



law judge following the plaintiff's appeal from an earlier adverse decision issued by a different administrative law judge after an earlier hearing. Record at 446-49, 452-56. The remand order specifically directed the administrative law judge to further evaluate the plaintiff's subjective complaints and mental impairments, prepare a psychiatric review technique form ("PRTF"), further evaluate the medical opinions concerning the plaintiff's maximum residual functional capacity, obtain evidence from a medical expert, and obtain supplemental evidence from a vocational expert. *Id.* at 448-49.

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 second administrative law judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity between December 1994 and March 1997, Finding 2, Record at 28; that he suffered from a personality disorder, mild bilateral carpal tunnel syndrome and cervical disc disease, impairments that were severe but did not meet or equal the criteria of any of the impairments list in Appendix 1 to Subpart P, 20 C.F.R. Part 404, Finding 3, *id.*; that his statements concerning his impairments and their impact on his ability to work were not entirely credible, Finding 4, *id.*; that he lacked the residual functional capacity to lift and carry more than 20 pounds or more than 10 pounds on a regular basis, perform tasks requiring overhead reaching, repetitive hand use or neck flexion or prolonged static positioning of the neck, or to work closely with others for sustained periods, Finding 5, *id.* at 29; that he was unable to perform his past relevant work as a general contractor, forklift operator, heavy equipment operator, and pipe laborer, Finding 6, *id.*; that, given an exertional capacity for light work, his age (40), educational background (high school), and work experience (semi-skilled without transferable work skills), application of 20 C.F.R. §§ 404.1569 and 416.969, along with Rule 202.21 in Table 2 of Appendix 2, Subpart P, 20 C.F.R. Part 404 ("the Grid"), would direct a

conclusion that the plaintiff was not disabled, Findings 8-11, *id.*; that, although the plaintiff was unable to perform the full range of light work, he was capable of making an adjustment to work in several specific positions, and use of the Grid as a framework resulted in a finding that he was not disabled, Finding 12, *id.*; and that the plaintiff had not been under a disability at any time through the date of the decision, Finding 13, *id.* The Appeals Council declined to review the second decision, *id.* at 5-6, making it the final decision 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.3d 218, 222 (1st Cir. 1981).

The administrative law judge in this case reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 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 in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

### **Discussion**

The plaintiff seeks benefits for a closed period, from December 30, 1994 to March 24, 1997. Record at 40. Counsel for the plaintiff stipulated at the second hearing that the plaintiff accepted the assessment of his residual functional capacity ("RFC") dated March 6, 1997, *id.* at 41, by his treating

physician, Douglas Pavlak, M.D., *id.* at 472-73. The issues raised by the plaintiff in this proceeding all arise out of the hypothetical questions put to the vocational expert at Step 5 of the evaluative process. The plaintiff contends, Statement of Errors at 6, that the administrative law judge erred in finding that the vocational expert misunderstood a hypothetical question posed by his attorney, so that her testimony that the plaintiff had a residual functional capacity only for sedentary work under the conditions included in the question could be disregarded. Specifically, the administrative law judge found as follows:

The vocational expert testified that assuming Mr. McAllister's specific work restrictions, he is capable of making a vocational adjustment to work as a security guard, telemarketer, and sales clerk. She did respond to a hypothetical question by counsel for the claimant that, given a limit of ten pounds lifting on an occasional basis and five pounds on a frequent basis in the upper right extremity alone, the occupational workbase would be eroded some but that sedentary jobs would still exist.

The undersigned is of the opinion that the vocational expert misunderstood the hypothetical posed by counsel, thinking it was hypothesized that the claimant was limited to ten pounds lifting in both upper extremities working together rather than in the right upper extremity alone. It follows from a 20 pound lifting restriction that the claimant could not lift more than ten pounds occasionally in each hand because the ability to lift more than ten pounds in each hand would mean that he could lift more than 20 pounds with both hands. It is the same with the ten pound limit in frequent lifting.

*Id.* at 27. The administrative law judge's view has a certain practical and logical appeal; it is indeed difficult to discern how a ten-pound lifting restriction for a single upper extremity differs from a twenty-pound lifting restriction for both extremities. However, the hypothetical question at issue did make this distinction.

