UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN J. SWAN, JR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-130-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges disability stemming from bilateral shoulder impingement, a torn meniscus of the right knee, epicondylitis, borderline intellectual functioning, degenerative disc disease and arthritis of the cervical spine, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be affirmed.

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[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on April 28, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the medical evidence established that the plaintiff had degenerative disc disease of the cervical spine, an impairment that was severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 17; that his statements concerning his impairment and its impact on his ability to work were not entirely credible, Finding 4, *id.*; that he lacked the residual functional capacity ("RFC") to lift and carry more than ten pounds but could stand and walk for at least two hours in an eight-hour workday and sit for up to six hours, Finding 5, *id.*; that he suffered from pain, a nonexertional limitation that narrowed the range of work he was capable of performing, Finding 7, *id.*; that, given his exertional capacity for sedentary work, age (49), education (marginal) and work experience (semi-skilled but with no acquisition of transferable skills), application of Rule 201.19 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") directed a conclusion of "not disabled," Findings 8-11, *id.* at 18; and he therefore had not been under a disability at any time through the date of decision, Finding 12, *id.*[2] The Appeals Council declined to review the decision, *id.* at 5-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the

[2] Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through at *(continued on next page)*

conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff raises a host of specific issues that can be crystallized into two key points: that the administrative law judge (i) improperly applied the Grid despite the presence of a number of significant nonexertional impairments and side effects of medication, and (ii) failed to apply the so-called "borderline age" rules. *See generally* Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 7). I find no reversible error.

I. Discussion

A. Application of Grid

Use of the Grid is appropriate when a rule accurately describes an individual's capabilities and vocational profile. *Heckler v. Campbell*, 461 U.S. 458, 462 and n.5 (1983). When a claimant's impairments involve only limitations related to the exertional requirements of work, the Grid provides a "streamlined" method by which the commissioner can meet his burden of showing there is other work a claimant can perform. *Heggarty v. Sullivan*, 947 F.2d 990, 995 (1st Cir. 1991). However, in cases in

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least June 30, 2006, *see* Finding 1, Record at 17, there was no need to undertake a separate SSD analysis.

which the claimant suffers from nonexertional as well as exertional impairments, the Grid may not accurately reflect the availability of other work he or she can do. *Id.* at 996; *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989).[3] Whether the commissioner may rely on the Grid in these circumstances depends on whether a nonexertional impairment "significantly affects [a] claimant's ability to perform the full range of jobs" at the appropriate exertional level. *Id.* (citation and internal quotation marks omitted). If a nonexertional impairment is significant, the commissioner generally may not rely on the Grid to meet his Step 5 burden but must employ other means, typically use of a vocational expert. *Id.* Even in cases in which a nonexertional impairment is determined to be significant, however, the commissioner may yet rely exclusively upon the Grid if "a non-strength impairment . . . has the effect only of reducing that occupational base marginally[.]" *Id*. This is true of mental as well as physical impairments. *Id*. at 525-28.

Naked reliance on the Grid thus was permissible to the extent the administrative law judge supportably found (explicitly or implicitly) that the plaintiff's nonexertional impairments (i) did not significantly affect his ability to perform the full range of sedentary jobs or (ii) in any event, had the effect of reducing the sedentary occupational base only marginally.

The administrative law judge found that the plaintiff had only one "severe" impairment: degenerative disc disease of the cervical spine. *See* Finding 3, Record at 17. He further found that as a result of this impairment the plaintiff suffered pain, a nonexertional limitation that narrowed the range of work he was capable of performing. *See* Finding 7, *id*.

