to two hours, and sitting to one to two hours, along with a 15 minute rest period every two hours. Record pp. 7-8.

Because the record before this court includes the information that the plaintiff speculates would have been in the Starbuck Assessment form, and because the cited regulation does not appear to mandate strict compliance with the listed elements of subsection (c), I conclude that the lack of an assessment form from Dr. Starbuck does not constitute grounds to reverse the decision of the Commissioner.

II. Credibility

The plaintiff next argues that the additional material from Ms. Groft is consistent with his testimony at the hearing concerning his limitations and that therefore his testimony must be accepted.

⁵ Some of Ms. Groft's notes were submitted at the hearing before the administrative law judge. Record at 184-88.

The decision finds that the plaintiff's statements concerning his impairments were "not entirely credible," Finding 4, Record at 59, and the basis for that finding is set forth in some detail, *id.* at 56-57. The decision does state that "no functional restrictions have been reported by any of the practitioners who have treated or examined the claimant," *id.* at 57 (emphasis in original), and this is inconsistent with the post-hearing Groft assessment, *id.* at 7-8. However, the remaining reasons given for the decision's credibility determination are not challenged by the Groft material. They include: (1) there is very little evidence of medical treatment since the plaintiff last engaged in substantial gainful activity (January 1, 1990) -- the Groft records begin in March 1995, two months before the hearing in this matter; (2) there is no mention of functional limitations due to the back pain in the treatment records of February and March 1995; (3) the plaintiff's statement dated August 6, 1994 reported that he engages in many daily chores and activities, although he had given up cutting wood and riding a bicycle; and (4) none of the practitioners other than Groft report any functional restrictions.⁶

A determination of credibility by an administrative law judge who has observed the claimant, evaluated his demeanor and considered how his testimony fits with the evidence is entitled to deference, especially when supported by specific findings. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987). Conflicts in the evidence are ordinarily to be resolved by the Commissioner, not the court. *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987).

Groft's limitation on walking to two hours in an eight-hour workday is inconsistent with the

⁶The chiropractor's report from Dr. Ouellette submitted to the Appeals Council does contain restrictions similar to those included in the Groft assessment, Record at 23-24, but it may not be considered for reasons stated previously.

plaintiff's testimony concerning his ability to walk.⁷ ("I have no problem walking." Record at 82). The administrative law judge is entitled to resolve this conflict by fully crediting the plaintiff's testimony. The Groft report does not address the plaintiff's expressed discomfort when twisting or performing repetitive motions. Groft also notes that her evaluation "is based primarily on patient's description of pain & not on significant objective findings." *Id.* at 8. As noted previously, Groft's lifting limitations are not inconsistent with those found by the administrative law judge. Thus, the sitting and standing limitations are the only disputed elements of the decision which could affect the ultimate finding of residual functional capacity for light work.

Groft's limitations on sitting and standing do not specify whether the two-hour limitations are for a total during the workday or for a consecutive period. The latter is the more likely conclusion, because the limitations given in Groft's report do not add up to eight hours. In that case, the limitations, whether consistent with the plaintiff's testimony or not, do not require a different outcome. Contrary to the plaintiff's argument, a finding of capacity for the full range of light work is not necessarily inconsistent with a need to alternate standing and sitting every two hours. *Fox v. Heckler*, 776 F.2d 738, 743 (7th Cir. 1985).

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 and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you

⁷ Groft's limitations also do not add up to a complete eight-hour workday, which is what the form she completed requires. Record at 7. At most, she allots six hours to standing, walking and sitting; even assuming that the 45 minutes she finds necessary as rest periods, Record at 8, would be spent lying down, one hour and 15 minutes of the workday is unaccounted for.

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). Inability to sit for long periods of time is thus a factor applicable to sedentary work, not light work. In addition, light work has been further defined by Social Security Ruling 83-10 as follows: “[T]he 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.” Ruling 83-10, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (1992) at 29.⁸ None of the plaintiff’s testimony is necessarily inconsistent with a finding of a capacity for light work, and his credibility is therefore not at issue. To the extent that Groft’s report is inconsistent with this finding, that fact is not relevant to a consideration of credibility. This argument provides no basis for overturning the Commissioner’s decision.

III. Sufficiency of the Evidence

Relying on the opinion of Groft, the physician’s assistant who reported on his limitations three weeks after the hearing, the plaintiff argues that he is not capable of performing a full range of light work, contrary to the finding of the administrative law judge, because he cannot stand for more than two hours during an eight-hour workday and because he requires a fifteen minute rest

⁸ The plaintiff also refers to Social Security Ruling 81-13 in connection with his discussion of light work, but that ruling does not deal with that topic. The ruling is reprinted in *West’s Social Security Reporting Service Rulings 1975-1982* (1983) at 649.

period every two hours. These limitations are contradicted by the reports of Dr. Brinkman, the medical advisor, Record at 130-137, and Dr. John, another medical advisor, *id.* at 138. They are not contradicted by the report of the consulting examiner, Dr. Starbuck. *Id.* at 160-62. The plaintiff asserts that Groft's opinion must be given controlling weight under 20 C.F.R. § 404.1527(d) because she, unlike Drs. Brinkman and John, is a treating source who actually examined the plaintiff.⁹ The plaintiff assumes, without citation to authority, that the standing and resting limitations make him incapable of performing a full range of light work.

