UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES NOYES,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	NO. 06-12265-DPW
	)	
MICHAEL J. ASTRUE	)	
COMMISSIONER OF SOCIAL SECURITY,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER
June 13, 2008

In this Social Security benefits appeal, plaintiff, Charles Putnam Noyes ("Noyes"), applied for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act on September 27, 2004, stating that he had been disabled since January 7, 2004 because of an unhealed L1 vertebrae disk fracture. The Social Security Administration denied Noyes benefits both initially and upon reconsideration. Noyes sought review by an Administrative Law Judge ("ALJ"). Following an evidentiary hearing, the ALJ denied Noyes's application. The Appeals Court denied review and the ALJ decision became the final decision of the Commissioner of the Social Security Administration. That decision is the subject of this appeal. After review of the record, I will remand the case for further proceedings.

I.

Noyes contends that the injuries that limit his ability to work are a L1 fracture, broken back, and a radial head fracture right arm, and that as a result of these injuries, "[he] can't stand or sit for any length of time" and "can't lift more than 25 lbs." He states the lower back and right arm[1] injuries cause him serious pain for which he takes pain medication, and that the medication causes nausea as a side effect. Noyes's highest completed level of education is 12th grade. Before Noyes suffered his injuries in 2004, he worked as an installer technician, installing satellites and cable TV for nineteen years.

A. Medical Records

Noyes fell from a ladder on January 7, 2004 and received "an acute comminuted L1 fracture" that now brings him pain. In late January of 2004, Dr. Jaslow stated that the X-ray of Noyes's spine shows "a compression fracture of L1 with approximately 25% compression of the anterior portion of the vertebrae" and "no root or cord symptoms" were present at the time. Dr. Jaslow stated that Noyes has a lumbar brace and prescribed Vicodin. In February of 2004 he did another X-ray and confirmed the results of the January diagnosis. Noyes had nausea from his previous

[1]Noyes's attorney stated before the ALJ hearing that the claimant's elbow injury "is not a major source of impairment" and the ALJ accordingly found that it is not a severe impairment.

medication, so Dr. Jaslow prescribed him Demerol and Compazine. In early March of 2004, Dr. Jaslow stated that Noyes "sustained severe injury to his lumbar spine," that he was unable to stand or walk for longer than two or three hours, that "there is no possibility that he can do his job at the present time," and that he continued to have problems with pain from the L1 compression fracture. Dr. Jaslow gave Noyes a Demerol refill and some Bextra samples to relieve the pain. At the end of March, Dr. Jaslow stated that although Noyes had made some progress, a recent fire at his house "during which he was doing a lot of running around" caused his back to start acting up again. At this time, Noyes had begun attending physical therapy. Dr. Jaslow continued to refill Noyes's medication and stated that Noyes was incapable of doing his regular duty work.

Dr. Jaslow stated in April of 2004 that Noyes was doing significantly more activity but had about the same pain levels; he refilled Noyes's pain medication. Dr. Jaslow noted that Noyes was only taking Tylenol at the time, that he was eager to get back to work and "is not one who likes to take pain medication." Dr. Jaslow also examined Noyes and noted that "straight leg raising is negative" and that Noyes had symmetric and physiologic reflex. After a discussion with Dr. Jaslow about his ability to start a light, four hour per day, sitting job with interim periods of sitting and standing, Noyes tried the job but his symptoms and a long commute that aggravated those symptoms did

not allow him to maintain the work. In May of 2004, Dr. Jaslow examined Noyes and noted that he has no root or cord symptoms, and that Noyes is depressed because "he is not making progress faster, although [Noyes] is better than he was last time [Dr. Jaslow] saw him." Dr. Jaslow again refilled Noyes's medication.

In May of 2004 Noyes complained to Dr. Gleason, his primary care physician, that his back pain was not improving and Dr. Gleason scheduled an MRI. The June MRI results showed a L1 compression fracture causing mild canal narrowing as well as three disk bulges. In July of 2004 Dr. Jaslow examined Noyes's MRI results and found "no evidence of significant retropulsed fragments," and said that Noyes's state had not changed, that Noyes has reached a clinical plateau, and referred him to a spine surgeon to see if surgery would be helpful.