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[3] "Exertional capacity addresses an individual's limitations and restrictions of physical strength and defines the individual's remaining ability to perform each of seven strength demands: Sitting, standing, walking, lifting, carrying, pushing, and pulling." Social Security Ruling 96-9p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-9p"), at 156. "Nonexertional capacity considers any work-related limitations and restrictions that are not exertional." *Id*. "Therefore, a nonexertional limitation is an impairment-caused limitation affecting such capacities as mental abilities, vision, hearing, speech, climbing, balancing, stooping, kneeling, crouching, crawling, *(continued on next page)*

As a threshold matter, the plaintiff contends that the pain finding, alone, precluded sole reliance on the Grid. *See* Statement of Errors at 3, 10. I am unpersuaded. While "[p]ain can constitute a significant non-exertional impairment which precludes naked application of the Grid and requires use of a vocational expert," *Nguyen v. Chater*, 172 F.3d 31, 36 (1st Cir. 1999), a finding of pain does not foreclose use of the Grid to the extent the adjudicator supportably determines the pain not to have constituted a significant nonexertional limitation, *see, e.g.*, *Howell v. Sullivan*, 950 F.2d 343, 349 (7th Cir.1991).[4]

Although the administrative law judge found that the plaintiff's pain "narrowed" the range of work he could perform, the body of his decision makes clear that he did not mean to suggest that there was more than a slight narrowing in capacity to undertake the full range of such work. *See, e.g.*, Record at 15 (concluding that in view of plaintiff's lack of credibility and his activities of daily living, he suffered "at worst no more than a modicum of pain"). This, in turn, was a supportable view inasmuch as (i) the Record contains substantial evidence that the plaintiff retained the RFC for sedentary work, free from any significant nonexertional impairment, and (ii) the administrative law judge made well-supported negative pain and credibility determinations.

1. RFC Determination

reaching, handling, fingering, and feeling." *Id*.

[4] I take comfort that in a series of decisions not to be cited as precedent, the First Circuit has reached the same conclusion. *See, e.g.*, *Silva-Valentin v. Commissioner of Social Sec.*, 74 Fed. Appx. 73, 75 (1st Cir. 2003) (administrative law judge supportably relied on Grid in case in which substantial evidence supported determination that pain was not a significant nonexertional limitation); *Vazquez v. Secretary of Health & Human Ser*vs., No. 94-1793, 1995 WL 23125, at **3 (1st Cir. Jan. 23, 1995) ("We are persuaded that substantial evidence supports the ALJ's conclusion that claimant's pain does not impair his ability to perform light work. Under the circumstances, there was no error in relying on the Grid.") (citation omitted); *Sanchez-Quiles v. Secretary of Health & Human Servs.*, No. 93-1151, 1993 WL 460761, at **1 (1st Cir. Nov. 10, 1993) ("It is true that the ALJ did not explicitly address claimant's pain as a nonexertional limitation. Nevertheless, we think his decision implies that claimant's pain did not significantly reduce his access to jobs at the sedentary level and thus did not preclude reliance on the grid. So construed, the ALJ's decision is supportable.") (footnote omitted).

The plaintiff suffers from both physical and mental impairments. *See, e.g.*, Record at 13-14. I separately consider the administrative law judge's RFC findings with respect to each category.

i. Physical RFC

As the administrative law judge observed, treating physician John Fuhrman, M.D., opined in April 2002 that the plaintiff was capable of at least sedentary work – a view consistent with those of several other treating practitioners. *See id*. at 16, 256; *see also, e.g., id*. at 191, 194 (view of Joseph Conrad, PA-C, who treated plaintiff for epicondylitis of elbows,[5] that plaintiff seemed to be "working at home in a fairly unrestricted capacity" and was not disabled), 224-25, 229 (declinations by Linda Seabold, PA-C, who treated plaintiff for various conditions including chronic bilateral shoulder pain and recurrent bilateral lateral epicondylitis, to fill out continuing-disability form), 295 (progress note of Patricia Griffith, M.D., of Franklin Orthopedics stating that she had encouraged plaintiff to look for sedentary work).

