UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-10042-RWZ

ANTHOULA N. BANUSHI

v.

JO ANNE B. BARNHART

MEMORANDUM OF DECISION AND ORDER

June 26, 2007

ZOBEL, D.J.

Plaintiff Anthoula N. Banushi ("Banushi") seeks review of a final decision of defendant Jo Anne B. Barnhart, the Commissioner of Social Security (the "Commissioner"), denying plaintiff disability insurance benefits. For the reasons discussed below, the case is remanded to the Commissioner for consideration of relevant evidence not addressed by the decision of the Administrative Law Judge ("ALJ").

I. Procedural History

Plaintiff filed an application for disability insurance benefits with the Department of Health and Human Services, Social Security Administration ("SSA") on October 18, 2002, claiming disability as of April 17, 2002. (R. 71.)[1] Her claim was denied initially on November 1, 2002 (R. 73), and again after reconsideration on December 20, 2002. (R. 78.)

[1] "R. nn" refers to page number "nn" in the Administrative Record.

Pursuant to SSA regulations, plaintiff filed a timely request for a hearing (R. 82), and following that, the ALJ held that plaintiff was "not entitled to a period of disability or Disability Insurance Benefits . . . ." (R. 24.) This decision became final on September 16, 2004, when the Appeals Council denied review of the ALJ's decision. (R. 8-10; see also 20 C.F.R. § 404.955.)

Plaintiff then sought review in this court, as provided by 42 U.S.C. § 405(g), and moved to reverse and/or remand the case on November 11, 2004.[2] (Docket # 10.) Defendant opposed plaintiff's motion and asked the district court to affirm the ALJ's decision. (Docket # 11.) For reasons that are unclear from the record, plaintiff brought her action in the District of Rhode Island, even though she resides in Massachusetts. (Docket # 13.) A magistrate judge of that district held the venue improper and transferred the case to the District of Massachusetts. (Id.)

II. Factual Background

Plaintiff, Anthoula Banushi, apparently a Greek citizen, completed her education

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[2] 42 U.S.C. § 405(g) provides in relevant part:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision . . . . Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business . . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The 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).

(through the 12th grade) and married in Greece prior to coming to the United States. (R. 109, 125.) In 1981 and 1982, she worked as a seamstress in a sewing factory. (R. 120.) From 1983 through 1994 she worked with her husband in his store taking care of customers. (See R. 30-31.) After he closed the store, she took outside work again, initially as a laundry attendant. (See R. 31, 120.) Her most recent employment, from 1995 through 2002, was as a seamstress, with a significant earnings record. (See R. 114-16, 120.)

Plaintiff alleges that a work-related accident on April 17, 2002, aggravated a prior injury from an automobile accident the previous year and causes her such severe pain in her right knee, waist, right hip and back that she can no longer operate a sewing machine, conduct fittings or carry moderate loads of clothing. (R. 30, 119-20.) She has not worked since the work-related accident, and takes a number of medications for her pain. (R. 30, 34, 40, 119, 124.) Plaintiff is currently 50 years of age; she was 45 at the time of the accident and 47 at the time of the SSA hearing. (R. 29, 109.) Her work history insured her for disability benefits through December 2006. (R. 128.)

III. Issue to be Decided

Plaintiff is entitled to Social Security disability benefits if she is unable "to engage in any substantial 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). A regulation promulgated by the SSA, 20 C.F.R. § 404.1520, sets out a

five-step evaluation process to decide whether a claimant is disabled under this definition. See 20 C.F.R § 404.1520. These steps entail the following determinations:

> (1) if the claimant is doing "substantial gainful activity," she is not disabled;
>
> (2) if the claimant does not have "any impairment or combination of impairments which significantly limits her physical or mental ability to do basic work activities," she does not have a "severe impairment" and, therefore, is not disabled;
>
> (3) if the claimant is not doing substantial gainful activity and has a severe impairment "which meets the duration requirement and is listed in Appendix 1 [of 20 C.F.R. Part 404, Subpart P] or is equal to a listed impairment(s)," she is presumed "disabled without any further consideration of "age, education, and work experience;"
>
> (4) if the claimant's impairment does not prevent her from doing her past relevant work, she is not disabled; and finally,
>
> (5) if, after an assessment of the claimant's "residual functional capacity based on all the relevant medical and other evidence in [her] case record," the SSA finds that she "can make an adjustment to other work," she is not disabled; otherwise she will be found to be disabled.