Dr. Phillips, a neurosurgeon, saw Noyes in early October of 2004, stating that Noyes's symptoms have improved with rest, but that Noyes "has undergone a prolonged course of physical therapy as well as oral pain medications without any significant relief." Dr. Phillips also examined Noyes's MRI from June 2004 and stated that "it shows a wedge compression fracture at L1 with disruption of both his anterior and posterior longitudinal ligaments," with "approximately 10 to 20 % kyphosis[2] and maybe 10% loss of body height." After discussing some surgery options with Noyes, Dr.

[2]A spinal deformity that can result from trauma.

Phillips suggested surgery and referred Noyes to another neurosurgeon for a second opinion.

In the middle of October 2004, Noyes completed a "questionnaire on pain" and stated that he has constant pain, that the medication "sometimes" helped, but made him nauseous. On the same day Noyes also filled out a "function report" and noted that he could not stand or sit for more than half an hour at a time, his back pain was so severe that he was sometimes unable to sleep, and that his wife does all the chores and takes care of him and the house. Noyes further stated that he can lift up to twenty five pounds and that activities such as stair climbing hurt his back.

Later in October of 2004, Dr. Manuelian, a non-examining physician, prepared a "physical residual capacity assessment," stating that Noyes could sit or walk slightly less than two hours and could sit with normal breaks[3] for about six hours in an eight hour work day, and that Noyes could occasionally lift ten pounds and could frequently lift less than ten pounds. Dr. Manuelian also noted than Noyes could "occasionally" climb, balance, stoop, kneel, crouch, or crawl.

In late October of 2004, Dr. Freidberg, a neurosurgeon, examined Noyes and his medical records, stating that Noyes's MRI demonstrated a fracture that was wedged anteriorly and that was

[3]Dr. Manuelian stated that Noyes must be allowed to stand for ten minutes of each hour.

kyphotic. Dr. Freidberg also stated that Noyes was currently taking Demerol and Bextra, that Noyes had gained thirty pounds since the accident, and that he was disabled because of the pain from the fracture. Dr. Freidberg stated that he agreed with Dr. Marcovici[4] that a kypholasty procedure should be attempted but may not be possible because the fracture may have healed. Noyes decided against having the surgery because of the "uncertain outcome or complications."

In December of 2004, Dr. Connelly, a non-examining physician, also prepared a "physical residual functional capacity assessment" and generally agreed with Dr. Manuelian's report, but with slightly more optimistic estimates of Noyes's capacity to work[5]. In January of 2005, Dr. Gleason filled out a "physical capacity evaluation" and stated that Noyes cannot sit, stand, or walk for longer than half an hour in total and in an eight hour workday, that he is unable to lift or carry any amount of weight, and that he is unable to bend, squat, crawl, climb, or reach. Dr. Gleason saw Noyes on six other occasions between November 2005 and March of 2006, noting that Noyes was taking at least two

[4]In fact, Dr. Phillips and not Dr. Marcovici authored the report with which Dr. Freidberg agreed. It appears that Dr. Phillips and Dr. Marcovici have a joint practice and Dr. Marcovici's letterhead appears at the top of the report while Dr. Phillip signed it at the bottom.

[5]Dr. Connelly stated that Noyes was able to lift twenty pounds occasionally and ten pounds frequently, and that Noyes would be able to stand or walk for at least two hours in an eight hour work day.

to three types of medication and finding no significant change in his condition during this time.

In March of 2006, Noyes began receiving counseling from Maria Cruz, an independent clinical social worker, and she diagnosed Noyes with depression and anxiety due to trouble adjusting to his new lifestyle. Cruz assigned Noyes a Global Assessment of Functioning ("GAF") score of 65[6]. In subsequent sessions Cruz noted that Noyes's progress was essentially unchanged and his level of functioning remains "stable" in the sense that it had neither improved nor declined. In March of 2006, Cruz filled out her estimate of Noyes's residual functioning capacity[7] and stated that Noyes had severe pain which made his level of anxiety "extremely high," "considerably" impaired his attention span and ability to concentrate, and that "progress is slow due to the severity of the injury." Dr. Gleason added his signature to Cruz's assessment in April of 2006.

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[6]A GAF score in the 61-70 is "consistent with not more than mild symptoms or impairment of occupational functioning."

[7]Cruz ranked as "severe" Noyes's restrictions in his ability to do daily activities, his degree of deterioration of personal habits, his constriction of interests, his ability to perform complex tasks, and his ability to perform varied tasks. She ranked Noyes's ability to relate to people, his understanding in carrying out instructions and his response to customary work pressure as "moderately severe." Cruz also noted "moderate" limitations in Noyes's ability to respond appropriately to supervision and to co-workers, and to perform simple and repetitive tasks.