Q [by the administrative law judge] A second question . . . [A]ssume for purposes of my question that Mr. McAllister is capable of light duty with limitations with respect to bilateral manual dexterity. In other words, no repetitive use of both hands. But the ability overall to lift to the limitations of light [duty work], that is ten pounds on a regular basis, 20 on an occasional basis, and that he does . . . have some difficulty, some personality difficulty

getting along with other workers as well as with supervisors. And for purposes of my question, let's say that's to a moderate degree.

\* \* \*

Q [from plaintiff's counsel] With respect to the second, the Court's second hypothetical . . . I would ask —

\* \* \*

But instead of that if I would ask you to incorporate the following because . . . instead of trying to interpret what Dr. Pavlock [sic] says I'll just read it. Restrictions of light duty work. No lifting or carry more than ten pounds routinely and 20 pounds occasionally. Avoiding repetitive use of right hand, wrist or forearm and with respect to the weight amount involved that 20/10 is with respect to using both hands. . . . [A]ssume further the doctor would indicate with respect to the dominant right arm alone the lifting capacity is as I read it sedentary. Ten pounds occasionally, five pounds routinely.

\* \* \*

And that there is a restriction from anywhere above shoulder level and from any repeated neck flexion, extension, rotation or prolonged neck positioning.

\* \* \*

Given that modified hypothetical if it modifies, if it is a modification, would that change your answers with respect to finding work for such a hypothetical individual?

A It would. . . . I believe that reducing the exertional lifting capacity of the right extremity, given the fact that the right extremity is the dominant extremity, will significantly erode employment capacity for lifting.

Q Such as to preclude work?

A It would preclude those jobs which I listed in the last hypothetical.

Q Because those jobs were at the light level?

A Correct.

Q Would it preclude all work?

\* \* \*

A [A]re you asking me to assume an individual with a light functional capacity with a lifting of ten to 20, both hands. Five, ten limitation on the right hand. Moderate personality difficulty. Neck positioning issues. And this is all you were asking me to consider for this hypothetical?

Q That's correct.

A Then I believe there would be jobs available. . . . And what we would do is we would look at sedentary occupations, unskilled, and we'd look at such things as cashier, ticket seller, addresser.

*Id.* at 97-103. The vocational expert repeated the distinction before responding. Accordingly, I can only conclude that the administrative law judge was in error when he concluded that the vocational expert misunderstood the hypothetical question as modified by the plaintiff's attorney.

The plaintiff does not contend that this error in itself requires remand. The vocational expert testified that there were available jobs that the plaintiff could perform at the sedentary level. The plaintiff does not suggest that anything further was required, and the administrative law judge's conclusion at Step 5 that the plaintiff was capable of making an adjustment to work that exists in significant numbers in the national economy is supported by substantial evidence, even if the appropriate residual functional capacity is for sedentary rather than light duty work.

The plaintiff focuses instead on the next addition to the hypothetical question made by his attorney.

Q . . . If you add the component of chronic pain deriving from either what was given in the first hypothetical of headache or from who is to say where it derives from, the cervical area, the carpal tunnel area. If you were to add that component of at least a moderate chronic pain syndrome, would that modify your answer?

A It would.

Q In what respect?

A I would be unable to find work for such an individual.

*Id.* at 103. He contends that the administrative law judge wrongfully rejected this testimony, which is not mentioned in the decision, apparently by discounting the plaintiff's testimony concerning his pain. Statement of Errors at 4, 6.

The plaintiff devotes a large portion of his statement of errors to an argument that his headaches were not a separate impairment but rather resulted from his cervical disc disease, *id.* at 4-6, apparently in an attempt to meet the requirement imposed by Social Security Ruling 96-7p that the record must establish the existence of a medically determinable physical or mental impairment that could reasonably be expected to produce the alleged pain. Social Security Ruling 96-7p ("SSR 96-7p"), reprinted in *West's Social Security Reporting Service Rulings*, Supp. 2000, at 133-42. Assuming *arguendo* that this requirement is met, the second requirement of the Ruling is that the administrative law judge make a finding about the credibility of the plaintiff's statements concerning

the pain and its functional effects. *Id.* at 133. The administrative law judge did so in this case. Record at 16-19, 23-26.