20 C.F.R. § 404.1520(b)-(g).

Plaintiff asks the court to review the ALJ's conclusion that, under this analysis, she can make an adjustment to other work as required by step 5 and therefore is not disabled.

IV. The ALJ's Factual Findings

At the hearing, the ALJ received testimony from three witnesses: plaintiff, Edward Spindell, M.D. ("an impartial [non-examining] Medical Expert"), and Robert McGinn ("an impartial Vocational Expert"). (R. 16.) She also relied on hospital and medical records of plaintiff's treating physicians, as well as the records of a physician

hired to examine plaintiff, apparently in response to her worker's compensation claim. (R. 16-20.) In addition, the record includes reports, relied upon by the ALJ, from non-examining medical sources asked to evaluate plaintiff's application and medical history for the SSA. (See R. 21, 164-73, 185-92.)

Plaintiff testified that she was unable to perform even sedentary work, the lowest capacity category, because she could only stand or walk for twenty to thirty minutes before she had to sit or lie down; the medications she takes made her weak and sleepy; and extreme pain in her arm, back and knee made movement difficult. (R. 30-45.) In addition, she can no longer cook dinner for her family or drive and rarely leaves her house. (Id.) Records from her treating physicians support the conclusion that plaintiff was unable to perform sedentary work. (R. 21.) The ALJ, however, found this evidence unpersuasive. She found a "lack of objective findings" to support plaintiff's back complaints, and she concluded that the treating sources relied on "the claimant's subjective pain rather than objective findings" to determine plaintiff was unable to perform sedentary work. (Id.) Instead, the ALJ did rely on the determination of non-examining sources that the claimant could perform light exertion and on reports "reflecting improvement in the right knee" and "claimant's report" of only occasional use of pain medication to find "the claimant is not precluded from all activity." (Id.) She also relied on plaintiff's ability "to perform all activities of daily living" to find that plaintiff retained sufficient residual functional capacity to:

> perform sedentary exertion with no repetitive climbing of stairs, scaffolding, ropes, ramps or ladders; no repetitive truncal bending, stooping, crawling or crouching; no extremes of temperature or moisture;

> no repetitive use of foot controls; a need to avoid hazards; and a moderate limitation in concentration resulting in a need for simple repetitive tasks.

(Id.)

The ALJ then analyzed plaintiff's application for benefits under the five-step procedure provided by 20 C.F.R. § 404.1520. She found that plaintiff had not engaged in substantial gainful activity since her claimed disability date and that her back disorder and knee pain were "severe" within the meaning of the regulations, thus avoiding disqualification under the first two steps of the analysis. (See R. 17.) At the third step of the analysis, however, the ALJ found that plaintiff's impairments were not severe enough to meet the one of the impairments listed in Appendix 1, which would have qualified her for benefits without consideration of any other factors. (Id.; see also supra, step (3); 20 C.F.R. Pt. 404, Subpt. P, App. 1.)

After analyzing the relevant evidence, the ALJ concluded that, while claimant was prevented from doing her past relevant work, and thus not disqualified by step (4), supra, she retained adequate residual functional capacity ("RFC") to perform the requirements of "other work existing in significant numbers in the national economy." (R. 17-20, 23.) The SSA has the burden to show that such work exists and that claimant is able to perform it consistent with her RFC, age, education and work experience. (R. 22; 20 C.F.R. § 404.1560(c)(2).)

The ALJ made this determination by applying the Medical-Vocation Guidelines (the "Grid") of Appendix 2 of Subpart P of the Regulations. 20 C.F.R. Pt. 404, Subpt. P, App. 2. This appendix provides a list of rules which take into account the claimant's

maximum sustained work capacity, age, education, and previous work experience to reach a disabled/not disabled decision. Where the findings of fact made with respect to a particular individual coincide with all of the criteria of a particular rule, a "not disabled" decision implicitly includes a determination by the SSA that there exists significant numbers of jobs in the national economy available to that individual. Thus, while a decision of the Grid is subject to rebuttal, the SSA has met its initial burden in showing adequate jobs exist that the claimant is capable of performing.