B. ALJ Hearing

Noyes was 47 at the time of the ALJ hearing. Noyes's attorney stated that Noyes's L1 fracture gave him ongoing, acute pain, that taking pain medication results in GI upset, and that Noyes was prone to deep depression. His attorney also said that Noyes's elbow fracture was no longer a source of disability. Noyes testified that he was "in constant pain all day long, every day" and that standing, walking, and sitting were painful. Noyes testified that he had been taking Celebrex, Vicodin, Demerol and Percocet for two and a half years and feels "a little dizzy" as a side effect. Noyes said that he had trouble sleeping at night, and that his tiredness affected his concentration. He stated that sometimes he went to the mall with his wife, and alternated sitting and walking "a little." He had no problems with personal hygiene or with getting dressed. Noyes said he was unable to do housework but was able to drive a car around town.

Noyes further testified that standing for long periods of time "is the worst," that he was only able to walk for ten to fifteen minutes, and that he was also in pain sitting but could do it for twenty to twenty five minutes. He stated that "any reaching or something can cause [his] back spasm or a very sharp pain. Stretching, bending, twisting, anything like that." Noyes testified that he lay down most afternoons for two to three hours to relieve the pain, which "seems to help" and that usually he

fell asleep. On a scale of one to ten, Noyes rated his pain level without medication at a nine and with medication at about six or seven. He said he had a lot on his mind, lacked concentration, and worried a lot, which impaired his ability to remember things and interact with people.

A vocational expert, Dr. Sacks, testified that none of Noyes's skills from his satellite installer job would be transferable to sedentary work. Dr. Sacks also testified that a claimant of Noyes's age, educational background, and a "moderate reduction in the ability to maintain attention and concentration," would be able to perform simple sedentary work tasks, with very limited complex or detailed work, that exists in the national and local economy, for the duration of an eight hour work day[8]. Dr. Sacks stated that such a claimant could sit or stand as he chooses during the workday and still maintain those jobs, but having to lay down for up to two hours per day would preclude employment. Further, Dr. Sacks said that if the claimant had a "moderately severe impairment" with respect to his ability to relate to people, he would likewise be unable to maintain those jobs.

II.

A "disability" is an "inability to engage in any substantial

[8]Dr. Sacks suggested work as a sedentary level hand packer, an assembler, or products inspector as potential jobs that such a claimant could engage in and testified that these jobs exist in thousands both locally and nationally.

gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 416(i)(1); 42 U.S.C. 423(d)(1). The impairment must be of such severity that "considering [the claimant's] age, education, and work experience, [that individual is unable to] engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A). "'Work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country." *Id.* Claimant has the burden to produce evidence of a disability that the Social Security Administration ("SSA") may require. 42 U.S.C. 423(d)(5).

The SSA engages in a sequential five-step process to determine if the claimant is "disabled." 20 C.F.R. 416.920(a)(1). As pertinent here, the fourth step involves determining whether the claimant is able to return to his past relevant work, based on his residual functioning capacity. 20 C.F.R. 416.920(a)(4)(iv). The residual functioning capacity is a determination of "the most [the claimant] can still do [in a work setting] despite [his] limitations" and takes into consideration all the relevant evidence regarding the claimant's "impairment(s), and any related symptoms, such as pain, [that]

may cause physical or mental limitations." 20 C.F.R. 416.945(a)(1).

The ALJ found that Noyes was unable to perform his past relevant work as a satellite technician. The ALJ also found that Noyes "has the severe impairment of a vertabral fracture at L1 and depression/anxiety" that causes more than a minimal limitation on his ability to perform basic work." The ALJ determined that Noyes "has the residual functioning capacity to perform a wide range of sedentary exertion[9] with a sit-stand option and a moderate limitation in the ability to maintain attention and concentration[10]."

At the fifth step of the disability analysis, the SSA uses the claimant's "residual functional capacity and [his] age, education, and work experience to see if [he] can make an adjustment to other work." 20 C.F.R. 416.920(a)(4)(v). If the claimant "can make an adjustment to other work," the ALJ will find that he is not disabled. 20 C.F.R. 416.920(a)(4)(v). Conversely, if the ALJ finds that the claimant is unable to make such an adjustment, he will be deemed "disabled." *Id.*

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[9]Work involving lifting no more than ten pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. A sedentary job mostly involves sitting, but may occasionally require walking or standing.

[10]Requires ability to maintain concentration and attention sufficient to perform simple work tasks for an eight hour workday with short breaks about every two hours. Ability to maintain concentration and attention for more complex and detailed tasks may occasionally be required for short periods of time.

The ALJ found that while the record supports Noyes's testimony that he is unable to stand, sit, or walk for long periods of time, the assessment of Noyes's residual functional capacity provides the option of being able to sit or stand at his own discretion while performing sedentary work,[11] and would therefore accommodate this problem. The ALJ also stated that he "extend[ed] to the claimant significant benefit of doubt in finding that the described depression/anxiety represents a 'severe' impairment and imposed the functional limitations described."

Based on Dr. Sack's testimony, the ALJ concluded that considering Noyes's age, educational background, work experience and residual functioning capacity, Noyes is able to perform a significant number of sedentary jobs that exist in the national economy and is therefore not disabled under the Social Security Act.

III.

Section 205(g) of the Social Security Act, 42 U.S.C. §405(g) grants this Court the "power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or

[11]Sedentary work involves mostly sitting, though often includes some necessary amount of walking and standing. 20 C.F.R. 404.1567(a). It likewise "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools." *Id.*

reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing" and states that the Social Security Administrator's finding of fact, "if supported by substantial evidence, shall be conclusive." 42 U.S.C. 405(g).

The SSA is charged with ultimately resolving conflicts in evidence in order to determine whether claimant qualifies as disabled. *Richardson v. Perales*, 402 U.S. 389, 399 (1971); *Rodriguez v. Secretary of Human Services,* 647 F.2d 218, 222 (1st Cir. 1981). This Court does not review the decision *de novo* and must uphold the SSA's resolution of conflicting medical evidence unless it is unsupported by "substantial evidence." *Rodriguez Pagan v. Sec. of Health & Human Services*, 819 F.2d 1, 3 (1st Cir. 1987); *Lizotte v. Secretary of Health and Human Services,* 654 F.2d 127, 128 (1st Cir. 1981).

A decision is "supported by substantial evidence" when "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'" exists. *Richardson v. Perales*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Unless the SSA commits a legal or factual error in evaluating plaintiff's disability claim, this Court must uphold denial. *Manso-Pizarro v. Secretary of Health and Human Services,* 76 F.3d 15, 16 (1st Cir. 1996)(per curiam).

IV.

The issue in this case is whether "substantial evidence" supports the finding of the ALJ, at step five of the disability analysis, that Noyes has the residual functional capacity to perform sedentary work that exists in the economy. I conclude that while the record may arguably support such a finding, the ALJ failed to justify such a conclusion in his analysis because the ALJ: (A) committed a factual error in finding that statements by Dr. Freidberg and by Noyes about pain are inconsistent with the record, and legal error in failing to apply the proper pain evaluation standard, and (B) committed legal and factual errors when he insufficiently justified the amount of weight he afforded to the opinion of Noyes's treating physician, Dr. Gleason. I leave unaddressed the determination of the ALJ that Noyes suffers from a "severe" mental impairment.

A. The ALJ's Assessment of Pain

The ALJ must use a two-step evaluation process to determine whether an individual's pain symptoms are sufficient to render him disabled: (1) the ALJ must find whether claimant's "underlying medically determinable physical...impairment" can be "reasonably expected to produce the individual's pain," without taking into account the level or intensity of pain at this step, and (2) whether the "intensity, persistence, or limiting effects of the individual's pain...limit the individual's ability to do basic work." (SSR 96-7p) 1996 WL 374186 (S.S.A.), at *2-3 (Social

Security Administration Ruling clarifying its policy for evaluating pain in disability claims).

In step one, the ALJ determined that Noyes's medically determined impairments could reasonably be expected to produce symptoms of the type Noyes alleges. In step two, however, the ALJ concluded that "the claimant's statements concerning the intensity, duration, and limiting effects of those symptoms are not entirely credible." I find that the ALJ gave insufficient consideration to Noyes's pain in light of the criteria set out in SSR 96-7p.

An adjudicator, when assessing whether claimant's complaints about pain are credible, must issue a credibility determination that is "grounded in the evidence and articulated in the determination or decision." SSR 96-7p at *4. The credibility assessment of claimant's statements "must contain specific reasons for the finding on credibility"..."and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave the individual's statements and the reasons for that weight." *Id.* The credibility determination may not be based on the adjudicator's "intangible or intuitive notion about the individual's credibility." *Id.*

Relevant evidence to determine credibility includes *inter alia* consistency, medical evidence, and medical treatment

history. *Id.* at *5-8.

An adjudicator should consider the consistency in claimant's complaints about pain, which lends those complaints credibility, while a lack of consistency does not necessarily indicate that statements are without credibility because symptoms may vary over time and explanations for symptom variations may exist in the record. *Id.* at *5-6 (emphasis in original). An adjudicator should also consider medical evidence that may corroborate the existence of pain, including "reduced joint motion, muscle spasm, sensory deficit, and motion disruption," but "allegations concerning the intensity and persistence of pain or other symptoms may not be disregarded solely because they are not substantiated by objective metical evidence." *Id.* at *6-7. Medical treatment history remains relevant: "a longitudinal medical record demonstrating an individual's attempts to seek medical treatment for pain,...persistent attempts by the individual to obtain relief of pain or other symptoms, such as by increasing medications, trials of a variety of treatment modalities..., referrals to specialists, or changing treatment sources may be [] strong indication[s] that the symptoms are a source of distress to the individual and generally lend support to an individual's allegations of intensity and persistence of symptoms." *Id.* at *7.

In assessing evidence of pain symptoms, the adjudicator must

investigate all avenues presented that relate to the subjective complaints, including the individual's daily activities; the nature, location, duration, frequency, and intensity of pain; precipitating and aggravating factors; type, dosage, effectiveness, and adverse side-effects of any pain medication; treatment other than medication, for pain relief; functional restrictions; and the claimant's daily activities. *Id.* at *3-4. The adjudicator must give full consideration to all the available evidence, medical and other. *Id.*

The statements of a claimant and his doctor regarding pain that are not inconsistent with the medical evidence, if found credible, must be part of the disability determination. 42 USC § 423(d)(5); *Avery v. Secretary of Health and Human Services*; 797 F.2d 19, 20-21 (1st Cir. 1986).

Here, the ALJ disregarded Dr. Freidberg's opinion and Noyes's own testimony that Noyes's back pain renders him disabled. The ALJ did so by finding that their statements were "not entirely consistent" because treating physician notes did not evidence ongoing complaints of severe pain, because Noyes showed disinterest in surgery, because Noyes stated that he had "some degree" of back pain, and because Noyes was taking only minimal pain medication, all of which, he found, were inconsistent with an individual who is suffering severe pain.

First, the ALJ used the absence of explicit notes at every

one of Noyes's medical visits regarding Noyes's complaints of severe pain to conclude that Noyes did not in fact feel severe pain. Substantial evidence in the record fails to support such a conclusion.

Dr. Jaslow prescribed Noyes Demerol, Bextra, Vicodin, and Compazine for his pain, and consistently refilled the Demerol and Bextra prescriptions. In May 2004 Dr. Jaslow noted that Noyes's pain was not improving and ordered an MRI, then referred Noyes to a neurosurgeon. Noyes saw two neurosurgeons, both of whom recommended surgery. In October of 2004 Noyes filled out a pain questionnaire in which he stated he was in constant pain, that he was unable to sit or stand for longer than half an hour, and that he was sometimes unable to sleep. Noyes testified at his hearing that he was "in constant pain, all day long, every day" and that walking, sitting, and standing were very painful. Noyes also testified that he lay down most afternoons for two to three hours per day, which "seem[ed] to help."

The consistent prescription refills of Noyes's pain medication and Dr. Jaslow's note that Noyes was still in severe pain, after which he ordered an MRI, strongly support a conclusion that Noyes's doctors did in fact conclude over an extended period of time that Noyes was in severe pain. Dr. Friedberg's conclusion that Noyes was disabled because of his pain and surgery recommendations of both neurosurgeons further support a finding that Noyes felt severe pain.

Second, the record fails to support the ALJ's conclusion that Noyes must not have been suffering severe pain because he declined to have surgery. The record shows that in October of 2004, Dr. Friedberg, a neurosurgeon, stated that Noyes was disabled because of his back pain, and that a kypholastic surgery may be attempted but may not be possible because Noyes's fracture may have healed. The ALJ stated in the findings of fact that Noyes declined to have the surgery because of the "uncertain outcomes or complications." The neurosurgeon's opinion that the surgery may be ineffective and Noyes's reason for declining show little regarding the level of pain Noyes suffered.