However, Groft's opinion is not "well-supported by medically acceptable clinical and laboratory diagnostic techniques," nor is it "not inconsistent with the other substantial evidence in [the] case record," both of which are required under 20 C.F.R. § 404.1527(d)(2) in order to give the opinion of a treating source controlling weight. Groft herself states that her opinion is based primarily on the plaintiff's description of his pain and symptoms and "not on objective findings." Record at 8. Her records contain only two records of a laboratory diagnostic technique directed at the plaintiff's back pain, x-rays performed on March 17, 1995 and October 26, 1994, *id.* at 186-87, both of which were before the administrative law judge. The plaintiff points to no other clinical or diagnostic techniques to support her opinion. The plaintiff seeks to rely on that opinion in two respects, both of which are inconsistent with the evidence from the medical advisors. Thus, the Groft opinion cannot be given controlling weight.

Even so, the opinion of a treating source is to be given more weight under the regulation than

⁹ Groft, as a physician's assistant, is not considered an acceptable medical source, 20 C.F.R. § 404.1513(a), and her report is therefore entitled to no more weight than would be given to information from "other sources," such as "[o]bservations by non-medical sources," *id.* § 404.1513(e).

that of a source who has not examined the claimant. Section 404.1527(d)(2)(i)-(ii) and (d)(3)-(5) set forth the factors to be considered in determining the weight to be given the opinion of a treating source. Because Groft's opinion, and some of her records, were not submitted to the administrative law judge, that determination must be made by the court, but only to the extent of determining whether remand is required.

Factor 1, length of the treatment relationship and frequency of examination: Groft's records indicate that she first saw the plaintiff on February 13, 1995, Record at 184, three months before the hearing, and that she saw him five times before the hearing, and an additional two times before issuing her opinion, *id.* at 7-10, 184-85. While this is not a long-term treatment relationship, there are frequent visits. This factor neither adds to nor detracts from the weight to be given to Groft's opinion. Factor 2, nature and extent of the treatment relationship: Groft ordered an x-ray of the plaintiff's back and prescribed bed rest, heat and Toradol, Flexoril and Tylenol #3 for his back pain. *Id.* at 10, 184-85. There is no indication of testing other than routine physical examination. The plaintiff refused an orthopedic consult, apparently due to financial considerations. *Id.* at 10.

Factor 3, supportability: "The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion." 20 C.F.R. § 404.1527(d)(3). Groft provides very little in terms of medical signs and laboratory findings to support her opinion; in fact, she states that it is not based on objective findings. Record at 8. Factor 4, consistency: Groft's opinion, in the two relevant respects, is not consistent with other medical reports in the record. Factor 5, specialization: No evidence is presented concerning whether Groft specializes in medical issues concerning the plaintiff's ability to stand for extended periods and need to rest every two hours during the work day. Her desire to refer the

plaintiff for an orthopedic consultation and the fact that she is a physician's assistant suggest that she is not a specialist. Factor 6, other factors: the record does not reveal any other factors which tend to support Groft's opinions, with the exception of the plaintiff's equivocal testimony concerning his ability to stand.

On balance, consideration of the factors set forth in section 1527(d) does not require that Groft's opinion be given more weight than those of the medical advisors. *See Chamberlain v. Shalala*, 47 F.3d 1489, 1494 (8th Cir. 1995) (weight given to treating physician's opinion limited if opinion consists only of conclusory statements). Further, the plaintiff offers no authority for his assertion that a limitation of two hours of standing per eight hour workday, if indeed that is how Groft's report is to be interpreted,¹⁰ and the need for rest periods automatically renders him incapable of performing the full range of light work. On the latter point, the case law in fact is to the contrary; the need for rest periods is not inconsistent with a capacity for light work. *Fox*, 776 F.2d at 742-43. Accordingly, there is substantial evidence to support the Commissioner's finding that the plaintiff is capable of light work.

IV. Need for a Vocational Expert

Asserting that "there is no question but that the Plaintiff cannot perform a full range of light work," Plaintiff's Itemized Statement at 12, the plaintiff argues that the administrative law judge was required to solicit the testimony of a vocational expert concerning whether he was capable of directly

¹⁰ An ability to stand for only two hours at a time is not inconsistent with the physical capacity to perform light work. *Adams v. Bowen*, 652 F. Supp. 139, 142 (N.D. Ill. 1986).

entering into skilled work at the sedentary level. If the court adopts my recommendation that it find that there is substantial evidence in the record to support the Commissioner's finding that the plaintiff is capable of performing light work, this issue is moot. For this reason, I decline to address this issue.

V. Conclusion

For the foregoing reasons, I recommend that the Commissioner's decision 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 at Portland, Maine this 1st day of July, 1997.

*David M. Cohen
United States Magistrate Judge*