In the instant case, the ALJ found that plaintiff had a maximum sustained work capacity limited to sedentary work and determined that she met the criteria of Rule 201.21 in Table No. 1 of the Grid:

Age:	Younger individual 45-49;
Education:	High school graduate or more;
Previous work experience:	Skilled or semi-skilled; skills not transferable;
Decision:	Not disabled.[3]

20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.21. Because "there are jobs, existing in significant numbers in the national economy, which the claimant is able to perform," the

[3] The "existence of jobs in the national economy" incorporated in this result is supported by administrative notice taken of, inter alia, jobs listed in the "Dictionary of Occupational Titles." See 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(b). Defendant submitted the results of a search of this publication for jobs requiring "Strength: sedentary work" and "Reasoning level: 1," to support her assertion that a significant number of such jobs exist. (Docket # 11, Attch. A.) The search identified forty-six occupations including "Almond Blancher, Hand," "Nut Sorter," "Dowel Inspector," "Getterer" ("Applies chemical solution to stems of wire leads used in making incandescent lamps."), "Sticker" ("Glues paper-covered wire to artificial flowers to stiffen and strengthen them."), "Shank Taper" ("Presses strips of gummed paper tape on shoe upper to protect it during sanding of outsole."), "Glass-Bulb Silverer," and a number of jobs involved in the manufacture and assembly of clocks and watches. Id.; see also Dictionary of Occupational Titles (4th Ed.1991).

ALJ found that plaintiff was not disabled. (R. 22-24.)

V. Standard of Review

Under 42 U.S.C. § 405(g), this court's review of the decision of the Commissioner is limited. Factual findings of the ALJ must be accepted by the district court as conclusive "if supported by substantial evidence." 42 U.S.C. § 405(g). Substantial evidence exists "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support [the Commissioner's] decision." Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

However, the ALJ's factual determinations are also governed by explicit standards. First, the ALJ is required to accord controlling weight to the opinions of treating sources when that "treating source's opinion on the issue(s) of the nature and severity of [claimant's] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record," since they "are likely to be the medical professionals most able to provide a detailed, longitudinal picture" of the medical impairments at issue. 20 C.F.R. § 404.1527(d)(2). Second, a determination that plaintiff is not credible must be supported by substantial, specific, and relevant evidence. Musto v. Halter, 135 F. Supp. 2d 220, 227 (D. Mass. 2001). Finally, "[a]n ALJ must consider a claimant's subjective assertion of pain by examin[ing] the following factors: (1) the nature, location, onset, duration, frequency, radiation, and intensity of pain; (2) any precipitating or aggravating factors; (3) the type, dosage, effectiveness, and adverse side effects of any pain medication; (4) any treatment, other than medication, for the

relief of pain; (5) any functional restrictions; and (6) the claimant's daily activities." Rohrberg v. Apfel, 26 F. Supp. 2d 303, 308 (D. Mass. 1998) (finding that the ALJ erred as a matter of law by not examining claimant's allegations of pain according to the enumerated factors); see also 20 C.F.R. § 404.1529.

VI. Discussion

There is no question that plaintiff's impairments place her on the borderline of the disabled/not disabled boundary. The ALJ found no disability largely by deciding each of the several factors against her to allow the use of the Grid to determine disability.[4] The difficulty is that in reaching her decision, the ALJ failed to fully consider and/or discuss all of the available evidence.

As discussed below, the decision adopts statements from plaintiff's application for disability benefits and the medical record which support RFC sufficient to perform sedentary work, without discussing statements tending to support an opposite finding. In addition, it does not discuss the physical findings described in the medical records or the testimony of the medical professionals that provide objective support for plaintiff's back pain. Finally, the decision does not address the issue of plaintiff's language skills, even though the instructions for the Grid relied upon by the decision explicitly note that an inability to read and write English may make a finding of "disabled" warranted.

A. Evaluation of the Testimony and Statements on Activity and Pain

[4] The court also suspects that if the SSA had to show that there actually existed jobs that plaintiff was capable of performing in sufficient numbers in the national economy, rather than relying on administrative notice that there exists an abundant need for nut sorters, bulb silverers, getterers and the like, plaintiff would be found disabled, even on the ALJ's findings.