None of the medical records in the administrative record includes a diagnosis of chronic pain syndrome. None of the pages of the record cited by the plaintiff in his Statement of Errors at 5-6 or at oral argument supports a conclusion that the plaintiff suffered from pain, whether resulting from his carpal tunnel syndrome, his cervical disc disease or some other unspecified source, that is sufficient to prevent him from working. Page 230 is the first page of a letter dated April 12, 1995 in which Kerry White, M.D., a neurosurgeon, reports the plaintiff's reports of pain in 1991, 1992 and 1995. Page 232 is a letter dated January 11, 1996 in which Dr. Pavlak reports that the plaintiff "still gets some soreness and recurrent symptoms [in the area affected by the carpal tunnel release] if he really pushes things hard" and "continues to get recurrent neck and shoulder pain," but also concludes that the plaintiff "needs no further active treatment other than appropriate activity restriction. . . . The ideal long-term solution for him would be to get alternative work." Page 235 is the first page of a letter dated October 5, 1995 from Dr. Pavlak that also records the plaintiff's statements concerning pain and states that the plaintiff "is looking forward to returning to some form of alternative or restricted employment once he fully recovers from his carpal tunnel surgery. . . . [H]e realizes that he cannot go back into heavy physical work." Page 237 is a letter dated April 6, 1995 from Dr. Pavlak, noting before the carpal tunnel surgery that the plaintiff was "having significant hand numbness and tingling" and that he "still gets some intermittent neck pain and arm pain, but nothing that he would want to have surgical intervention for at this point." Finally, page 238 is the first page of a letter dated February 2, 1995 in which Dr. Pavlak records the plaintiff's reports of pain and recommends that he seek alternative work: "[H]e is not likely going to be able to stick with heavy labor or anything where he has to do a lot of heavy lifting or bending or twisting."

At no time does Dr. Pavlak find the plaintiff totally disabled. In his March 6, 1997 letter, *id.* at 472-73, which the plaintiff indicated established an RFC that he accepted, *id.* at 41, Dr. Pavlak placed physical restrictions on the plaintiff that were consistent with light duty work, *see* 20 C.F.R. §§ 404.1567(b), 416.967(b). Throughout the plaintiff's medical records, Dr. Pavlak repeatedly recommends light duty or alternative work for the plaintiff, who had been performing heavy duty work. This is not consistent with the claimed existence of a moderate chronic pain syndrome that would render the plaintiff unable to work at all. The only support in the record for the plaintiff's final modification of the hypothetical question to the vocational expert is the plaintiff's own testimony, and the administrative law judge appropriately set forth the basis for his conclusion that the testimony was not fully credible. 20 C.F.R. §§ 404.1529, 416.929; SSR 96-7p at 134-41. *See Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 194-95 (1st Cir. 1987).

With respect to the lack of a transcript of the first hearing, the plaintiff states repeatedly, in conclusory fashion, that he is disadvantaged by this fact. Statement of Errors at 3, 7-8. Neither in his statement of errors nor in the presentation by his attorney at oral argument did he specify the manner in which his ability to present his claims was compromised by this omission which, to be sure, is not acceptable behavior on the part of the commissioner. The specific errors alleged by the plaintiff in his statement of errors do not depend for judicial resolution upon testimony given in the earlier hearing. Accordingly, the plaintiff is not entitled to a remand for award of benefits, the only remedy he seeks, as a sanction for this regrettable lapse by the commissioner.

Finally, the plaintiff contends that the administrative law judge erred in "entirely discount[ing]," Statement of Errors at 7, the report of Richard Rau, Ph.D., a psychologist who evaluated the plaintiff on November 14, 1996 and March 20, 1997, Record at 425. At oral argument, counsel for the plaintiff stated that he "d[id] not concede" on this issue. March 20, 1997 was four

days before the end of the period for which the plaintiff seeks benefits. The plaintiff worked full time, operating a bucket loader, between late March and November 1997. *Id.* at 42, 50, 53. The report, which is dated June 19, 1997, found the plaintiff to be “not employable” due to major depression and anxiety. *Id.* at 425, 439. Dr. Rau’s conclusion is inconsistent with that of Richard E. Fortier, Jr., M.D., a psychiatrist who evaluated the plaintiff on September 5, 1996, *id.* at 397-400, and was rejected by the medical expert, also a psychiatrist, who testified at the hearing and stated his reasons for rejecting Dr. Rau’s report in considerable detail, *id.* at 78, 80-82, 83-85. When there is a conflict in the medical reports, whether provided by a treating or a consulting medical professional or a medical expert testifying at the hearing, “the resolution of such conflicts in the evidence is for the [commissioner].” *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987). The plaintiff offers no persuasive reason for this court to depart from this principle.

### **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.*

Date this 6th day of October, 2000.

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David M. Cohen  
United States Magistrate Judge

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