The plaintiff attacks reliance on Dr. Fuhrman, asserting that (i) Dr. Fuhrman did not purport to offer a full RFC assessment; in fact, he recommended that one be performed, and (ii) in any event the weight of his opinion is undercut by subsequently submitted evidence. *See* Statement of Errors at 13-14. That evidence is described as including (i) an MRI demonstrating for the first time that the plaintiff suffered from actual impingement of the spinal cord at C6-7 and likely at C5-6, (ii) first-time diagnoses of bilateral carpal tunnel syndrome and a torn meniscus of the right knee,[6] and (iii) a letter from subsequent treating physician Robert M. O'Reilly, D.O., describing the plaintiff as temporarily disabled and his neck, shoulder and arm problems as "apparently old and worsening." *See id*. at 14; Record at 293, 310, 326, 332.

The plaintiff further observes that the administrative law judge disregarded limitations on pushing/pulling and/or reaching found by two non-examining DDS physicians even without benefit of the subsequent carpal-tunnel evidence. *See* Statement of Errors at 7-9; Record at 183-90 (RFC assessment

[5] This condition also is known as "tennis elbow." Stedman's Medical Dictionary ("Stedman's") at 603 (27th ed. 2000).

dated December 6, 2001 by Richard Chamberlin, M.D.), 266-73 (RFC assessment dated July 19, 2002 by Lawrence P. Johnson, M.D.).[7]

Although Dr. Fuhrman did not have the benefit of the updated MRI of the neck, the carpal-tunnel and knee diagnoses or Dr. O'Reilly's opinion, the administrative law judge supportably found that there was "no subsequent substantial contradictory medical evidence which could reasonably rebut his opinion." Record at 16. This is so inasmuch as:

1. Neck MRI. The Record reveals that Dr. Griffith, who reviewed the updated MRI with the plaintiff, encouraged him to seek sedentary work. *See* Record at 293, 295.

2. Carpal-Tunnel Diagnosis. The administrative law judge supportably determined the carpal-tunnel condition to be non-severe, *see id*. at 13; *see also, e.g., id*. at 299 (letter dated August 16, 2002 from Richard L. Sullivan, M.D., to Dr. O'Reilly describing carpal-tunnel condition as mild; finding normal strength and sensation in both hands on examination).

3. Knee Diagnosis. Although the administrative law judge erred in treatment of the knee condition, the error is harmless. The administrative law judge determined the torn meniscus to be non-severe on the basis of testimony at hearing by medical expert Olaf Andersen, M.D., that, with surgery, normal function likely would be restored to the knee within six to eight weeks and, thus, the condition would not cause significant work-related limitations for twelve consecutive months. *See id*. at 14, 56. As the plaintiff suggests, *see* Statement of Errors at 12, this analytical construct is flawed. The administrative law

[6] "Meniscus" is defined in relevant part as "[a] crescent-shaped fibrocartilaginous structure of the knee[.]" Stedman's at 1091.

[7] The plaintiff's diagnosed physical impairments as of the time Dr. Fuhrman and the DDS non-examining physicians rendered their RFC opinions included (i) degenerative disc disease of the cervical spine, *see* Finding 3, Record at 17; *see also, e.g., id*. at 182; bilateral shoulder impingement, *see id*. at 13; *see also, e.g., id*. at 259; and bilateral epicondylitis of his elbows, *see id*. at 13; *see also, e.g., id*. at 259.

judge conflated two separate analyses: whether a condition is severe and whether compliance with treatment would restore a claimant's ability to work. *See, e.g., McGuire v. Heckler*, 589 F. Supp. 718, 723 n.34 (S.D.N.Y. 1984) ("The Secretary's regulations do not explicitly authorize an ALJ to consider the ease with which an impairment could be cured when determining whether that impairment is 'severe.' Rather, a separate rule, 20 C.F.R. § 404.1530(a) (1983), states that the [Commissioner] will not award benefits unless the claimant 'follow[s] treatment prescribed by [his] physician *if this treatment can restore [claimant's] ability to work*.'") (emphasis in original); *see also* 20 C.F.R. §§ 404.1530(a), 416.930(a).

Nonetheless, the error was harmless. Had the administrative law judge properly categorized the meniscus condition as severe, he supportably could have concluded that it could have been alleviated by compliance with treatment – namely, surgery to repair the tear. While failure to follow prescribed treatment can be excused for "good reason," 20 C.F.R. §§ 404.1530(b), 416.930(b), the plaintiff offered no such good reason. Rather, he testified that he intended to make efforts to secure surgery on the torn meniscus but thus far had made none. *See* Record at 56.[8] Any pain or functional limitation flowing from the knee condition (including any difficulty stooping, *see* Record at 55-56), accordingly did not preclude reliance on the Grid. *See, e.g., McMillian v. Apfel*, 67 Soc. Sec. Rep. Serv. 481, 485 (S.D. Ala. 2000) ("Because the plaintiff failed to follow prescribed treatment that would have controlled his hypertension, that condition cannot support a finding of disability. Necessarily, then, it cannot preclude reliance on the Grids.") (citation omitted).

4. Dr. O'Reilly's Opinion. Dr. O'Reilly opined, following two office visits with the plaintiff, that his problems "apparently" were worsening and that he should be considered temporarily disabled (for a

[8] In his Statement of Errors, the plaintiff asserts that he "was laid off work with no indication that he had either the medical
(continued on next page)

period of three to six months) pending further workup. *See* Record at 310. This equivocal opinion does not directly contradict Dr. Fuhrman's opinion that the plaintiff remained capable of sedentary work.

Finally, even assuming *arguendo* that the administrative law judge erred in ignoring limitations on hand and/or arm usage found by the DDS physicians (Drs. Chamberlin and Johnson), *see* Statement of Errors at 7-8, any such error again was harmless. Dr. Chamberlin found the plaintiff, in relevant part, incapable of constant push and/or pull of his left upper extremity but free of any manipulative limitations, *see* Record at 184-86, while Dr. Johnson found him, in relevant part, incapable of constant push and/or pull of his upper extremities and impaired by one manipulative limitation, preclusion from overhead reaching, *see id.* at 267-69. As SSR 96-9p makes clear, limitations on pushing and/or pulling have only a negligible impact on the occupational base for unskilled sedentary work. *See* SSR 96-9p, at 157 ("Limitations or restrictions on the ability to push or pull will generally have little effect on the unskilled sedentary occupational base."). Further, while impairment in bilateral manual dexterity can seriously erode that occupational base, *see id*. at 159, neither Dr. Chamberlin nor Dr. Johnson found impairment in the plaintiff's ability to handle, finger or feel, *see* Record at 186, 269. SSR 96-9p does not indicate that ability to reach overhead is a critical nonexertional capacity for purposes of unskilled sedentary work. *See* SSR 96-9p, at 159-60.[9]

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insurance or the funds to obtain such surgery at that [sic] time of the hearing." Statement of Errors at 12. However, he provides no corroborating record citation for this evidence.

[9] At oral argument, counsel for the plaintiff acknowledged that the limitations found by the DDS physicians did not implicate manual dexterity; however, he suggested that the subsequently diagnosed carpal-tunnel condition did. Nonetheless, the Record supports the administrative law judge's implicit conclusion that the carpal-tunnel impairment did not significantly erode the occupational base for sedentary work. Although Dr. Sullivan's studies evidently corroborated the plaintiff's complaints of intermittent hand numbness and tingling, Dr. Sullivan noted that on examination he found normal strength and sensation in both hands. *See* Record at 299. Further, as counsel for the commissioner pointed out, Dr. Sullivan noted no particular limitations stemming from the impairment. *See id*.

The record evidence as a whole accordingly supports a finding that the plaintiff did not have physical nonexertional impairments of a nature that would more than marginally erode the full occupational base for unskilled sedentary work.

Three more physical-RFC issues merit mention: the plaintiff's contentions that the administrative law judge (i) erroneously determined that he suffered no side effects of medication, *see* Statement of Errors at 10-11, (ii) failed to address the impact of his obesity, in contravention of Social Security Ruling 02-01p, *see id*. at 9, and (iii) neglected to cite concrete examples of jobs the plaintiff still could perform, as he was obliged to do by SSR 96-9p, *see id*. at 11-12.

1. Side effects of medication. The administrative law judge supportably found the plaintiff not to be suffering side effects of medication on the basis that this allegation was unsupported by the documentary evidence. *See* Record at 15. Specifically, the administrative law judge found that treating-source notes for December 2001 and May 2002 indicated that the plaintiff denied medication side effects. *See id*. at 16. The plaintiff asserts that the administrative law judge relied on the wrong records inasmuch as he complained at hearing of side effects of a medication he had just begun taking a couple of months prior to the hearing (presumably Paxil). *See* Statement of Errors at 10; Record at 33-34, 337A. Any error in failing to consider the Paxil allegation is harmless. I find no medical record from that time frame corroborating that the plaintiff suffered side effects from that medication.

2. Obesity. As the plaintiff implicitly acknowledges, *see* Statement of Errors at 9, no issue was made of his obesity until Dr. Andersen raised it at hearing, opining that the plaintiff's weight "would undoubtedly impact on his skeletal system and arthritis," Record at 53. Nonetheless, Dr. Andersen (a non-examining physician) did not quantify the amount of impact, and, from all that appears, the plaintiff's treating practitioners either factored his obesity into their overall assessments *sub silentio* or found it to have no

quantifiable impact on his functioning. Inasmuch as obesity, standing alone, is not a presumptively severe impairment, *see* Social Security Ruling 02-01p, 2000 WL 628049 (S.S.A.), at *4 ("There is no specific level of weight or BMI [Body Mass Index] that equates with a 'severe' or a 'not severe' impairment. Neither do descriptive terms for levels of obesity (e.g., 'severe,' 'extreme,' or 'morbid' obesity) establish whether obesity is or is not a 'severe' impairment for disability program purposes."), and the plaintiff can suggest no concrete way in which factoring it in would have altered the administrative law judge's analysis, *see* Statement of Errors at 9, I find any error in neglecting to consider it to have been harmless.

3. Citation of Specific Jobs. SSR 96-9p provides: "Where there is more than a slight impact on the individual's ability to perform the full range of sedentary work, if the adjudicator finds that the individual is able to do other work, the adjudicator must cite examples of occupations or jobs the individual can do and provide a statement of the incidence of such work in the region where the individual resides or in several regions of the country." SSR 96-9p, at 156. Although the administrative law judge found that the plaintiff suffered from pain that "narrowed" the range of sedentary work he could perform, the decision in context makes reasonably clear that the administrative law judge found no more than a slight narrowing in ability to undertake such work. Thus, there was no error in failing to undertake a specific job analysis.

ii. Mental RFC

DDS examining consultant Willard E. Millis, Jr., Ph.D., diagnosed the plaintiff as suffering from two mental impairments: borderline intellectual functioning (with a full-scale IQ of 72) and adjustment disorder with depressed mood, *see* Record at 262-64.

Troublingly, although the administrative law judge addressed the plaintiff's depression, finding it non-severe, he omitted any mention whatsoever of the plaintiff's borderline intellectual functioning and failed to complete the requisite Psychiatric Review Technique Form ("PRTF") rating the severity of the combined

mental impairments. *See* Record at 12-18; 20 C.F.R. §§ 404.1520a(e)(2), 416.920a(e)(2) ("[T]he written decision issued by the administrative law judge . . . must incorporate the pertinent findings and conclusions based on the [psychiatric review] technique."). Typically, a wholesale failure to adjudicate a point warrants remand for further proceedings. *See, e.g.*, *Soto v. Secretary of Health & Human Servs.*, 795 F.2d 219, 222 (1st Cir. 1986) ("We are ill-equipped to sort out a record that admits of conflicting interpretations. Accordingly, we believe the case must be remanded . . . ."); *Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.").

Nonetheless, under the circumstances of this case, I find these regrettable errors to have been harmless. As an initial matter, I note that although the administrative law judge himself neglected to fill out a PRTF, the Record does contain a PRTF completed by DDS non-examining psychologist Thomas Knox, Ph.D., with the benefit of the Millis report. *See* Record at 274-87. The regulations contemplate that an administrative law judge may call upon a medical expert to assist in this way. *See* 20 C.F.R. §§ 404.1520a(e)(3), 416.920a(e)(3).

Secondly, the administrative law judge's express finding that the plaintiff's depression was non-severe is soundly corroborated by the evidence of record. *See, e.g.*, Record at 264 (findings of Dr. Millis), 274, 284 (Knox PRTF rating the plaintiff's mental impairments as mildly impacting activities of daily living, social functioning and concentration, persistence and pace and causing no episodes of decompensation), 316-17 (note of Douglas Rand, D.O., finding mood disturbance secondary to history of chronic pain and primary complaint of frustration and anger regarding disability-claims system); *see also, e.g.*, 20 C.F.R. §§ 1520a(d)(1), 416.920a(d)(1) ("If we rate the degree of your limitation in the first three functional areas as 'none' or 'mild' and 'none' in the fourth area, we will generally conclude that your impairment(s) is non-

severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities[.]").

Finally, as counsel for the commissioner posited at oral argument, the only pertinent evidence of record regarding the plaintiff's borderline intellectual functioning indicates that it, too, was non-severe. *See, e.g.*, Record at 264 (findings of Dr. Millis), 274, 284 (Knox PRTF). Given the state of the evidence, adjudication of this case does not oblige the court in the first instance to resolve evidentiary conflicts, and no useful purpose would be served in remanding for explication of what now is implicit.[10]

The undisputed evidence demonstrates that the plaintiff's mental impairments did not impose a significant enough restriction to preclude reliance on the Grid. Dr. Millis found that despite these impairments, the plaintiff retained the capacity to understand detailed instructions, had no significant memory impairment and was capable of interacting with peers and supervisors in a work situation without any interference from psychological issues. *See id*. at 264. He further noted that although the plaintiff had a "very mild" problem with persistence and pace, he had no evident difficulty with concentration or focus. *See id*. The plaintiff accordingly retained a mental capacity consistent with the demands of unskilled sedentary work. *See, e.g.*, SSR 96-9p, at 160 (mental capacities generally required by competitive, remunerative unskilled work include (i) understanding, remembering and carrying out simple instructions, (ii)

[10] The plaintiff correctly observes that in failing altogether to address his borderline intellectual functioning, the administrative law judge neglected to consider whether his low IQ, combined with his other impairments, equaled Listing 12.05C. *See* Statement of Errors at 5-6. To meet Listing 12.05C, a claimant must adduce evidence of "[a] valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function[.]" However, per Social Security Administration Program Operation Manual System ("POMS") § DI 24515.056, a "slightly higher IQ's (e.g., 70-75) in the presence of other physical or mental disorders that impose additional and significant work-related limitation of function may support an equivalence determination." POMS § DI 24515.056(D)(1)(c), 2001 WL 1933392 (SSA-POMS). Nonetheless, the POMS also clarifies that the criteria for meeting Listing 12.05C "are such that a medical equivalence determination would very rarely be required." *Id.* Given that the administrative law judge supportably found the bulk of the plaintiff's impairments non-severe and his pain complaints *(continued on next page)*

making judgments commensurate with the functions of unskilled work, for example simple work-related decisions, (iii) responding appropriately to supervision, co-workers and usual work situations and (iv) dealing with changes in a routine work setting); *compare, e.g.*, *Ortiz*, 890 F.2d at 527-28 (while use of vocational expert preferable, exclusive reliance on Grid supportable in case in which mental impairments found to cause moderate restrictions).

The finding that the plaintiff's mental impairments imposed only mild restrictions on his work-related functioning (thus permitting use of the Grid) accordingly was supported by substantial evidence.

2. Pain, Credibility Determinations

The administrative law judge heavily discounted the plaintiff's complaints of "unrelenting, excruciating and paralyzing" pain and medication-related tiredness on the basis of lack of credibility and inconsistency with the objective medical evidence and with his daily activities. *See* Record at 15. I find no basis to disturb this finding or its companion conclusion that the plaintiff suffered, at most, a modicum of pain. *See id*.

Per *Avery v. Secretary of Health and Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986), an adjudicator must "be aware that symptoms, such as pain, can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder." *Avery*, 797 F.2d at 23 (citation and internal quotation marks omitted). "Thus, before a complete evaluation of this individual's RFC can be made, a full description of the individual's prior work record, daily activities and any additional statements from the claimant, his or her treating physician or other third party relative to the alleged pain must be considered." *Id*. (citation and internal quotation marks omitted); *see also, e.g.*, Social Security

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greatly exaggerated, this is not such a rare case. Any error in failure to apply this section of POMS accordingly is *(continued on next page)*

Ruling 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-7p"), at 135.

After obtaining such information the administrative law judge must make a credibility finding regarding the claimed pain or other symptoms. *See, e.g.*, SSR 96-7p, at 137 ("The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight."). On review, the supportability of this determination is assessed on the same basis as are credibility determinations in general – *i.e.*, "entitled to deference, especially when supported by specific findings." *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

The administrative law judge described the plaintiff's hearing testimony as "evasive and purposefully misleading," Record at 15, a characterization to which I defer inasmuch as the administrative law judge saw and heard the plaintiff and, in any event, the cold record supports such a description, *see, e.g.*, *id*. at 28-33 (colloquy between plaintiff and administrative law judge). In his Statement of Errors, the plaintiff acknowledges that his answers to questions "were confusing and sometimes contradictory"; however, he asserts that this resulted from comprehension difficulties corroborated by Dr. Millis's report. *See* Statement of Errors at 6-7. I am unpersuaded. While Dr. Millis ranked the plaintiff in the second percentile in verbal-comprehension skill, he nonetheless deemed him capable of understanding detailed instructions, free of difficulty with concentration or focus and capable of interacting with peers and supervisors in a work sitting without any interference from psychological issues. *See* Record at 263-64.

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harmless.

Beyond this, and consistent with *Avery*, the administrative law judge canvassed the plaintiff's daily activities, supportably finding such undertakings as daily conversations with a nephew, shopping once a week, driving one to two times per week, watching television three to four hours a day and reading a newspaper one to two times a week inconsistent with complaints of severe and unremitting pain twenty-four hours a day. *See id*. at 15, 40-42.

As the administrative law judge further noted, medical evidence of record also undercut the plaintiff's pain and functional-restriction allegations, including (i) progress notes indicating that the plaintiff had been non-compliant with physical therapy, doing a lot of labor at home, driving fairly long distances and helping a friend move a mobile home, (ii) an assessment by a treating physician's assistant that the plaintiff's complaints of pain were disproportionate to the objective medical findings, and (iii) Dr. Johnson's assessment that the plaintiff retained the exertional capacity for medium work. *See id*. at 15-16, 193-94, 196-99, 267.

In short, the Record supports the administrative law judge's finding that, in this case, pain was not a significant nonexertional limitation.

B. Borderline-Age Issue

In his second overarching point of error, the plaintiff complains that the administrative law judge neglected to consider his "borderline age" status. *See* Statement of Errors at 18-21. This plaint implicates the basic rule that the age categories of the Grid may not be applied in mechanical fashion in cases in which a claimant's age is just shy of the next higher category. *See, e.g*., 20 C.F.R. §§ 404.1563(b), 416.963(b) ("We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a

determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.").

The plaintiff posits that at the time of his hearing he was "on the borderline between the grid categories" of "younger individual" (age 18 to 49) and "individual approaching advanced age" (age 50 to 54). *See* Statement of Errors at 18. He correctly observes that in view of the administrative law judge's findings that he retained the RFC only for sedentary work, had only a marginal education and lacked transferable vocational skills, Rule 201.10 of Table 1 of the Grid would have directed a conclusion of "disabled" had he simply been given the benefit of the next higher age category. *See id.*; Rule 201.10, Table 1 to Grid.[11]

Unfortunately for the plaintiff, as of the relevant time (the date of decision) he was too many months shy of the next higher age category to qualify for "borderline age" consideration.[12] The plaintiff, who was born on December 29, 1953, *see, e.g.*, Record at 238, was approximately eight-and-a-half months away from his fiftieth birthday when the decision in his case was rendered on April 9, 2003, *see id.* at 18. I find no guidance from the First Circuit on the discrete question of how many months or days shy of the next higher age category a claimant must be to qualify as "on the borderline"; however, after thoroughly canvassing the extant caselaw, the District Court for the Western District of Tennessee determined in a 2002 case that the general consensus is that "the borderline range falls somewhere around six months from

[11] The plaintiff mistakenly cites Rule 201.12 of Table 1 of the Grid. *See* Statement of Errors at 18.

[12] For SSI purposes, entitlement to borderline-age consideration is measured as of the date of the administrative law judge's decision, *see, e.g., Crady v. Secretary of Health & Human Servs.*, 835 F.2d 617, 620 (6th Cir. 1987) ("The decision date is the relevant cut-off point for analysis of all factors on which the determination of disability *vel non* is based, including the claimant's age."), while for SSD purposes, it is measured from the plaintiff's date last insured, *see, e.g., Smith v. Barnhart*, No. 00 C 2643, 2002 WL 126107, at *3 (N.D. Ill. Jan. 31, 2001) ("The first step for an ALJ is to determine whether a borderline situation exists. This is done by determining, based on the evidence, whether a claimant's age is within a few days or a few months of a higher age category *at the time the disability insured status expires*.") (emphasis in original). Inasmuch as in this case the plaintiff's disability insured status had not expired as of the date of decision, the

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the older age category." *Pickard v. Commissioner of Soc. Sec.*, 224 F. Supp.2d 1161, 1168-69 (W.D. Tenn. 2002); *see also, e.g., Lambert v. Chater*, 96 F.3d 469, 470 (10th Cir. 1996) (claimant seven months younger than next age category did not fall into borderline situation); *Russell v. Bowen*, 856 F.2d 81, 84 (9th Cir. 1988) (same).[13]

The administrative law judge accordingly committed no error in omitting to consider the plaintiff for borderline-age status.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of April, 2004.

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latter date controls for purposes of both his SSI and SSD claims.

[13] The plaintiff cites *Tousignant v. Apfel*, 55 Soc. Sec. Rep. Serv. 609, 613-14 (N.D. Ill. 1998) (ten months from next age category), *Bennett v. Sullivan*, Civ. A. No. 89-1907, 1990 WL 122912, at *5 (E.D. Pa. Aug. 21, 1990) (ten months from next age category), *Williams v. Bowen*, Civ. A. No. 86-3763, 1987 WL 9148, at *2 (E.D. Pa. Apr. 6, 1987) (seven months from next age category),and *Howard v. Bowen*, 638 F. Supp. 68, 72 n.4 (D.D.C. 1986) (eight months from next age category), in support of the proposition that he should be found to fall within the borderline. *See* Statement of Errors at 19-20. Neither *Tousignant* nor *Williams* is persuasive authority inasmuch as neither considers the body of caselaw wrestling with the issue of the definition of "borderline" age. *See Tousignant*, 55 Soc. Sec. Rep. Serv. at 613-14; *Williams*, 1987 WL 9148, at *2. *Bennett* is not persuasive authority inasmuch as the two cases on which it relies for the proposition that a person within one year of the next age category falls within the borderline do not support that assertion. *See Bennett*, 1990 WL 122912, at *5; *Ford v. Heckler*, 572 F. Supp. 992, 994 (E.D.N.C. 1983); *Hilliard v. Schweiker*, 563 F. Supp. 99, 101 (D. Mont. 1983). Nor does *Howard* help the plaintiff inasmuch as the *Howard* court focused on the claimant's age at the time of her application – not at the time of decision. *See Howard*, 638 F. Supp. at 72 n.4.

/s/ David M. Cohen
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United States Magistrate Judge

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