***UNITED STATES DISTRICT COURT***

***DISTRICT OF MAINE***

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| ***ANDREW P. HARVEY,*** | ) | |
| | ) | |
| ***Plaintiff*** | ) | |
| | ) | |
| ***v.*** | ) | ***Civil No. 94-235-B*** |
| | ) | |
| ***SHIRLEY S. CHATER,*** | ) | |
| ***Commissioner of Social Security,***[1] | ) | |
| | ) | |
| ***Defendant*** | ) | |

***REPORT AND RECOMMENDED DECISION***[2]

This Social Security Supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal requires the court to decide whether the Commissioner erred in her determination that the plaintiff was not under a disability as of February 16, 1994 in light of the Appeals Council's

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[1] Donna E. Shalala, Secretary of Health and Human Services, was originally named as the defendant in this matter. On March 31, 1995 the Social Security Administration ceased to be part of the Department of Health and Human Services and became an independent executive branch agency. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, §§ 101, 110(a). Concerning suits pending as of that date against officers of the Department of Health and Human Services, sued in an official capacity, Congress has authorized the substitution of parties as necessary to give effect to the change. Such substitution is so ordered here and I will therefore refer to all determinations made by the Social Security Administration in this case as those of the Commissioner.

[2] 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 26, 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 July 19, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

refusal to review the case based on an evaluation of the plaintiff conducted by an occupational therapist on March 9, 1994, and in light of the administrative law judge's findings that the plaintiff has the residual functional capacity for medium work, subject to certain limitations, and that he is therefore capable of performing jobs that exist in significant numbers in the national economy. I recommend that the court vacate the decision of the Commissioner and remand for further proceedings.

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 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since July 31, 1991, Finding 2, Record p. 20; that the medical evidence fails to establish the claimed impairments of gouty arthritis, migraine headaches, arthritis of the hands or severe scoliosis, Findings 3-4, Record p. 20; that the plaintiff suffers from "severe low back pain on a mechanical basis," but that he does not have an impairment or combination of impairments that is equal to any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 5, Record p. 20; that he is unable to perform his past relevant work, Finding 8, Record p. 21; that he has a high school education and a skilled work background, Findings 10-11, Record p. 21; that his residual functional capacity for the full range of medium work is reduced by his inability to perform more than occasional climbing, balancing, stooping, kneeling, crouching and crawling, Finding 7, Record p. 21; that, despite these findings, there exists a significant number of jobs in the national economy the plaintiff could perform, including those of duplicating machine operator, mail clerk (non-post office), and non-bicycle messenger, Finding 13, Record p. 21; and that, therefore, the plaintiff is not disabled, Finding 14, Record p. 21. The Appeals Council declined to review the

decision, Record pp. 4-5, 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).

## I. The Appeals Council's Determination

The plaintiff first contends that the Appeals Council erred by refusing to consider the report of occupational therapist Myra E. Otero-Massey, who examined the plaintiff on March 9, 1994 and concluded that he "does not qualify" for sedentary work. Record p. 178-80. The Appeals Council dismissed this conclusion as "based entirely on [the plaintiff's] effort and motivation" and inconsistent with the medical evidence of record. *Id.* at 4. The council also concluded that an occupational therapist is not an acceptable medical source as required by 20 C.F.R. §§ 404.1513 and 416.913. The plaintiff's position is that a licensed occupational therapist who performs an evaluation at the request of a treating physician is an acceptable medical source, that sections 404.1513(e) and 416.913(e) permit the Commissioner to consider information about his impairment from "other sources," and that the report of the occupational therapist is actually consistent with the other medical evidence of record.

