UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORMAN DIONNE,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Docket No. 01-188-B***
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

The plaintiff in this Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal, who was found to be suffering from the residuals of neck and ankle injuries, seeks remand for the taking of new and material evidence, or, alternatively, remand on the basis that the commissioner erred in finding that he was capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the plaintiff's motion for remand on the first basis be denied, but that the decision of the commissioner nonetheless be vacated and remanded on the second basis.

[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 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 March 21, 2002, 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.

I. Motion To Remand for Taking of Additional Evidence

As an initial matter, I address the plaintiff's motion for remand for consideration of additional evidence pursuant to 42 U.S.C. § 405(g). *See* Motion To Remand for Consideration of Additional Evidence ("Motion To Remand") (Docket No. 9). Section 405(g) provides "the statutory authority to remand for further proceedings where new evidence is presented after the ALJ decision if the evidence is material *and* good cause is shown for the failure to present it on a timely basis." *Mills v. Apfel*, 244 F.3d 1, 5 (1st Cir. 2001) (emphasis in original). However, "Congress plainly intended that remands for good cause should be few and far between, that a yo-yo effect be avoided – to the end that the process not bog down and unduly impede the timely resolution of social security appeals." *Evangelista v. Secretary of Health & Human Servs.*, 826 F.2d 136, 141 (1st Cir. 1987).

The plaintiff filed the SSD and SSI applications in issue on March 4, 1997. Record at 21. A Field Office worker taking his applications noted that he said he had "important medical info[rmation] in prior [Social Security] file." *Id*. at 112. Someone – it is not clear whether it was a Field Office worker or the plaintiff – indicated that he had indeed filed prior applications for SSD and SSI as to which a decision was rendered in July 1984. *Id*. at 109. However, this individual checked a box marked "No" under the heading, "Prior folder requested[.]" *Id*. Inasmuch as appears, the prior folder never was obtained.

Following initial denial of his applications, the plaintiff sought reconsideration in June 1997, writing, *inter alia*: "you didn't look at my full medical history[.]" *Id*. at 57. A hearing was held on November 18, 1997, after which the administrative law judge issued his adverse ruling on May 11, 1998. *Id*. at 25-27. At hearing, the administrative law judge asked plaintiff's counsel whether he had any additional evidence to offer that day; counsel responded: "No." *Id*. at 29. On May 26, 1998 the plaintiff, then representing himself *pro se*, wrote to request Appeals Council review. *Id*. at 17. He

again complained that he did not believe the commissioner had the benefit of a complete copy of his medical records, which he said he was in the process of obtaining. *Id*. Inasmuch as appears, the plaintiff never submitted any such records. On September 8, 1998 a new, non-attorney representative entered an appearance on behalf of the plaintiff. *Id*. at 13. On August 10, 2001 the Appeals Council declined review of the administrative law judge's decision. *Id*. at 5-6.

The plaintiff, now represented by new counsel, belatedly proffers two pieces of evidence: letters from Frank A. Graf, M.D., and Cynthia R. Robertson, M.D. *See* Letter dated February 7, 2002 from Frank A. Graf, M.D., to Attorney Francis M. Jackson ("Graf Letter"), attached to Motion To Remand; Letter dated January 28, 2002 from Cynthia R. Robertson, M.D., to Francis Jackson, Esq. ("Robertson Letter"), attached to Motion To Remand. Dr. Graf concludes, on the basis of both examination of the plaintiff and a detailed review of his medical history (apparently including the "missing" records, which are not themselves offered), that the plaintiff has no employment capacity. *See generally* Graf Letter; *see also* Motion To Remand at 2; Plaintiff's Reply Memorandum ("Reply") (Docket No. 11) at 1-2. Dr. Robertson also opines that the plaintiff "is totally incapable of returning to work." Robertson Letter.

Even assuming *arguendo* that this evidence is "new" and "material," the plaintiff offers no good cause for its submission now, more than four years after his hearing, nearly four years after the issuance of the administrative law judge's decision and approximately six months after the Appeals Council declined review. Two interrelated excuses are offered: (i) that "this information was not available at the time of the hearing since these doctors had not seen him at that time," Motion To Remand at 1; and (ii) that the commissioner is to blame for the fact that the missing records discussed in the Graf Letter never were obtained, *id*. at 1-2; Reply at 1-2.

The mere fact that Drs. Graf and Robertson had not seen the plaintiff at the time of hearing is not in itself a good excuse; if it were, nearly all late-submitted evidence would be cognizable. The plaintiff offers no further explanation for the tardiness of the Graf and Robertson evidence apart from the commissioner's alleged default in failing to obtain the file associated with his earlier applications for benefits. It is unclear whether the plaintiff or the Field Office was responsible for the initial misunderstanding that the previous file was not being requested. However, by the time of his hearing the plaintiff was represented by counsel. At no point during that proceeding did counsel (or the plaintiff himself) inquire as to the status of the previous file; in fact, when the administrative law judge pointedly asked counsel whether more evidence was forthcoming, counsel said no. Further, during the interim when the plaintiff represented himself *pro se* following issuance of the administrative law judge's decision, the plaintiff offered to supply the missing medical records. There is no evidence that he ever did so. Inasmuch as appears, it would have been possible then (or earlier) for the plaintiff to obtain these missing records, as he ultimately did for purposes of Dr. Graf's review. *See, e.g.*, Reply at 1-2.

No good cause for the tardiness of the Graf and Robertson evidence having been shown, I recommend that the Motion To Remand be denied.

II. Challenge to Administrative Law Judge's Decision

The plaintiff seeks remand on yet another basis: that, even when review is confined to the body of evidence presented to the administrative law judge, one cannot discern substantial support for the conclusion that the plaintiff was capable of performing work existing in significant numbers in the national economy. *See* Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 6) at 1. I agree.

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 had the residuals of neck and ankle injuries, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 24-25; that he lacked the residual functional capacity ("RFC") to lift and carry more than ten pounds or stand or walk for prolonged periods, Finding 5, *id*. at 25; that he had no significant nonexertional limitations narrowing the range of work that he was capable of performing, Finding 7, *id*; that, given his exertional capacity (sedentary work), age (42), education (high school) and work experience (semi-skilled), application of Rule 201.28 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") directed a conclusion that he was not disabled, Findings 8-11, *id*.; and that he therefore had not been under a disability at any time through the date of decision, Finding 12, *id*.[2] The Appeals Council declined to review the decision, *id*. at 5-6, 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 conclusion 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 administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his

[2] Inasmuch as the plaintiff was insured for purposes of SSD through at least December 31, 1998, Record at 21, there was no need to
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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).

The plaintiff makes two overarching points: (i) that the administrative law judge could not supportably have found that he possessed the RFC to perform a full range of sedentary work, and (ii) that, in a trio of interrelated errors, the administrative law judge failed to develop the record adequately, properly assess credibility or correctly analyze the plaintiff's subjective complaints of pain. Statement of Errors at 2-20. Inasmuch as I agree with the first overarching point, I need not address the second.

The plaintiff claimed that he was in constant, severe pain and that his range of movement was markedly limited as the result of a series of accidents, including a 1972 incident in which he broke his right leg in four places, almost lost his left arm, broke his right arm and right shoulder and sustained a major head injury, Record at 143; a 1981 incident in which a tree fell on him as he was working in the woods, breaking his neck and crushing his hip, *id*. at 31-32; a 1987 incident in which he broke four ribs on his left side, *id*. at 143; and a 1989 incident in which he slipped off a roof while working as a carpenter, crushing his heels and shattering his left ankle, *id*. at 33-34.[3]

The Record contains no evidence of medical treatment for injuries allegedly sustained in the 1972, 1981 or 1987 accidents (some of which may have been among the "missing" records discussed above in the context of the Motion To Remand). It does contain evidence of treatment for the plaintiff's 1989 ankle and foot injuries, including a report of a 1992 x-ray suggesting the existence of a

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undertake a separate analysis of his level of disability as of his date last insured.

[3] The plaintiff's descriptions of his multiple accidents and injuries are not always consistent. *Compare, e.g.*, Record at 33 (1989 accident crushed his heels, shattered his left ankle) *with id*. at 143 (1989 accident crushed his heels, broke both ankles). However,
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mild inflammatory process in his right ankle, *id*. at 163, records of a 1991 procedure (a lumbar sympathetic block) performed to address his "tarsal tunnel pain," which was noted to have provided no significant relief, *id*. at 164-68, records of 1990 physical therapy, which again was noted to have afforded no significant relief, *id*. at 169-71, a report of a March 1990 bone scan showing no abnormality of the calcaneus[4] in either foot, but noting possible "changes of healing," *id*. at 173, and a report of a January 1990 CT scan revealing no evidence of fracture or joint disruption to either foot, *id*. at 174. There is no evidence of treatment or the performance of any diagnostic procedure after 1992.

With this as backdrop, the commissioner arranged for the following assessments relevant (or potentially relevant) to the issue of the plaintiff's RFC:

1. A physical examination by consultant Gina S. Gomez, M.D., who issued a report dated March 27, 1997 noting, *inter alia*: "The source of my information was the patient myself [sic]. There is [sic] no medical records sent for review and no radiological studies, or reports, were ever sent." *Id*. at 175. Dr. Gomez concluded: "At present, based on the history and physical examination, it is actually very hard to evaluate this patient because I think that there is also a component that he is voluntarily making this hard to evaluate him so it was [sic] seem like there is something wrong with his [range of motion] in his neck." *Id*. at 176. She suggested that the plaintiff be evaluated by an orthopedic surgeon and that diagnostic procedures, including C-spine films and x-rays of his ankle and heel, be ordered. *Id*. at 177. She was unable to assess his RFC. *Id*.

2. An RFC assessment dated May 23, 1997 by non-examining consultant Lawrence P. Johnson, M.D., who concluded that the plaintiff's claimed physical impairments were non-severe. *Id.* at 153. The portion of this report containing Dr. Johnson's actual RFC assessment is missing from the

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nothing turns on that for purposes of this decision.

Record; at hearing, counsel for the commissioner stated that she had been unable, despite diligent effort, to locate it.[5]

3. A physical examination by consultant Paul Stucki, M.D., who issued a report dated July 8, 1997, stating, under the subheading "work capacity": "He can sit for only five minutes, stand for 10 minutes and walk for only a 'couple hundred yards,' he states, before the pain becomes 'just too much.' The most he can lift is 'a gallon' of liquid. During the exam he seemed to handle objects satisfactorily, heard, spoke and communicated satisfactorily. It did seem difficult for him to put his socks and shoes back on, but he did do so; part of the difficulty was that his neck seemed so stiffly held as to make the whole project awkward and slow." *Id*. at 185. Dr. Stucki indicated that x-rays of the plaintiff's left ankle and foot were being done, *id*. at 184-85, but there is no evidence of record that they were.

4. An RFC assessment dated July 17, 1997 by non-examining consultant Robert Hayes, D.O., who rated the plaintiff as possessing the capacity to lift up to fifty pounds occasionally and up to twenty-five pounds frequently; to stand and/or walk with normal breaks for a total of about six hours in an eight-hour workday; and to sit with normal breaks for a total of about six hours in an eight-hour workday. *Id*. at 156. The only further limitations noted were that the plaintiff could climb ladders, ropes and scaffolds only occasionally, could do no frequent reaching overhead as a result of his prior cervical fracture and needed to avoid rough ground and uneven floors. *Id*. at 157-59.

5. The opinion of medical expert Edward Babcock, M.D., at hearing on November 18, 1997 that there was no objective medical evidence substantiating the plaintiff's claims and that "the only way we could hope to settle this now, other than take his history as the sole determinant, would

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[4] The "calcaneus" is the heel bone. Taber's Cyclopedic Medical Dictionary at 222 (14th ed. 1983).

[5] At oral argument, counsel for the plaintiff took the position that the commissioner's inability to locate the missing pages constituted yet another reason to remand this case.

be to get an orthopedic consultation to try to review this and give us an opinion as to whether he's able to work . . . ." *Id*. at 48. Dr. Babcock further suggested that x-rays be obtained of the plaintiff's feet, ankles and probably any other areas in which he was claiming symptomatology. *Id*. at 48-49.