In her evaluation of the evidence, the ALJ relies almost exclusively on the written record. She makes no mention of plaintiff's testimony that she is unable to cook for herself or drive, that she sleeps much of the day, that she is left weak and tired from the medications she takes and that she must apply hot and cold compresses to her back and knees for her pain. (R. 33-34, 39-43.) Indeed, the decision not only fails to discuss plaintiff's testimony, it does not explicitly discuss the testimony of the impartial Medical and Vocational Experts hired by the SSA to assist the ALJ. (See R. 16-24.) In addition, the decision discusses evidence supporting the finding that plaintiff is capable of sedentary work while neglecting evidence supporting the opposite conclusion.

For example, to support the finding that plaintiff has "an ability to perform all activities of daily living," the decision relies on "a form" that "claimant completed" indicating "she read, watched television, attended appointments, performed exercises and self-care except shaving her legs, prepared cereal and sandwiches, managed finances, and often had relatives to visit." (R. 19, 21.) This description of plaintiff's responses on the SSA's "Questionnaire on Pain" (R. 139-42) and "Activities of Daily Living" (R. 143-48), however, is incomplete and does not accurately describe "the evidence in the record as a whole," as required before this court must accept the Commissioner's findings. Rodriguez, 647 F.2d at 222; see also Seavey v. Barnhart, 276 F.3d 1, 8 (1st Cir. 2001) ("It is the ALJ's duty to investigate and develop the facts and develop the arguments both for and against the granting of benefits."); Cotter v. Harris, 642 F.2d 700, 706 (3d Cir. 1981) ("The ALJ's failure to explain his implicit rejection of [] evidence [supportive of claimant's claim] or even to acknowledge its

presence was error."); Rohrberg, 26 F. Supp. 2d at 308 (enumerating factors that must be examined in evaluating claimants allegations of pain).

Information provided by plaintiff, but not discussed, in the forms cited to support the ALJ's conclusions includes:

> [The pain] has gotten worse. (R. 139.)
>
> [M]y body has gotten used to the medications and doesn't make me any better. (Id.)
>
> Now I have to rely on others to do things like cook for me, clean my house, wash my clothes, shave my legs, drive me to appts. I can't do these things. (R. 141.)
>
> I can make cereal or a sandwich on my own. But no full course meals. I don't use the stove or other appliances in the kitchen anymore. (R. 144.)
>
> If I want to clean I can't bend over. If I want to wash dishes, I have pain from standing. (Id.)
>
> I don't do any chores in my house. (Id.)
>
> [I watch television] [a]bout 10 times a day for about 30 minutes. My pain gets in the way and I can only watch for about a half hour straight. (R.146.)
>
> Relatives often come to my house and visit. . . . I have pain that interferes with me going out with friends socially. . . . I can't do any [social activities] anymore. (R. 146-47.)
>
> I have to rely on others heavily. For example to drive me, cook for me, shave my legs. It's very upsetting. (R. 147.)
>
> I used to sleep about 4 hours and now as a result of my illness, I can only sleep about two. I used to go to social events with family and friends and now I can't go. I used to go grocery shopping & carry my own bags, but not anymore. I can't sit nor stand for long periods, because of the pain in my knee that extends to the right hip area. I have severe pain even when I bend especially in my back. (Id.)

Plaintiff also testified concerning her frequent use of numerous medications and the use of heating pads and ice to control her pain. (R. 139-40.) In addition, she stated that her relatives no longer visit, even though they had initially, and that the medications she takes make her weak and sleepy. (R. 40-43, 50.) None of this evidence is discussed in reaching the conclusion that plaintiff is capable of performing all activities of daily living.

The decision is similarly selective in its discussion of plaintiff's medical records. For example, in discussing plaintiff's use of medication, the decision describes a report by Dr. Phillips on June 6, 2003 as noting: ". . . the Celebrex improved the back pain better than any other medication." (R. 19.) That report, however, states:

> The back pain is really bothering her. She finds Celebrex works better than any other medication she has tried, but she is in pain most of the time. She is taking amitriptyline 25 mg two to three at bedtime.[5] Chiropractic care has not helped much.

(R. 287.) In the following visit on August 5, 2003, Dr. Phillips further noted, "Celebrex 200 mg a day helps a little but not much." (R. 288.)