As pointed out by the Commissioner at oral argument, the Second Circuit has recently ruled that it would be inconsistent with the Social Security regulations to require the Commissioner to give controlling weight to the opinion of a chiropractor. *Diaz v. Shalala*, 1995 WL 367078 at *4 (2d Cir. June 20, 1995). Noting that the Commissioner must give controlling weight to the well-supported medical opinions of a treating source, the Second Circuit stressed that only physicians and others enumerated in the regulations as acceptable medical sources may provide medical opinions that have

such a binding effect. *Id.; see also* 20 C.F.R. § § 404.1513(a), 416.913(a) (defining acceptable medical sources as physicians, osteopaths, optometrists and persons authorized to transmit or summarize medical records). Although occupational therapists, unlike chiropractors, are not among the "other sources" enumerated in subsections 404.1513(e) and 416.913(e) whose information "may also help [the Social Security Administration] to understand how [a claimant's] impairment affects [his] ability to work," chiropractors are listed there only by way of example. Clearly, the opinion of an occupational therapist is among the data that may be helpful to the Commissioner in making the disability determination, but without carrying the special weight accorded medical opinions.

To the extent that the opinion of the occupational therapist is otherwise material, there is no basis for disturbing the Appeals Council's decision not to revisit any of the issues determined by the administrative law judge because the newly submitted evidence might support a different set of findings. It is the function of the Commissioner, and not the court, to resolve conflicts in the evidence. *Irlanda Ortiz v. Secretary of Health & Human Servs*., 955 F.2d 765, 769 (1st Cir. 1991). For the same reason, it is of no significance that the occupational therapist's opinion is consistent with some of the medical evidence *not* credited by the administrative law judge.

The plaintiff points out that the administrative law judge took note in his decision that the plaintiff had failed to take up his treating physician's offer to set up an evaluation by an occupational therapist for him. *See* Record p. 17. The administrative law judge did not indicate what weight, if any, he accorded the lack of such an evaluation in the record. It is permissible for the Commissioner to take into consideration a failure to seek treatment in making an assessment of the plaintiff's credibility. *Irlanda Ortiz*, 955 F.2d at 769. But from this it does not follow that when a claimant mitigates such a failure following the date of the administrative law judge's determination, the

Appeals Council is somehow compelled to reach a different determination. I conclude that the Appeals Council committed no error in refusing to consider the report of the occupational therapist.

## II. The Plaintiff's Residual Functional Capacity

The plaintiff next contends that there is an absence of substantial evidence in the record to support the Commissioner's determination of his residual functional capacity. *See* 42 U.S.C. §§ 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In reviewing for substantial evidence in the record, the court considers whether the Commissioner's determination is supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions 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 plaintiff contends that there is not medical evidence in the record to support the determination that he can perform medium work, limited by an inability to perform more than occasional climbing, balancing, stooping, kneeling, crouching and crawling. According to the plaintiff, this finding is inconsistent with the administrative law judge's additional finding that he suffers from severe low back pain, and the administrative law judge improperly ignored evidence of rheumatism, gouty arthritis, scoliosis and migraine headaches, erroneously disregarded the plaintiff's limitations based on pain, improperly disregarded the treating physician's findings concerning the plaintiff's limited ability to stand, sit, lift, bend and stoop, and erroneously dismissed the plaintiff's testimony as not credible.

The medical evidence in the record from treating physicians is not extensive and may be summarized as follows. The plaintiff's primary physician, Kenneth Baker, D.O., reported on April

21, 1993 “no knowledge of any back injury, heart attack or arthritis problems,” but did diagnose “chronic low back pain dating back approximately 20 years.” Record p. 131. He reaffirmed these findings on June 29, 1993. *Id*. at 130. Dr. Baker also referred the plaintiff to a surgeon, Chester C. Suske, D.O. Dr. Suske first examined the plaintiff in January 1993, finding “decreased mobility, with posterior rotation of the lower lumbar spine on the right, myospasm of the lumbosacral junction, and tenderness over the iliolumbar ligament.” *Id*. at 145. Thereafter, in September 1993, Dr. Suske reported a diagnosis of “probable arthritis,” which he theorized was due to gout in light of elevated levels of uric acid in the plaintiff's bloodstream. *Id.* at 139. The doctor specifically declined to express an opinion as to the plaintiff's capacity to perform work. *Id.*

The record also contains a residual functional capacity assessment prepared by a non-examining, non-testifying physician in May 1993. *Id*. at 122-29. Based on a diagnosis of scoliosis, this doctor concluded that the plaintiff can occasionally lift and/or carry 50 pounds, and can frequently lift and/or carry 25 pounds. *Id*. at 123. He found that the plaintiff was limited to occasional climbing, balancing, stooping, kneeling, crouching and crawling, *id*. at 124, and, giving the plaintiff the “benefit of doubt,” he concluded that the plaintiff could not perform heavy work, *id*. at 129.

The administrative law judge's findings are fully consistent with this evidence. He essentially adopted all of the findings of the treating and non-treating physicians, declining only to adopt Dr. Suske's finding of probable arthritis. In so doing, the administrative law judge noted that the plaintiff's primary care physician, Dr. Baker, reported no knowledge of any arthritis problems as of April 1993, despite the plaintiff's hearing testimony that he has been bothered by arthritis in his hands since 1983. *Id*. at 15. The judge concluded that the elevated uric acid level reported by Dr.

Suske does not conclusively establish the existence of arthritis. *Id.* In light of Dr. Suske's finding that arthritis was only probable, the administrative law judge was not compelled to find that the plaintiff suffers from arthritis.

Neither can I agree with the plaintiff that the administrative law judge's findings relative to impairment are inconsistent with his finding of chronic low back pain, or amount to an improper rejection of the plaintiff's testimony about the pain he experiences. "Pain cannot be found to have a significant effect on a disability determination or decision unless medical signs or laboratory findings show that a medically determinable physical or medical impairment is present that could reasonably be expected to produce the pain alleged." Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service* at 652, 653 (1992); *Avery v. Secretary of Health & Human Servs*., 797 F.2d 19, 21 (1st Cir. 1986). With clinical findings as a foundation, the Commissioner is permitted to find disability based on the level of pain if statements by the claimant or his doctor about the level of pain are both consistent with the objective findings and found credible by the adjudicator. *Id*. Further, when there is a claim of pain not supported by objective findings, the adjudicator must

> obtain detailed descriptions of daily activities by directing specific inquiries about the pain and its effects to the claimant, his/her physicians from whom medical evidence is being requested, and other third parties who would be likely to have such knowledge.

*Id*. at 23 (quoting POMS, DI T00401-570).

> In instances in which the adjudicator has observed the individual, the adjudicator is not free to accept or reject that individual's subjective complaints solely on the basis of such personal observations. Rather, in all cases in which pain is alleged, the determination or decision rationale is to contain a thorough discussion and analysis of the objective medical evidence and the nonmedical evidence, including the individual's subjective complaints and the adjudicator's personal observations. The

> rationale is then to provide a resolution of any inconsistencies in the evidence as a whole and set forth a logical explanation of the individual's capacity to work.

Social Security Ruling 88-13 at 655. Here, the administrative law judge did not simply reject the plaintiff's allegations of pain as not credible, but noted the absence of pain-related complaints in the medical records until September 1992, and the absence of recommendations from the treating physicians that the plaintiff restrict his activities in light of his pain complaints. Record p. 18.

At oral argument, the plaintiff took the position that remand is appropriate in light of the First Circuit's decision in *Rose v. Shalala*, 34 F.3d 19 (1st Cir. 1994). In *Rose*, the administrative law judge made a finding that the claimant suffered from "possible" chronic fatigue syndrome, but that the symptoms of chronic fatigue did not significantly restrict the claimant's capacity to perform the full range of sedentary work. *Id*. at 14, 17. The First Circuit vacated the administrative finding of no disability, ruling that uncontroverted medical evidence established the claimant's chronic fatigue syndrome. *Id*. at 17, 19. More significantly for present purposes, the court was sharply critical of the administrative law judge's reliance on the findings of two non-testifying, non-examining physicians who did not cite any significant limitations resulting from fatigue. *Id*. at 18-19. Noting that the amount of weight that can be accorded such medical evidence will vary with the circumstances, the court found the particular nature of chronic fatigue syndrome itself to be dispositive. *Id*. at 18. *Rose* teaches that in cases where chronic fatigue syndrome is established, the Commissioner must eschew "blind reliance" on a non-examining physician's determination that objective findings are lacking; something more in the way of medical evidence is required. *Id*. at 19.

The present case is readily distinguishable from *Rose*. Even assuming that the plaintiff's medical conditions are both conclusively established and similar to chronic fatigue syndrome in that

they can "reasonably be expected to produce" the subjective complaints made by the plaintiff, *id*., this is not a case of blind reliance by the administrative law judge on the assessment of a non-examining physician. Rather, the findings of the non-examining physician are corroborative of the findings made by the treating physicians with the possible exception of Dr. Suske. There is thus no reason to disturb the finding that the plaintiff suffers from chronic low back pain, but that this pain does not impair the plaintiff's ability to perform work to the extent claimed by the plaintiff in his testimony.[3]

## III. The Existence of Jobs in the National Economy that the Plaintiff Can Perform

[3] The plaintiff further contends that the administrative law judge improperly found him less than credible on the issue of pain in light of the judge's observation that the plaintiff first testified that the plaintiff shared grocery shopping and child care duties with his wife, but "later retracted this statement, following questioning by his attorney, and said all he did was pay the bills." Record p. 18, 32. In fact, the plaintiff's statement about bill paying did not follow questioning by his attorney, and actually fell between his testimony that he shares child care responsibilities, *id*. at 28, and his testimony that both he and his wife do the grocery shopping, *id*. at 32. It is of no consequence that the administrative law judge misreported the timing of the plaintiff's statements. The point being made by the administrative law judge was that the plaintiff's testimony about performing certain family and household chores was inconsistent with his statement that the only such task he performs is bill-paying.

Similarly, at oral argument the plaintiff noted an inconsistency between his actual testimony and the administrative law judge's description of it. The plaintiff testified: "I've seen times that I've bent over just to pick up a piece of paper off the floor and my back is gone." Record p. 36. The administrative law judge commented that the plaintiff "testified that he was unable to lift anything even bending down to lift a piece of paper," and that such an assertion has no support in the medical evidence and is contradicted by the plaintiff's other testimony. *Id*. at 18. This lapse is more troubling; as the plaintiff notes, the administrative law judge made his observation in the context of explaining why he found the plaintiff's allegations to be not credible. The administrative law judge is therefore vulnerable to the claim the plaintiff makes here, that the judge had set up a straw man so as to bolster his credibility determination. Ultimately, however, the decision of the administrative law judge makes clear that his credibility determination is rooted in the lack of medical evidence to support the plaintiff's pain allegations.

In short, the administrative law judge's careless summary of some of the plaintiff's testimony, though a source of concern, results in mistakes that are *de minimis*.

Finally, the plaintiff contends that even if the Commissioner's assessment of his residual functional capacity is supported by the evidence, the Commissioner did not meet her burden in establishing the existence of a significant number of jobs in the national economy that the plaintiff is capable of performing. Here I must agree at least in part with the plaintiff. It is not clear whether the Commissioner has met her burden or not.

In making his determination as to the existence of suitable jobs, the administrative law judge relied on a hypothetical posed to the vocational expert that required her to assume that the plaintiff, *inter alia*, is a "worker of younger age, that is to say under 40, who has a high school education, . . . [and] relevant past work experience . . . much of it at the semi-skilled or skilled level on the construction or mechanics trade." Record p. 46. The vocational expert sought clarification on whether the administrative law judge wanted her to assume the plaintiff had transferable work skills, and the judge responded that he was specifically not including such a restriction in the hypothetical. *Id*. at 46-47. He did ask the vocational expert, however, to state whether the jobs she cited involved transferable work skills or not. *Id*. at 47. She then cited the jobs of duplicating machine operator, non-post office mail clerk and non-bicycle messenger, but without indicating whether any of these jobs require transferable skills. *Id*. The plaintiff contends that in light of record evidence that he possesses transferable work skills, the Commissioner's reliance on this hypothetical is fatally flawed because the vocational expert failed to specify how many of the jobs she was citing required such skills.

Vocational factors, *i.e*., age, education and work experience, along with residual functional capacity, are the ingredients that go into the Commissioner's determination of whether a claimant

is capable of performing jobs that exist in significant numbers in the national economy. 20 C.F.R. §§ 404.1560(c), 614.960(c). A key component of work experience, in turn, is the extent to which a claimant has acquired skills and, if so, whether such skills are transferable to other jobs if the claimant is unable to return to his past relevant work. 20 C.F.R. § § 404.1565(a), 416.965(a) (skills as a component of work experience); §§ 404.1568, 416.968 (describing skill levels and transferability).

When the hypothetical posed to the vocational expert omits significant functional limitations applicable to the claimant, the vocational expert's opinion cannot form the basis for a finding that the plaintiff is not disabled. *Rose,* 34 F.3d at 19. Here, the plaintiff's functional limitations were adequately presented to the vocational expert. But the record lacks any evidence of record, or an opinion from the vocational expert herself, that the plaintiff has any skills that are transferable. Since some of the jobs cited by the vocational expert, in expressing her view that there exists a significant number of jobs in the national economy capable of being performed by the plaintiff, include positions that require transferable work skills, it is impossible to determine whether the Commissioner's finding at Step 5 is supported by substantial evidence. As the plaintiff points out, had the vocational expert been limited to discussing jobs that require no transferable skills, she might well have expressed a different opinion.

At oral argument, the Commissioner conceded the significance of this issue but suggested that one may find the requisite evidentiary foundation in the subsequent examination of the vocational expert by the plaintiff. I disagree. It is true that the plaintiff had the vocational expert recite the numerical codes (from the Department of Labor's *Dictionary of Occupational Titles*) for the specific jobs comprising the three general job categories cited in the hypothetical, a process that

literally caused the administrative law judge to cry "uncle." Record p. 54. It is also true, as the Commissioner points out, that one may consult the *Dictionary of Occupational Titles* to determine which of those specific jobs require transferable skills. But this does not cure the central ambiguity, which is the vocational expert's failure to specify whether and to what extent she was relying on specific jobs requiring transferable skills in expressing her opinion as to the plaintiff's employability. Clarification is necessary for a determination of whether the Commissioner can meet her burden at Step 5, and remand is therefore appropriate. *See Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 376 (1st Cir. 1982) (remand appropriate for further inquiry of vocational expert as to effect of claimant's limitations).

I make that recommendation mindful that in some Step 5 cases a remand for award of benefits may be appropriate in light of the Commissioner's burden of proof at that stage of the sequential evaluation process. For example, in *Allen v. Bowen*, 881 F.2d 37 (3d Cir. 1989), the administrative law judge denied the claimant benefits at Step 5 based on a Grid rule applicable to certain claimants with transferable work skills. *Id*. at 39. The vocational expert testified that the plaintiff had such skills, but identified only unskilled positions when asked what jobs the plaintiff was capable of performing. *Id*. at 42. The Third Circuit concluded that the Secretary had failed to meet his burden at Step 5 and directed an award of benefits, rejecting the Secretary's argument that further inquiry of the vocational expert would yield evidence of unskilled or semi-skilled jobs available to the plaintiff. *Id*. at 43. By contrast, this is not a case in which the Commissioner asks the court to "assume facts for which there is no supporting evidence in the record." *Id*. Rather, it is a case in which the court is unable to determine whether such supporting evidence underlies the opinion of the vocational expert.

## IV. Conclusion

Accordingly, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

***NOTICE***

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

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

***Dated at Portland, Maine this 24th day of July, 1995.***

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***David M. Cohen***
***United States Magistrate Judge***