Third, the ALJ referenced an ambiguous statement that Noyes had "some degree" of back pain and a single instance where Dr. Jaslow noted that Noyes was taking only Tylenol to find that Noyes was taking "minimal" pain medication. Those references understate the weight and breath of a record showing that Noyes had taken seven different types of pain medication, and consistently reported that he felt severe back pain. Dr. Jaslow's April 2004 note that Noyes was only taking Tylenol was the only documentation of Noyes ever failing to take prescription pain medication in the record. Dr. Jaslow consistently refilled Noyes's prescriptions for Demerol and Bextra. Dr. Freidberg noted that Noyes was taking Bextra and Demerol in October of 2004 and Noyes testified at the ALJ hearing in April 2006 that he had been taking Percocet, Demerol, Bextra, and Vicodin for two and a

half years. Dr. Gleason saw Noyes six times between November 2005 and March 2006 and noted each time that Noyes was taking two or three different types of prescription pain medicine.

The ALJ also erred when he dismissed testimony by Noyes that he had to lay down during the day for two hours to relieve his pain[12] because "the record does not demonstrate that this is the consequence of medical necessity." In doing so, the ALJ explicitly dismissed an important fact that lends credibility to Noyes's claims of severe pain. *See* SSR 96-7p at *3 (pursuit of "treatment, other than medication . . . for pain relief" lends credibility to an individual's claim regarding the intensity of his pain). This treatment of the Noyes statement was improper because "allegations concerning the intensity and persistence of pain or other symptoms may not be disregarded solely because they are not substantiated by objective medical evidence." *See* SSR 96-7p.

I find that the ALJ failed adequately to articulate reasons for determining that Noyes reported levels of pain that were inconsistent with the record and therefore not credible. The ALJ must evaluate all the evidence, including that provided in statements by both Noyes and Dr. Freidberg, regarding the level of pain Noyes experienced according to the criteria set out in

[12]Dr. Sacks testified that this fact would preclude full-time employment.

SSR 96-7p, affording the several dimensions of evidence adequate weight. *See* Avery, 797 F.2d at 20-21.

B. Treating Physician Rule

The ALJ insufficiently justified the weight he assigned to the opinions of Dr. Gleason, a treating physician.

The ALJ should "generally" give more weight to opinions of treating and examining sources, and the ALJ must give those opinions "controlling weight," when the opinions of the treating sources regarding the "nature and severity" of the impairments are (1)"well-supported by medically acceptable clinical and laboratory diagnostic techniques," and (2) "not inconsistent with" other "substantial" evidence in the record. 20 C.F.R. § 416.927(d)(2). The ALJ is entitled to reject the opinions of treating sources when they are inconsistent with the opinions of other physicians. *Cf. Shaw v. Secretary of Health and Human Services*, 25 F.3d 1037, No. 93-2173, 1994 WL 251000, at *3 (1st Cir. Jun. 9, 1994) (table decision); *Rivera v. Secretary of Health and Human Services*, 986 F.2d 1407, No. 92-1896, 1993 WL 40850, at *3 (1st Cir. Feb. 19, 1993) (table decision). Treating and examining sources have more *prima facie* credibility than opinions of non-examining medical practitioners. *Alcantara v. Astrue*, 257 Fed.Appx. 333, 2007 WL 4328148 (C.A.1 (R.I.))(1st Cir. December 12, 2007) at *1 (per curiam).

When the ALJ fails to give the opinions of treating

physicians controlling weight, he must look at "the length of the treatment relationship," "the nature and extent of the treatment relationship," "supportability," and other factors "that tend to support or contradict the [treating physician's] opinion" to determine how much weight to afford to the opinion. 20 C.F.R. § 406.927(d)(2), (d)(3), (d)(6). The ALJ must provide a "good reason" for the weight he affords to the opinions of treating sources. 20 C.F.R. § 406.927 (d)(2).

In January 2005, Dr. Gleason, Noyes's primary care physician, stated that Noyes was unable to carry any amount of weight and could not sit, stand, or walk for longer than half an hour in an eight hour work day, rendering Noyes unable to perform sedentary work. The ALJ referred to Dr. Gleason's testimony, but found Dr. Gleason's opinion to be without merit because at one point Dr. Jaslow observed that Noyes has "increased activity," and because Noyes had improved in physical therapy. The ALJ therefore found that Dr. Gleason's report lacked credibility because it is inconsistent with other evidence on record. *See* 20 C.F.R. 416.927(d)(2); *Shaw*, 25 F.3d at *3; *Rivera*, 986 F.2d at *3. I find a lack of substantial evidence to support the reasons the ALJ articulated for finding Dr. Gleason's report inconsistent with other evidence in the record.

First, the record fails to support the conclusion that Dr. Jaslow's note on "increased activity level" discredits Dr.

Gleason's findings. In April of 2004 Dr. Jaslow noted that Noyes was doing significantly more activities but was still in the same amount of pain. Dr. Jaslow's records indicated that the only increased activity Noyes engaged in was doing a lot of running around when his house caught on fire in March of 2004, which made Noyes's condition considerably worst, and his unsuccessful attempt to work a sedentary part-time four hour per day job. The ALJ construed the house fire as Noyes "increasing his activity level" and used the fact that Dr. Jaslow thought it may be appropriate for Noyes to try a part-time job because Noyes was eager to work as further evidence of fitness. The ALJ failed to take into consideration the fact that Noyes was unable to maintain that job because of the pain in April of 2004, a fact which strongly suggests that Noyes is in fact unable to work for even four hours a day in a sedentary setting. This, of course, corroborates Dr. Gleason's findings.

Second, the ALJ's finding that Noyes made improvement in physical therapy lacks substantial evidentiary support. The record strongly suggests his physical state has remained constant since July of 2004; when Dr. Jaslow examined Noyes's MRI results and stated that Noyes has reached a clinical plateau. Dr. Jaslow referred Noyes in October of 2004 to a neurosurgeon, Dr. Philips, who stated that Noyes "has undergone a prolonged course of physical therapy as well as oral pain medications without any significant relief." Moreover, between November 2005 and March

of 2006 Dr. Gleason saw Noyes on six occasions and noted no significant change in Noyes's condition during that time. No records show, and the ALJ does not identify, any evidence of improvement from physical therapy.

There is no evidence that the ALJ afforded Dr. Gleason's opinion *prima facia* credibility. *See Alcantara*, 257 Fed.Appx. at *1. The ALJ discredited Dr. Gleason's medical opinion because of the alleged inconsistencies described above, which are unsupported by substantial evidence in the record. Accordingly, the ALJ failed to provide a good reason for the weight he afforded to the opinion of Noyes's treating physician Dr. Gleason. *See* 20 C.F.R. § 404.1527 (d)(2).

The only evidence in the record that potentially supports the ALJ's conclusion that Noyes has the physical residual functioning capacity to perform sedentary work for eight hours each day is found in forms that non-examining physicians, Dr. Manuelian and Dr. Connelly, filled out, stating that Noyes would be able to sit for six hours per day if he had ten minute breaks and could walk for about two hours. Accordingly, the ALJ's determination that Noyes has the residual functioning capacity to perform sedentary work appears to rely solely on the conclusions on non-examining sources. The ALJ apparently assigned no weight to Dr. Gleason's findings.

There is a lack of substantial evidence to be found in the ALJ's articulation in support of a finding that Dr. Gleason's

testimony is inconsistent with the record, and I find that the ALJ erred in not assigning "controlling weight" to Dr. Gleason's opinion. *See* 20 C.F.R. 416.927(d)(2).

After failing to assign Dr. Gleason, a treating source, controlling weight, the ALJ disregarded Dr. Gleason's opinion and improperly failed to consider the nature, extent, and duration of Dr. Gleason's treatment relationship with Noyes, as well as the extent to which the record supports Dr. Gleason's opinion. *See* 20 C.F.R. 404.1527(d)(2), (d)(3), (d)(6).

V.

I conclude that the ALJ gave inadequate consideration to evidence in the record that Noyes suffers from severe pain. The record fails to provide substantial support for the reasons the ALJ relied upon to discredit the testimony of Noyes's treating physician, Dr. Gleason. Accordingly, I remand for further proceedings to include, without limitation, the giving of further consideration to the evidence of record - in light of the factors in SSR 96-7p - in determining Noyes's pain level, the amount of weight assigned to Dr. Gleason's opinion, and the finding that Noyes has adequate physical residual functioning capacity to perform work at a sedentary level. In the absence of cross appeal by the SSA, which in its answer sought only affirmance of the SSA final judgment, I leave undisturbed the ALJ's "benefit of the doubt" finding that Noyes has a severe mental impairment.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE