

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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GERALD TISO	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 06-10558-WGY
JO ANNE B. BARNHART,	)	
Commissioner, Social Security	)	
Administration	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM AND ORDER

YOUNG, D.J.

January 9, 2007

**I. INTRODUCTION**

The plaintiff Gerald Tiso ("Tiso") brought this action under sections 205(g) and 1631(c)(3) of the Social Security Act, codified at 42 U.S.C. §§ 405(g), 1383(c)(3). Tiso seeks judicial review of the final decision of the Commissioner of Social Security (the "Commissioner") denying his application for Social Security Disability Insurance Benefits and Supplemental Security Income Payments. Tiso argues that the Commissioner's decision was not supported by substantial evidence because the hearing officer failed to follow the appropriate procedures for evaluating the credibility of Tiso's testimony. Pl.'s Mem. in Supp. of Mot. to Reverse or Remand the Decision of the Comm'r of

Soc. Sec. [Doc. No. 9] ("Pl.'s Mem.") at 12-13. Tiso also argues the hearing officer failed fully to develop his medical record and that this failure resulted in prejudice. Id. at 23-24. Tiso requests this Court reverse the Commissioner's decision and award attorney's fees, or, alternatively, remand the case for further development of his medical record. Id. at 25; Pl.'s Mot. to Reverse or Remand the Decision of the Comm'r of Soc. Sec. [Doc. No. 8] (Pl.'s Mot.") at 1-2. In response, the Commissioner filed a motion for an order affirming the decision of the commissioner [Doc. No. 10].

## **II. BACKGROUND**

### **A. Procedural History**

Tiso filed applications for Disability Insurance Benefits and Supplemental Security Income on December 24, 2003. R. at 50-52, 396-99. Tiso's application for Disability Insurance Benefits states that he became unable to work on January 23, 2003. Id. at 50. This contradicts his application for Supplemental Security Income that states that his disability began on September 6, 2003. Id. at 396. In his recitation of the procedural history for this appeal, Tiso again offers the earlier disability date. Pl.'s Mem. at 3. His applications were denied initially, R. 34-37, and on reconsideration, id. at 39-41. Tiso filed a request for, and was granted, a hearing before a hearing officer on July 19, 2004. Id. at 42-44. Tiso was represented by counsel and

testified along with a vocational expert at the hearing on August 24, 2005. Id. at 406-31. On October 27, 2005, the hearing officer found that Tiso was not entitled to benefits. Id. at 31. The Appeals Council denied Tiso's request for review of the hearing officer's decision. Id. at 11-13. On March 29, 2006, Tiso filed an action in this Court to review the decision of the Commissioner pursuant to 42 U.S.C. sections 405(g) and 1383(c)(3). Pl.'s Compl. [Doc. No. 1] at 1.

#### **B. Factual Background**

Tiso was born on January 27, 1968. R. at 50. He has worked as an insulation installer, a fish packer, and as a lobsterer. Id. at 26. He dropped out of school during the ninth grade and never completed his General Equivalency Diploma. Id. at 410. He is divorced from his first wife, with whom he has a thirteen year old son. Id. at 30. He married his second wife two weeks before the hearing. Id. His second wife has two children, ages 11 and 10. Id.

For a nine month period in 2003, Tiso rented a room and would only leave to get a cup of coffee in the morning. Id. at 419. Tiso worked for a brief period during the time he claims to have been disabled. For a three month period in early 2005, Tiso worked as an insulation installer. Id. at 411. In February 2004, his daily activities included watching TV, listening to the radio, visiting his son twice a week, and occasionally going to

his son's hockey games. Id. at 183. At this time he did not cook or do his own laundry. Id. His work as an insulation installer involved "going up ladders, crawling under heaters and around heaters and over vents," id. at 411, as well as lifting 40-60 pounds of supplies, id. at 412.

On September 9, 2003, Tiso was involved in a motor vehicle accident. Id. at 21, 320. Some time after the accident, but not immediately thereafter, Tiso complained of neck and back pain symptomatic of whiplash injury. Id. at 21. He also complains of an ankle injury that limits his use of his left leg. Id. Furthermore, Tiso complains of an assortment of mental problems arising out of abuse he suffered as a child and from having witnessed his son suffer a traumatic injury. Id. at 26-27.

## **1. Medical Evidence**

### **a. Physical Conditions**

The earliest recorded physical impairment of which Tiso complains is a May 1996 injury involving the tearing of the ligaments in his left ankle. R. at 139. This injury occurred while he was working as a lobsterer. Id. In August 1996, he had reconstructive surgery on his ankle. Id. Despite this surgery, Tiso continued to complain of pain in his ankle and foot. E.g., id. at 129, 139. On January 4, 2004, Tiso underwent surgery to relieve "severe pain, popping, snapping, and swelling" of his ankle. Id. at 147. On January 19, 2004, less than two weeks

after the surgery, Tiso reported that while 90% of the burning in his ankle was gone, he was still experiencing some locking. Id. at 150.

As mentioned, Tiso was involved in a car accident in September 2003. Id. at 21. After the accident, Tiso began to experience lower-back and neck pain, as well as headaches. Id. at 113. Initially, Tiso was prescribed a program of pain medication and physical therapy. Id. at 21. Tiso was also referred to a neurologist for treatment of his headaches. Id. at 114. Two to three months after the accident, Tiso reported that his neck and back pain were getting worse despite his physical therapy. Id. at 96. At that time, while he had attended his physical therapy, he had not seen the neurologist to whom he had been referred for treatment of his headaches. Id. On November 29, 2003, a Magnetic Resonance Imaging ("MRI") scan revealed that Tiso had chronic disc degeneration and very small midline disc herniations. Id. at 92-95. His chronic disc degeneration diagnosis is of the kind that occurs in one-third of the population between ages thirty and forty and is of little clinical significance. Id. at 92. According to the American Medical Association Guide of Permanent Impairment, this diagnosis resulted in a permanent 2% loss of function. Id. His very small disc herniations resulted in a 5% loss of function. Id. On December 1, 2003, Dr. Douglas Howard of Massachusetts Medical & Physical Therapy Associates reported that Tiso had "nonradiating

chronic low back pain that needs to be managed by a formal pain program at this time since he has reached maximum medical improvement from the injury sustained in the motor vehicle accident." Id. Dr. Howard also reported that "[h]e is certainly not a surgical candidate for any surgical intervention or for further testing." Id.

Tiso also reported to Dr. Howard that he suffered from abdominal pain and Dr. Howard referred him to several physicians for treatment of this pain. Id. The only other mention of abdominal pain in the record, that this Court was able to locate, is from a December 23, 2003 visit to Dr. Joel Snider of the East Boston Health Center. Id. at 117-18. Dr. Snider noted Tiso complained of pressure in the back of his stomach. Id. at 118. Tiso does not mention this abdominal pain beyond what is described in Dr. Howard's report. See Pl.'s Mem. at 21. It is unclear from the briefs and from the record whether Tiso followed up on Dr. Howard's referrals concerning the abdominal pain.

On February 4, 2004, Dr. M. Lipski conducted a Physical Residual Functional Capacity Assessment of Tiso. Id. at 170-77. Dr. Lipski found that Tiso could occasionally lift and carry 20 pounds, frequently lift and carry 10 pounds, stand and walk at least 2 hours in an 8-hour workday, sit for about 6 hours in an 8-hour workday, and had limited push and pull controls in his lower extremities. Id. at 170-71. Dr. Lipski also noted that Tiso could occasionally climb, balance, stoop, kneel, crouch, and

crawl. Id. at 172. Dr. Lipski further noted that Tiso had limited overhead reaching ability, but no other manipulative limitations. Id. at 173.

On May 5, 2004, Dr. Carlos Carpena conducted a second Physical Residual Functional Capacity Assessment. Id. at 222-29. Dr. Carpena found that Tiso could occasionally lift and carry 20 pounds, frequently lift and carry 10 pounds, stand and/or walk about 6 hours in an 8-hour workday, sit for about 6 hours in an 8-hour workday, and had limited push and pull controls in his lower extremities. Id. at 223 Dr. Carpena also noted that Tiso could occasionally climb, balance, stoop, kneel, crouch, and crawl. Id. at 224. Otherwise Dr. Carpena did not note any other limitations in his Physical Residual Functional Capacity Assessment of Tiso, including no manipulative limitations. Id. at 224-27. The primary difference between Dr. Carpena's assessment and Dr. Lipski's assessment is that Dr. Carpena found Tiso capable of four more additional hours of standing and walking, and that Tiso's reaching ability was unlimited.

In addition to Doctors Lipski and Carpena, Tiso visited a number of physicians in 2004 and 2005. In May 2004, he visited Dr. Alec Meleger. Dr. Meleger reported that Tiso had pain in the small of his back, mid-cervical region, left upper arm, and left forearm. Id. at 365. Next, on September 14, 2004, Tiso met with Dr. Mark Nguyen who reported that Tiso refused to consider an "outpatient comprehensive pain program." Id. at 370. Instead,

Tiso wanted either cervical facet injections, epidural steroid injections, or lumbar facet injections. See id. at 362, 370. In March 2005, Tiso again met with Dr. Nguyen and refused to consider behavior modification as part of the outpatient plan. Id. at 380. Instead he again insisted on the injections and pain medications. Id. In May and June of 2005, Tiso visited at least three more physicians. Id. at 381-90. All of the doctors reported that Tiso had neck, shoulder, and back pain. Id. They also reported that had Tiso normal motor and cerebral functioning, as well as stable or normal gait. Id. at 382, 384, 386, 390. On June 15, 2005, Tiso received injections and reported that he had increased mobility in his neck. Id. at 387.

The hearing officer adopted Dr. Carpena's assessment in full, with the additional finding that Tiso had limited reaching ability, as described by Dr. Lipinski. Id. at 30.

#### **b. Mental Conditions**

In May 2003, Tiso sought treatment with the North Suffolk Mental Health Association ("North Suffolk") for his mental health for the first time in his adult life. Id. at 182, 300. During this initial treatment session, Tiso related how his son was seriously injured in a sledding accident approximately three years prior to this visit. Id. at 182, 302. In this accident, Tiso's son fractured his skull and had to be resuscitated by the fire department. Id. at 182. Tiso does not cite this accident



as the sole reason that he began therapy. In addition, he cites his recent recollections of his traumatic childhood as a primary reason for this counseling. Id. at 182. He alleges that he was forced to watch his stepfather sexually molest his stepsister. Id. at 427. Tiso claims his stepfather would beat him if he refused to watch the molestation. Id. These traumatic incidents allegedly affected his ability to concentrate, id. at 180, and led him to believe that "everyone is going to hurt [him]," id. at 64.

Tiso also claims he received counseling when he was child. Id. at 182. He states that the Department of Social Services took custody of him for a period of time due to his mother's psychiatric difficulties. Id. Tiso further states that when he was 17 years old he spent time at Bridgewater State Hospital for substance abuse treatment. Id. at 181. Tiso states that he began using marijuana when he was eight years old; and by the time he was 17 he was using alcohol, cocaine, and THC and Valium pills. Id. at 181, 266. Tiso claims he has not used cocaine and pills since the early 1990s, and has not used alcohol since 1999. Id. at 182, 266. As of July 6, 2005, he was continuing to consume marijuana at the rate of about five joints per week. Id. at 266. Tiso also claims he abused OxyContin for a period of two years but that he has not used the substance since 2003. Id.

Tiso received regular treatment from North Suffolk for a period of slightly over a year. Id. at 273-302. While at North

Suffolk, Tiso received medications to help him concentrate and sleep at night. Id. at 182. He reported, however, that these medications were not really helping him. Id. at 183. In June 2004, North Suffolk refused to continue to provide him with services because he regularly missed appointments. Id. at 273. At that time, North Suffolk referred Tiso to Boston Medical Center for continued treatment. Id. at 273. While at Boston Medical Center, Tiso continued to receive treatment for his trouble sleeping and concentrating, as well as treatment for bipolar disorder. Id. at 250, 260. Boston Medical Center reported Tiso as demonstrating age-appropriate attention, cooperative behavior, coherent thought process, average cognition, mild judgment impairment, and a fair memory. Id. at 262. Boston Medical Center also reported Tiso as having increased energy level, a depressed mood, concentration difficulties, sleep difficulties, and a coherent thought process. Id. at 267-68. Tiso received treatment at Boston Medical Center at least until June 16, 2005. Id. at 250.

On May 25, 2004, Dr. Menachem Kasdan conducted a Mental Residual Functional Capacity Assessment. Id. at 244-46. Dr. Kasdan found Tiso moderately limited in his ability to: understand, remember, and carry out detailed instructions; maintain attention and concentration for extended periods of time; complete a normal work-day; and respond appropriately to changes in the work setting. Id. at 244-45. Dr. Kasdan found

Tiso not significantly limited in his ability to: remember locations and work-like procedures; understand, remember, and carry out very short and simple instructions; perform activities within a schedule; sustain an ordinary routine without special supervision; work in coordination with others; make simple work-related decisions; interact socially; be aware of normal hazards and take precautions; travel in unfamiliar places; set realistic goals; and make plans independently of others. Id. Finally, Dr. Kasdan did not find Tiso to be markedly limited in his ability to perform any activities in a normal workday on an ongoing basis. Id. at 244. The hearing officer adopted Dr. Kasdan's assessment. Id. at 31.

## **2. Vocational Expert's Testimony**

The hearing officer questioned Joseph Goodman, the vocational expert, on Tiso's ability to perform jobs found in substantial numbers in the national and regional economy. R. at 427-31. Goodman then classified the skill and exertion levels of Tiso's work over the past 15 years.<sup>1</sup> Id. at 428. Using the mental attributes found by Dr. Kasdan and the physical attributes found by Dr. Lipinski, which were more limited than the ones the

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<sup>1</sup> Goodman classified Tiso's work as an insulation installer as medium skilled work, his work as a fish packer as medium unskilled work, and his work as a lobsterer as very heavy unskilled work. R. at 428.

hearing officer adopted,<sup>2</sup> the hearing officer asked whether a person with these attributes could perform Tiso's past work. Id. at 429. Goodman replied that such a person could not perform Tiso's prior work activities, but that a person with these attributes could perform a number of other jobs found in the national and regional economy. Id. Goodman testified that such a person would be capable of performing over 880,000 jobs in the nationally economy and over 15,000 in the state economy. Id. The hearing officer then presented Goodwin with a different hypothetical person that had the same physical limitations as the previous hypothetical person but also with marked limitations in the ability to maintain concentration, persistence, or pace. Id. at 429-30. The hearing officer then asked whether such a person could perform jobs in the national or regional economies. Id. at 430. Goodwin answered that such an individual would be precluded from the workforce. Id.

The hearing officer held, based on evidence in the record supporting Dr. Kasdan's and Dr. Carpena's assessments, that Tiso can perform a significant number of jobs in the national and regional economy. Id. at 31. Therefore, the hearing officer found Tiso not disabled. Id.

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<sup>2</sup> The hearing officer's hypothetical person specifically included the ability to understand and remember simple instructions, concentrate for two hour periods on simple tasks, interact appropriate with coworkers, and adapt to changes in the work setting. R. at 429.

### III. DISCUSSION

#### A. Standard of Review

Review of a disability benefit determination is limited by section 405(g) of the Social Security Act, which provides that "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is "more than a mere scintilla." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB of New York, 305 U.S. 197, 229 (1938)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. In reviewing the record for substantial evidence, "[i]ssues of credibility and the drawing of permissible inferences from evidentiary facts are the prime responsibility of the [Commissioner]." Rodriguez v. Secretary of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981) (quoting Rodriguez v. Celebrezze, 349 F.2d 494, 496 (1st Cir. 1965)). Therefore, this Court must affirm the decision of the Commissioner "even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence." Rodriguez Pagen v. Secretary of Health and Human Servs., 819 F.2d 1, 3 (1st Cir. 1987).

#### B. Disability Determination Process

In order to receive benefits, a claimant must demonstrate that he or she is disabled under the Social Security Act. 42 U.S.C. §§ 423(a)(1)(E), 423(d). A person is disabled if, due to physical or mental impairments, he or she cannot engage in any "substantial gainful activity" that exists in the national economy for a period of more than 12 months. 42 U.S.C. § 423(d)(1)(A). In evaluating whether a claimant is disabled, the hearing officer must answer the following questions:

- (1) Is the claimant engaged in substantial gainful activity;
- (2) Does the claimant have a severe impairment;
- (3) Does the impairment meet or equal a listed impairment;
- (4) Does the impairment prevent the claimant from performing past relevant work; and
- (5) Does the impairment prevent the claimant from doing any other work when considering claimant's age, education, and work experience?

20 C.F.R. §§ 404.1520(a)(4) and 416.920(a)(4). The claimant is not disabled if the hearing officer finds in the affirmative on question one or in the negative on any of questions two through five. See id. §§ 404.1520(a)(4) and 416.920(a)(4). The claimant bears the burden of proving he or she is disabled under the first four questions, while the government bears the burden of proving the claimant can perform other specific jobs in the national economy. Freeman v. Barnhart, 274 F.3d 606, 608 (1st Cir. 2001).

The hearing officer found that the claimant had not engaged in substantial gainful activity since the alleged onset of disability, that the claimant's pain and mental disorder are severe under the regulations, that this severe impairment does not meet or equal one of the listed impairments, that the impairment precludes him from performing his past work, and that the impairment does not preclude him from "light work" of the kind that is found in significant quantity in the national and regional economies. R. at 25-26. The hearing officer concluded that Tiso was not disabled. Id. at 26.

In order to make a determination that an applicant cannot perform a job in the national economy, the hearing officer must first "assess and make a finding about [the claimant's] residual functional capacity based on all the relevant medical and other evidence in [the claimant's] case record." 20 C.F.R. §§ 404.1520(e) and 416.920(e). In assessing the claimant's residual capacity, the hearing officer did not find fully credible Tiso's self-assessment that his impairments precluded performance of all sustained work activity. R. at 22, 25.

**C. Tiso's Challenge to Hearing Officer's Determination of Credibility**

Tiso argues this Court must reverse the hearing officer's decision because the hearing officer failed to support with substantial evidence his finding that Tiso's self-assessment of his impairment level was not credible. Pl.'s Mem. at 12. Tiso

claims the hearing officer failed to utilize the Avery factors in his credibility assessment. Id. at 13-14; see Avery v. Secretary of Health and Human Servs., 797 F.2d 19, 29 (1st Cir. 1986)

(listing the six required elements of a credibility determination). Under Avery, when a claimant alleges limitations due to pain greater than what objective findings in the medical record support, the hearing officer must evaluate a claimant's subjective claims of pain by "investigat[ing] all avenues presented that relate to subjective complaints, including the claimant's prior work record and information and observations by treating and examining physicians and third parties." Id. at 28.

A hearing officer must investigate the following matters:

- 1) The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
- 2) Precipitating and aggravating factors (e.g. movement, activity, environmental conditions);
- 3) Type, dosage, effectiveness, and adverse side-effects of any pain medication;
- 4) Treatment, other than medication, for relief of pain;
- 5) Functional restrictions; and
- 6) The claimant's daily activities.

Id. at 29.

Tiso's claim that the hearing officer failed to examine these factors is completely without merit. Contrary to Tiso's argument, a hearing officer investigates the Avery factors not



solely through direct examination of the claimant but also through examination of the medical records and all other evidence. Id. at 28 (“[I]t is essential to investigate all avenues presented that relate to subjective complaints, including the claimant's prior work record and information and observations by treating and examining physicians and third parties.”).

In his thorough investigation of Tiso and Tiso's medical records, the hearing officer evaluated all six of the Avery factors. The hearing officer found Tiso had back pain, neck pain, left ankle pain, depression, and bipolar disorder. R. at 22. The hearing officer examined and referenced medical reports that contained detailed information regarding the nature, location, onset, duration, frequency, radiation, and intensity of any of Tiso's complaints of pain. See, e.g., id. at 22 (referencing Exhibit 1F, id. at 114, which details complaints such as “[i]n the supine position, straight leg raising causes him to complain of low pack pain at 30 degrees on the right side and bringing his foot no more than 6 inches off the examining table on the left side”). The hearing officer examined Tiso's medical reports and noted that despite these pains and disorders, medical examinations demonstrated Tiso's ability “to ambulate without any assistive devices and appeared to be in no acute distress.” Id. at 22. The hearing officer noted that despite Tiso's claims of pain, Tiso only suffered a 7% loss of functioning of his whole body. Id. The hearing officer also

noted Tiso's failure to follow his doctors' advice for non-medication-based treatment for pain relief. Id. The hearing officer examined Tiso regarding his daily activities. Id. at 30. Additionally, the hearing officer noted the effectiveness of the pain medication, in particular the shots Tiso received in the neck. Id. at 30. The hearing officer's review of all of this evidence comports with the requirements of Avery.

This Court's holding that the hearing officer complied with the Avery factors is supported by the relevant case law. In Cing Mars v. Barnhart, the court found error because the hearing officer did not specifically state that he considered the claimant's medical reports. No. Civ.A. 05-30137-MAP, 2006 WL 961913, at \*6-\*7 (D. Mass. Apr. 6, 2006). Here, the hearing officer specifically stated that he considered Tiso's medical reports. R. at 22. In Phillips v. Barnhart, the court noted that it is particularly important for a hearing officer to give specific reasons for the weight given to the claimant's testimony. 421 F. Supp. 2d 272, 279 (D. Mass. 2006) (Neiman, M.J.). Here, the hearing officer determined that Tiso's subjective complaints of neck and back pain were not credible because Tiso only had a 7% loss in the functioning of his whole body, R. at 22, and that Tiso was happy with the functionality of his ankle, id. at 23. Additionally, a hearing officer must make more than just a passing reference to the Avery factors. Torres v. Barnhart, 235 F. Supp. 2d 33, 43 (D. Mass. 2002) (Ponsor, J.).

The hearing officer in the present case provides six paragraphs' worth of Avery analysis. R. at 22-23.

The presence of these six paragraphs directly contradicts Tiso's claim that the hearing officer "failed to support his credibility finding with specific facts." Pl.'s Mem. at 12. The hearing officer provided specific facts for his credibility determination such as Tiso having only "a 7% total loss of functioning," and Tiso being "able to ambulate without any assistive devices and appeared to be in no acute distress." Tr. at 22. A hearing officer's credibility determination, which he supports with specific findings, "is entitled to deference." Frustaglia v. Secretary of Health and Human Servs., 829 F.2d 192, 195 (1st Cir. 1987). Therefore, this Court defers to the hearing officer's determination that Tiso's claims of pain rendering him unable to perform any type of work are not credible.

**D. Tiso's Challenge to the Mental Health Assessment**

Tiso claims that the hearing officer should not have adopted Dr. Kasdan's assessment because that assessment was made on May 25, 2004,<sup>3</sup> several months before Licensed Clinical Social Worker Malusca Garcia-Diaz reported that Tiso had a current Global Assessment of Functioning ("GAF") score of 50 and a twelve-month

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<sup>3</sup> Dr. Kasdan did not identify any marked impairments that would preclude Tiso from the workforce. See R. 222-29.

low of 45.<sup>4</sup> Pl.'s Mem. at 23 (referencing Garcia-Diaz's report located at R. at 272). Tiso argues that due to Garcia-Diaz's recording of a twelve-month low GAF score of 45 on September 14, 2004, Dr. Kasdan's assessment was out of date. Id. at 24.

Tiso's argument falls flat. Tiso argues that Dr. Kasdan did not have a complete file when he made his assessment. Id. This Court's duty, however, is not to determine whether Dr. Kasdan had a complete record before him when he made his assessment but whether the hearing officer had a complete record when he adopted Dr. Kasdan's assessment and found Tiso not disabled. When the hearing officer made his decision, Garcia-Diaz's report was in the record. Therefore, Tiso's argument that the hearing officer did not fully develop the record is misguided.

More appropriately, Tiso is essentially arguing that Garcia-Diaz's September 14, 2004 GAF score demonstrates that the hearing officer's adoption of Dr. Kasdan's report is not supported by substantial evidence. Garcia-Diaz's twelve-month low GAF score of 45 is in direct contradiction to the rest of the record,

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<sup>4</sup> "The Global Assessment of Functioning Scale ranges from 0 ('persistent danger of severely hurting self or others') to 100 ('superior functioning'). A GAF score of 41-50 indicates 'serious symptoms' and 'serious impairment in social, occupational, or school functioning.' Scores of 51-60 and 61-70 reflect moderate symptoms/moderate impairment in functioning and some mild symptoms/some difficulty in functioning, respectively." Walker v. Barnhart, No. Civ.A 04-11752-DPW, 2005 WL 2323169, at \*4 n.3 (D. Mass. Aug. 23, 2005) (Woodlock, J.) (citing Global Assessment of Functioning (GAF) Scale, available at <http://www.avapl.org/gaf/GAFSheet.html>).

including the previous assessment of Tiso by Garcia-Diaz and her North Suffolk colleagues. A hearing officer may disregard errant observations when the observations are not consistent with other medical assessors' observations and opinions of the claimant and "the medical record as a whole." Arruda v. Barnhart, 314 F. Supp. 2d 52, 74-75 (D. Mass. 2004) (Bowler, M.J.). In Arruda, a doctor assigned a GAF score signaling greater limitations that supported by the symptoms recorded by that same doctor, as well as those recorded by other doctors. Id. at 66, 75. In addition, the doctor's description of the claimant's symptoms did not correspond to the other doctors' assessments of the claimant. Id. at 75. The court properly recognized that in such a situation, the hearing officer may exercise the discretion to decide which medical opinion to adopt as long as there is substantial evidence for the decision. Id. In the present case, the hearing officer exercised that discretion by not adopting Garcia-Diaz's September 14, 2004 GAF score. His decision is supported by substantial evidence.

Just as in Arruda, Garcia-Diaz's GAF score is inconsistent with her own observations. Garcia-Diaz noted on September 14, 2004, that Tiso currently had a GAF score of 50 but his twelve-month low was 45. Nothing in any of North Suffolk's records for the previous year support a GAF score below 50. The record indicates that employees of North Suffolk assessed Tiso's GAF score twice during the twelve month period. In both instances,

Tiso's low twelve-month GAF score was assessed at 50, with the second assessment made on January 7, 2004. Id. at 285, 289. Therefore, in order to determine whether the hearing officer appropriately disregarded Garcia-Diaz's September 14, 2004 GAF score, it is necessary to analyze whether Garcia-Diaz's observations of Tiso's limitations correlate to Tiso having a GAF score below 50 between January 7 and September 14, 2004. Tiso had at least twenty-six appointments with North Suffolk during that twelve month period. R. at 272-287. Tiso missed at least ten of those appointments. Id. The greatest limitations reported by either Garcia-Diaz or her colleagues during that period included that Tiso either had difficulty sleeping, id. at 283, was agitated, id. at 279, had poor insight, id. at 278, was very irritable and angry, id. at 277, or was anxious, id. at 276. None of these symptoms occurred at the same time. At any given time, he was at most suffering from one of these symptoms. Individually, none of these symptoms would result in a GAF score below 50. It is therefore reasonable to conclude Garcia-Diaz's low score is an anomaly. See Arruda, 314 F. Supp. 2d at 74-75 (declining to give weight to errant symptoms that did not coincide with GAF score).

Tiso received treatment at Boston Medical Center after his treatment at North Suffolk that ended due to his failure to attend appointments. Boston Medical prepared reports of much greater depth than those of North Suffolk. Compare R. at 261-63

(three pages of examination results), with id. at 276 (one-half of one page of examination results). None of the Boston Medical Center reports indicate symptoms that would indicate a GAF score lower than 50. R. at 250-269. Boston Medical Center reported Tiso as having age-appropriate attention, cooperative behavior, appropriate thought process, average cognition, mild judgment impairment, and a fair memory. Id. at 262. Boston Medical Center also reported Tiso as having an increased energy level, a depressed mood, concentration difficulties, sleep difficulties, and a coherent thought process. Id. at 267-68. All of these observations are consistent with Dr. Kasdan's assessment of Tiso, which the hearing officer adopted.<sup>5</sup> Id. at 31. Furthermore, physicians at Boston Medical Center never rated Tiso as having a GAF score lower than 50. Id. at 250-269. In all, none of the observations, including those found in the reports from both North Suffolk and Boston Medical Center, support Garcia-Diaz's errant GAF score. Dr. Kasdan's assessment, on the other hand, finds substantial support in the North Suffolk and Boston Medical Center reports. Therefore, the hearing officer's decision to not

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<sup>5</sup> Dr. Kasdan found Tiso moderately limited in his ability to understand and remember detailed instructions, to carry out detailed instructions, to maintain attention and concentration for extended periods of time, to complete a normal work-day, and to respond appropriately to changes in the work setting. R. at 244-45. In all other categories Dr. Kasdan found Tiso not significantly limited. Id.

adopt Garcia-Diaz's GAF score as part of Tiso's Mental assessment is supported by substantial evidence.

#### IV. CONCLUSION

"We must uphold the [hearing officer's] findings in this case if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion." Rodriguez, 647 F.2d at 222. This Court holds that a reasonable mind could accept the hearing officer's use of the Avery factors and his adoption of Dr. Kasdan's mental assessment. Tiso's Motion to Reverse or Remand the Decision of the Commissioner of Social Security and the request for attorney's fees [Doc. No. 8] are hereby DENIED, and the Commissioner's Motion for Order Affirming the Decision of the Commissioner [Doc. No. 10] is hereby ALLOWED.

The request for attorneys' fees is DENIED.

SO ORDERED.

/s/ William G. Young

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WILLIAM G. YOUNG  
DISTRICT JUDGE



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