6. A post-hearing physical examination by consultant Christopher S. Smith, M.D., who issued a report dated December 29, 1997 noting that x-rays ordered of the plaintiff's neck "showed normal alignment, no fracture, and a large spur seen off the C3 vertebral body." *Id*. at 190. Dr. Smith further noted, "I do not know whether the back and neck injury as [the plaintiff] described it with fractures and dislocations in 1981, would lead to a relatively normal cervical spine 16 years later, but certainly there is no hard evidence to substantiate his current disability as he states it." *Id*. at 191. Dr. Smith nonetheless completed an RFC assessment, stating, "My findings were based on the examination of the patient as I found him on that day and certainly showed marked limitation of employability." *Id.* at 190. These findings included an ability to lift and/or carry only up to five pounds; a complete inability to climb, balance, stoop, crouch, kneel or crawl; marked limitations on ability to reach, handle and push/pull, and diminished mental acuity. *Id*. at 192-95.

The administrative law judge found that the plaintiff did in fact suffer from the residuals of neck and ankle injuries; however, he found him capable of performing the full range of sedentary work with no nonexertional limitations. Findings 3, 7 & 11, *id*. at 24-25. Applicable Social Security regulations define sedentary work as involving "lifting no more than 10 pounds at a time and occasionally lifting or 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).

Social Security Ruling 96-9p sheds further light on the capacities required for the full range of sedentary work. For example, "[a] complete inability to stoop would significantly erode the unskilled sedentary occupational base and a finding that the individual is disabled would usually apply[.]" Social Security Ruling 96-9p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2001) ("SSR 96-9p"), at 159. In addition, "[a]ny significant manipulative limitation of an individual's ability to handle and work with small objects with both hands will result in a significant erosion of the unskilled sedentary occupational base." *Id*. "If an individual is unable to sit for a total of 6 hours in an 8-hour work day, the unskilled sedentary occupational base will be eroded." *Id*. at 158.

Rosado mandates that the record "contain positive evidence in support of the commissioner's [RFC] findings[.]" *Rosado*, 807 F.2d at 294. In this case, neither Drs. Gomez nor Babcock were able to come up with any RFC assessment for the plaintiff. The commissioner admits that she cannot locate the portion of Dr. Johnson's report containing his actual RFC findings. To the extent Drs. Stucki and Smith were able to offer detailed RFC assessments, neither is compatible with capacity to perform the full range of sedentary work. For example, neither the Stucki nor Smith report shows that the plaintiff is capable of lifting as much as ten pounds, Dr. Stucki conveyed the plaintiff's report that he could only sit for five minutes before the pain became intolerable, and Dr. Smith noted that the plaintiff was completely incapable of stooping and markedly limited in reaching, handling and pushing/pulling.[6]

This leaves only the report of non-examining consultant Dr. Hayes as "positive evidence" in support of the administrative law judge's RFC finding. However, "the amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert." *Rose v.*

[6] Inasmuch as appears, Dr. Stucki merely relayed the plaintiff's subjective complaints in discussing work capacity. *See* Record at 185.
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Shalala, 34 F.3d 13, 18 (1st Cir. 1994) (citations and internal quotation marks omitted). Inasmuch as appears, the administrative law judge himself apparently accorded no weight to Dr. Hayes' assessment. *See* Record at 21-24. In addition, Dr. Hayes' assessment predated both the testimony of Dr. Babcock that the record as it stood precluded meaningful assessment of RFC and the resultant, thorough post-hearing report obtained from Dr. Smith. One cannot be confident that, if Dr. Hayes had had the benefit of Dr. Smith's detailed analysis and RFC findings, his own judgment would have remained unchanged. *See Frankl v. Shalala*, 47 F.3d 935, 938 (8th Cir. 1995) (RFC assessment by non-examining consultant "cannot constitute substantial evidence that Frankl was capable of performing the full range of light work at the time of the hearing . . . however because the opinions in these agency RFC assessment forms . . . were not based upon the full record in this case.").

The administrative law judge's RFC error, in turn, undermined his use of the Grid to satisfy the commissioner's burden at Step 5. *See, e.g.*, *Heckler v. Campbell*, 461 U.S. 458, 462 & n.5 (1983) (use of Grid appropriate when a rule accurately describes an individual's capabilities and vocational profile).

II. Conclusion

For the foregoing reasons, I recommend that the Motion To Remand be **DENIED**, but that the decision of the commissioner be **VACATED** and the case **REMANDED** for proceedings not inconsistent herewith.

NOTICE

Nonetheless, justifiable disregard of certain evidence does not in itself constitute "positive evidence" in support of an RFC finding.

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 this 26th day of March, 2002.

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David M. Cohen
United States Magistrate Judge

PORTLD ADMIN
U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-188

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