The decision also does not discuss testimony by the impartial medical expert that would support a finding of disability for a claimant with these limitations. The medical expert testified that plaintiff should avoid "continuous and prolonged sitting and standing," opining that she "could get up – she – sit/stand alternately." (R. 57.) In response to hypothetical questioning by the ALJ, the vocational expert testified that while a requirement to "stand for a couple of minutes every two hours or so" did not rule

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[5] Amitriptyline is an anti-depressant agent sometimes used in the treatment of neurogenic pain syndromes. STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000).

out sedentary vocational occupations, a requirement "to get in the recumbent position for up to one hour twice a day" would "preclude the ability to perform any type of work." (R. 68-69.) See Nguyen v. Chater, 172 F.3d 31, 36 (1st Cir. 1999) ("The inability to remain seated may constitute an exertional impairment which significantly erodes the occupational base for sedentary work and requires use of additional vocational resources.")

The decision's use of portions of the evidence to support a finding of mobility, while not discussing contrary evidence that shows an inability to perform the functions of daily life, does not meet the requirement to examine the evidence as a whole.[6]

B. Objective Evidence to Support Back Pain

While acknowledging that imaging tests of plaintiff's back showed degeneration and that her treating physician diagnosed "chronic" and "persistent" sciatica on multiple occasions, the decision concludes, without explanation, that "there is no objective evidence to support the alleged severity of back pain and limitations." (R. 20-21.) The statement in the decision that "while examinations of the back demonstrated significant limitations . . ., x-rays and objective examinations were unremarkable" (R. 21) is at odds with the description of an April 17, 2003 lumbar MRI report as "reveal[ing] moderate to

[6] Plaintiff also testified that she was "sad," but she denied that she was depressed. (R. 46-50.) The ALJ implicitly accepted plaintiff's denial of depression, without discussing the impartial medical expert's opinion that this denial could be the result of a misunderstanding, and thus not reflect plaintiff's actual mental state. (See R. 61-62.) A finding of depression would make the Grid directly applicable only if it found plaintiff disabled, but would require further analysis if it resulted in a determination of not disabled. See 20 C.F.R. § 404.1569a; 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(e).

severe facet and ligamentous hyper atrophy with bulging and ridging at L4-5 that caused triangulation of the canal and mild to moderate medial displacement of traversing nerve roots with narrowed neural foramen as well as similar but significantly less severe changes at L3-4." (R. 19.) The decision also states: "The [MRI] report noted a broad based disc bulge with disc dehydration and loss of disc height at L5-S1 causing neural foraminal narrowing." (Id.; see also R. 202-03 (Radiologist's MRI Report); R. 284 (notes of Dr. Phillips describing degeneration on "spine film"); R. 286 (notes of Dr. Oakley describing "degenerative disc disease"); R. 303 (medical questionnaire completed by Dr. Phillips stating that plaintiff's pain is "caused by a medically determined impairment").)

Although the ALJ questioned the impartial medical expert concerning these findings, she does not discuss his testimony in her decision. (See R. 56-57.) In response to her questions, the expert opined that because of the "multi-level degenerative disk disease in her spine, [it would be appropriate for plaintiff] to avoid any climbing or excessive repetitive bending, stooping, crawling, and continuous and prolonged sitting and standing . . . . She could get up – she – sit/stand alternately." (R. 57.)

On cross-examination by plaintiff's attorney, the expert discovered he had not received the second page of the radiologist's report reading plaintiff's back MRI. Upon reviewing the complete report, the expert described the MRI as showing "the traversing nerve roots are slightly displaced secondary to ligamentous hypertrophy, and there's narrowing," noting that "it has the potential for affecting the nerve root at that level." (R.

60.) When asked if a displaced nerve root could cause an individual to have pain, the expert opined, "It could, yes. Yes." (Id.) He further opined that the degenerative changes described at the L5-S1 level could cause pain as well.[7] (R. 61.)

Based on this testimony, the ALJ's conclusion that there is no objective evidence to support the alleged severity of plaintiff's back pain is simply unfounded. Several of plaintiff's treating physicians and the SSA's expert opined that the displaced nerve root and the degenerative changes shown on the MRI of plaintiff's back could explain her back pain. The ALJ cannot substitute her lay opinion for that of the medical experts in reaching her conclusions. See Aronis v. Barnhart, 2003 WL 22953167, at *6 (S.D.N.Y. Dec. 13, 2003) (holding that "the ALJ failed to provide 'good reasons' for discrediting plaintiff's treating physicians' opinions" where his decision rejected two doctor's findings of disability and concluded "without citing any medical opinion, that despite the results of the MRI tests and EMG studies, there is no 'muscle atrophy to suggest disuse of her extremities'"); Balsamo v. Chater, 142 F.3d 75, 81 (2d Cir. 1998) (noting that the ALJ cannot substitute his own judgment for competent medical opinions) (internal citation omitted); Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (same).

C. The Non-Exertional Factor of Language Skills

1. Language Skills are Relevant to a Determination of Disability

The decision of the ALJ does not address plaintiff's language difficulties as a non-native English speaker, although the record is replete with references to the

[7] Although the expert did testify that "objective findings are not described" (R. 58), it was in response to a question concerning his assessment of plaintiff's right arm, not her back. (Id.)

problem. Plaintiff's facility with English is relevant because the rule applied by the ALJ to find plaintiff not disabled applies only to claimants with an education level of "High school graduate or more." 20 C.F.R. Pt. 404, Subpt. P, App. 2, Rule 201.21. This rule, however, implicitly assumes a high school education provides the claimant with twelve years of study of English grammar, spelling and punctuation. See 20 C.F.R. § 404.1564(b) (noting "[t]he term education also includes how well you are able to communicate in English" and defining a high school education as "abilities in reasoning, arithmetic, and language skill acquired through formal schooling at a 12th grade level or above") (emphasis added). The Regulations explicitly acknowledge this assumption by including the evaluation of a claimant's ability to communicate in English as an educational category separate from a high school education:

> (5) Inability to communicate in English. Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, we consider a person's ability to communicate in English when we evaluate what work, if any, he or she can do. It generally doesn't matter what other language a person may be fluent in.

20 C.F.R. § 404.1564(b)(5) (emphasis added). However, there is no indication in the decision that plaintiff's ability to communicate in English was considered in evaluating what work she could do. (See R. 23 ¶ 13.) The lack of a finding that plaintiff's ability to communicate in English was competent enough to allow the application of Rule 201.12 constitutes legal error. See (R. 23 ¶¶ 9, 12-13); Lugo v. Chater, 932 F. Supp. 497, 502 (S.D.N.Y. 1996) ("Before slotting a claimant into a particular grid rule, however, the ALJ

must first determine whether the claimant is conversant and literate in English." (citing Vega v. Harris, 636 F.2d 900, 903-904 (2d Cir.1981))); Zayas v. Heckler, 577 F. Supp. 121, 127 (D.C.N.Y. 1983) (holding that rule 210.17 specifying "illiterate or unable to communicate in English" applied to claimant, even though he had completed high school in Puerto Rico).

2. Plaintiff's Difficulty Communicating in English

There is overwhelming evidence in the record that plaintiff has considerable difficulty communicating in English. In her initial application for disability benefits, plaintiff responded to the question, "Can you read English?" with a checkmark in the "yes" box but wrote in the margin: "very, very little." (R. 118; see also R. 29.) A Sturdy Memorial Hospital Physical Therapy Evaluation report describes plaintiff's cognition as "does not read English well, does understand and speak well." (R. 224; accord R. 229.) However, other evidence in the record contradicts this assessment of plaintiff's inability in English as limited to reading; suggesting that she also has difficulties understanding and being understood.

An SSA employee interviewed plaintiff in person in conjunction with her initial application and observed, "[s]ome difficulty with understanding[,] she came into the office with her daughter who assisted in understanding/explaining things . . . ." (R. 130 (Interview Notes, Oct 18, 2002).) An SSA-3441 form dated a month later includes "some language barrier" in response to the question asking if the claimant requires assistance. (R. 138 (form signed Nov 20, 2002).) In her opening statement at the hearing, plaintiff's counsel commented that, "as far as speaking the language, she

seems ok, although she struggles at times." (R. 29.) The Sturdy Hospital ECC Clinical Record includes a notation that plaintiff required a Greek speaking interpreter. (R. 246.)

