

law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage to remain insured only through December 31, 1996, Finding 1, Record at 19; that he had the following medically determinable severe impairments – status post two cranial aneurysms and disorders of the back (discogenic and degenerative) – but that any mental impairments present were not severe, Finding 3, *id.*; that despite his medically severe impairments, he retained the residual functional capacity (“RFC”) to perform his past relevant work on a regular and consistent basis during the period from February 5, 1990 through December 31, 1996, Finding 6, *id.* at 20; and that he therefore was not under a disability at any time from February 5, 1990 through December 31, 1996, Finding 7, *id.* The Appeals Council declined to review the decision, *id.* at 8-9, 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 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 in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. § 404.1520(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings of the plaintiff’s residual functional capacity and the physical and mental demands of past

references to the administrative record.

work and determine whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. § 404.1520(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service Rulings 1975-1982* ("SSR 82-62"), at 813.

The plaintiff's complaint also implicates Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* at 1124 (quoting Social Security Ruling 85-28).

The plaintiff identifies four alternative grounds for remand, asserting that the administrative law judge erred in (i) assessing his mental impairments as non-severe – a decision assertedly unsupported by substantial evidence, (ii) proceeding without a medical expert, in violation Social Security Ruling 83-20, (iii) making a credibility finding unsupported by substantial evidence and inconsistent with the commissioner's own regulatory criteria, and (iv) failing to recontact a treating physician for clarification as required by Social Security Ruling 96-5p and *Lemelin v. Apfel*, No. 98-282-P-H, 1999 WL 33117108 (D. Me. May 17, 1999) (rec. dec., *aff'd* June 8, 1999). *See generally* Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 8). I agree that the Step 2 finding concerning the plaintiff's mental impairment is unsupported by substantial evidence, warranting reversal and remand.

I. Discussion

This is a sad case, in which the plaintiff and his wife, who seemed to have everything going for them, suffered a reversal of fortune when in February 1990 the plaintiff (then only 28 years old) was found nearly comatose as a result of a ruptured cerebral aneurysm, following which he underwent two successive brain surgeries. *See, e.g.*, Record at 255, 274-77, 333-35. Physically, the plaintiff made what one treating physician, David L. Ewing, M.D., described in 1992 as “a very remarkable” recovery. *See id.* at 335; *see also, e.g., id.* at 274, 277 (plaintiff discharged from hospital on March 10, 1990 in excellent condition, asymptomatic). While the plaintiff claims some continuing physical fallout, he primarily alleges that he has been disabled by depression and anxiety secondary to his aneurysm ruptures. *See, e.g., id.* at 46-48, 220.

The plaintiff first contends that the determination that his mental impairments were non-severe as of December 31, 1996 is unsupported by substantial evidence of record. *See* Statement of Errors at 1-3. The voluminous record in this case includes sharply conflicting evidence as to whether his mental impairments were or were not severe as of that date. For example, psychiatrist David Dettman, D.O., with whom the plaintiff began treating on November 26, 2001, *see* Record at 466, submitted a detailed retrospective report dated September 9, 2002 opining that since at least December 31, 1996 the plaintiff has been markedly limited in understanding and memory, sustained concentration and persistence, social interaction and adaptation, as a result of which he clearly has been unable to sustain any gainful full-time employment during that time, *see id.* at 482-85. By contrast, two non-examining Disability Determination Services (“DDS”) psychologists filed their own retrospective opinions to the effect that the plaintiff’s depression was mild and non-severe as of the relevant time. *See id.* at 371-79 (Psychiatric Review Technique Form (“PRTF”) completed April 4, 2000 by James J. Wanstrath, Ph.D.), 382-86 (PRTF completed September 24, 2001 by David R. Houston, Ph.D.).

Beyond this, DDS consulting examiner Raymond L. Yockey, M.D., submitted a report dated July 18, 1996 describing the plaintiff's depression as apparently in remission and well-controlled on Prozac. *Id.* at 347. And a non-examining DDS physician whose name is illegible completed a PRTF on August 14, 1996 finding the plaintiff's mental impairments to be non-severe. *See id.* at 349-56.

Resolution of such evidentiary conflicts normally is the province of the administrative law judge. *See, e.g., Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts."). Nonetheless, "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. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) (citations and internal quotation marks omitted). "In some cases, written reports submitted by non-testifying, non-examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule." *Id.* (citations omitted).

Counsel for the plaintiff contended at oral argument – and I agree – that in this case the DDS reports cannot serve as substantial evidence inasmuch as the DDS consultants did not have the benefit of a number of medical records submitted subsequent to their assessments. *See, e.g., Record* at 234-38 (letters dated May 23, 2002 and June 20, 2002 from plaintiff's counsel transmitting additional proposed exhibits), 394-443 (Exhibits 21F through 27F). Those later submitted materials include medical records documenting the plaintiff's status in the months immediately following his date last insured. *See, e.g., id.* at 416-19.

At oral argument, counsel for the commissioner posited that, even assuming *arguendo* that the commissioner erred at Step 2, any such error is harmless inasmuch as the Record supports an ultimate

finding of non-disability as of the plaintiff's date last insured. He cited no authority for the proposition that the commissioner may be excused from methodical application of the sequential-evaluation process, and I know of none. I am unwilling simply to assume, in the absence of any further development of this record, that were the commissioner to reach Step 5 she would meet her burden of proving that the plaintiff is capable of performing work existing in substantial numbers in the national economy.

Although the Step 2 error alone warrants reversal, I briefly comment on the plaintiff's remaining points of error (none of which I find meritorious) for the benefit of the parties on remand: 1.

Failure To Call Medical Expert Per SSR 83-20. The plaintiff asserts that the administrative law judge failed to call a medical expert, in contravention of Social Security Ruling 83-20. *See* Statement of Errors at 3-4. However, Ruling 83-20 pertains to adjudication of the onset date of disability once a claimant has been determined to be disabled. *See* Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* ("SSR 83-20"), at 49 ("In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability."); *see also, e.g., Key v. Callahan*, 109 F.3d 270, 274 (6th Cir.1997) ("Since there was no finding that the claimant is disabled as a result of his mental impairment or any other impairments or combination thereof, no inquiry into onset date is required."). No such determination has been made in this case. While the administrative law judge did allude to Dr. Dettman's current findings, his focus was on whether the plaintiff was disabled as of December 31, 1996:

[A]lthough Dr. Dettman's opinion may be supported with respect to the claimant's current condition, there is insufficient supportable basis upon which to rely to apply that opinion to the claimant's condition prior to December 31, 1996.

As noted above, although current evidence supports marked functional limitations in

activities of daily living, social functioning, and concentration, persistence and pace, there is no indication that such limitations existed prior to December 31, 1996.

Record at 17-18. These remarks cannot reasonably be construed as constituting a determination that the plaintiff became disabled subsequent to his date last insured. SSR 83-20 accordingly is inapposite.

2. Credibility Assessment. The plaintiff also contends that remand is warranted inasmuch as, in assessing credibility, the administrative law judge entirely ignored his hearing testimony as well as that of his wife. *See* Statement of Errors at 4-5. He suggests that this omission contravened Social Security Ruling 96-7p, *see id.*; however, while that ruling requires adjudicators to set forth “specific reasons for the finding on credibility, supported by the evidence in the case record,” it does not demand that they specifically discuss hearing testimony, *see* Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) (“SSR 96-7p”), at 134. The administrative law judge supplied several specific reasons for his credibility finding, each supported by a Record citation (for example, that the plaintiff’s alleged level of fatigue was inconsistent with reports of injuries incurred while playing tennis and ping-pong and with his report in March 1997 of continued back-country skiing every weekend). *See* Record at 18, 323, 326, 417. I find no reversible error with respect to the administrative law judge’s credibility findings. *See, e.g., Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) (“The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.”). That said, I note that it is appropriate for the commissioner to take a fresh look at credibility upon remand.

3. Failure To Follow SSR 96-5p and Lemelin: The plaintiff finally asserts that the

administrative law judge contravened Social Security Ruling 96-5p and this court's *Lemelin* decision when he refused to call a medical expert or, at the least, seek clarification from Dr. Dettman. *See* Statement of Errors at 5-6. Ruling 96-5p provides, in relevant part:

Because treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to recontact the source for clarification of the reasons for the opinion.

Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (Supp. 2003) ("SSR 96-5p"), at 127. In *Lemelin*, the Appeals Council rejected the opinion of the claimant's longtime treating physician (who had treated him during the relevant period) on the ground that it was not well-supported by other evidence of record. *See Lemelin*, 1999 WL 33117108, at *4. The claimant complained, *inter alia*, that pursuant to SSR 96-5p the Appeals Council should have contacted the treating physician for clarification of the bases of his opinion before simply rejecting it out of hand. *See id.* This court agreed, determining on independent review that the record revealed no apparent basis for the treating physician's opinion (which seemingly was at odds even with his own progress notes). *See id.* at *4-*7. It accordingly remanded the case for further clarification pursuant to SSR 96-5p. *See id.* at *9.

In this case, as in *Lemelin*, the administrative law judge noted that he found Dr. Dettman's opinion inconsistent with other evidence of record, including Dr. Dettman's own progress notes. *See* Record at 16-17. Nonetheless, this case is materially distinguishable from *Lemelin* in that Dr. Dettman, who was not the plaintiff's treating physician at the relevant time, meticulously detailed the bases for his retrospective opinion. *See* Record at 482-85. Thus, no duty arose to contact him for further clarification pursuant to SSR 96-5p. *See, e.g., May v. Barnhart*, No. CIV. 01-269-M, 2002 WL 1005103, at *6 (D.N.H. May 16, 2002)

(inasmuch as it was clear that physicians' opinions were based almost entirely on claimant's own statements about her symptoms, there was no need to contact the physicians for clarification pursuant to SSR 96-5p).

II. Conclusion

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

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 this 3rd day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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