The SSA transcriber for the administrative hearing noted on the transcription quality control checklist: "Couldn't understand Claimant's Italian [sic] accent. Maybe someone else can pick it up." (R. 48.) The transcript of the hearing itself evidences the language problem. When asked by the ALJ if her high school education was obtained in the United States, plaintiff replied, "yes," even though on her disability application she listed her school as "Ioannina High School" in "Ioannina, Greece." (Compare R. 30, with R. 125.) In recalling an interaction with one of her treating physicians, plaintiff described problems with communication:

> . . . Dr. Pollen, she no understand very well, the time I am there, because I don't have anybody there to speak English . . . . She asked me, do you have depression? Do you want to kill yourself? Some stuff doesn't have any matter for my back, because she no understand my English.

(R. 36; see also R. 50.) Plaintiff explained that she usually brought one of her daughters with her when she had a doctor's appointment, but neither daughter was available to accompany her that day. (R. 50.) She testified that other doctors also had to rely on her daughters to ensure clear communications:

> Understand me, not everything. Sometimes, Dr. Phillips doesn't understand me; call my daughter and speak to my daughter. And Dr. Guild . . . doesn't understand me. Next visit, I bring someone, always.

(Id.) Dr. Phillips apparently concurred with this assessment, as he noted on the record of a June 5, 2003 exam, "I asked her to bring her daughter to [the next] visit so that

there is no language barrier" (R. 287), on December 2, 2003, "I will let her daughter know the plan" (R. 292), and on January 27, 2004, "[s]he plans to bring her daughter to that appointment so there can be a good translation." (R. 293.)[8]

3. Alternate Guideline Rules Applicable

The instructions for applying the Grid explicitly recognize language skills affect the vocational opportunities available to a claimant. Section 200.00(i) of the Grid notes that "illiteracy or the inability to communicate in English may significantly limit an individual's vocational scope," but it concludes that "the functional capability for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18-44 even if they are illiterate or unable to communicate in English." 20 C.F.R. Pt. 404, Subpt. P, App. 2, 200.00(i) (emphasis added). Plaintiff, however, was 45 years old when she stopped working and 47 at the time of the hearing. Therefore, the special rule of Section 201.00(h)(1) applies:

> (h)(1) The term younger individual is used to denote an individual age 18 through 49. For individuals who are age 45-49, age is a less advantageous factor for making an adjustment to other work than for those who are age 18- 44. Accordingly, a finding of "disabled" is warranted for individuals age 45- 49 who:
>
> (i) Are restricted to sedentary work,
>
> (ii) Are unskilled or have no transferable skills,
>
> (iii) Have no past relevant work or can no longer perform past relevant

[8] The record also records the presence of plaintiff's daughter at an examination by Dr. DeWitt Brown on June 28, 2002 (R. 157), and at the SSA hearing. (R. 27.) However, there is no indication in the record if the daughter helped with communication at either venue or was present for some other reason such as chauffeur or as an observer.

work, and

(iv) Are unable to communicate in English, or are able to speak and understand English but are unable to read or write in English.

20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(h)(1) (emphasis added). In the instant case, the ALJ found facts that meet the restrictions of (i) through (iii) of this rule. (See R. 23 ¶¶ 7, 10-11.) She did not, however, make an evaluation of plaintiff's language skills as required by 20 C.F.R. § 404.1564(b)(5) to determine if a finding of disabled is warranted under this rule.

VII. Conclusion

Because the findings that plaintiff is capable of sedentary work and that there exists jobs in sufficient numbers in the national economy that she can perform are not supported by a review of the evidence in the record as a whole, the Commissioner's conclusion of no disability is not supported by "substantial evidence." Accordingly, the case is remanded to the Commissioner for a full examination of the evidence in the record, both written and testimonial: (1) concerning plaintiff's subjective assertion of pain, her exertional limitations and the availability of jobs that accommodate her requirements to sit, stand and recline during a normal work-day; (2) supporting an objective source for plaintiff's complaints of back pain; and (3) concerning plaintiff's language limitations, particularly with respect to the alternate rule described in section 201.00(h)(1). Before applying the Grid, the Commissioner must consider the extent to which plaintiff's exertional and non-exertional impairments limit her ability to perform sedentary work and utilize vocational resources as necessary.

Plaintiff's motion to reverse and/or to remand (Docket # 10) is ALLOWED, and defendant's motion to affirm the Commissioner's decision (Docket # 11) is DENIED. The Commissioner's decision is reversed and the matter remanded for further proceedings consistent with this opinion. Judgment may be entered accordingly.

June 26, 2007
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE