UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHANNON L. MORTON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 05-82-P-S***
	)	
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 question whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that he is disabled by insomnia, depression, right knee pain and arthritis in the lumbar spine, is capable of returning to past relevant work as a cook or fence installer. I recommend that the decision of the commissioner be affirmed.

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

[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 November 29, 2005, 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.

administrative law judge found, in relevant part, that the medical evidence established that the plaintiff had chronic pain syndrome, spondylolisthesis of L5 on S1, and caffeine intoxication, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Findings 3-4, Record at 18; that he retained the residual functional capacity ("RFC") to perform the exertional demands of medium work inasmuch as he was able to lift and carry more than twenty-five pounds frequently and fifty pounds occasionally and to sit, stand and/or walk for at least six hours in an eight-hour workday, Finding 6, *id.*; that he was capable of returning to his past relevant work as a cook and fence installer, Finding 7, *id.*; and that he therefore had not been under a disability at any time through the date of decision, Finding 8, *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 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 in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the

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

commissioner must make findings of the plaintiff's RFC and the physical and mental demands of past work and determine whether the plaintiff's RFC would permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-1982 ("SSR 82-62"), at 813.

The plaintiff complains that the administrative law judge erred in (i) failing to make the required Step 4 finding concerning the mental demands of his past relevant work, (ii) citing selectively from the opinions of expert consultants in analyzing his mental impairments, and (iii) failing to develop the record adequately. *See generally* Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 10). I find no reversible error.

I. Discussion

A. Step 4 Analysis

To be deemed capable of returning to past relevant work, a claimant must retain the RFC to perform either "the actual functional demands and job duties of a particular past relevant job" or, "when the demands of the particular job which claimant performed in the past cannot be met, . . . the functional demands of that occupation as customarily required in the national economy[.]" *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 & n.1 (1st Cir. 1991) (citations and internal quotation marks omitted); *see also, e.g.*, SSR 82-62, at 811.

Per SSR 82-62, a Step 4 determination must contain specific findings of fact regarding (i) the claimant's RFC, (ii) the physical and mental demands of the past job/occupation and (iii) the fit between RFC and the demands of the past relevant work. *See, e.g.*, SSR 82-62, at 813. The plaintiff posits that, as

March 31, 2007, *see* Finding 1, Record at 18, there was no need to undertake a separate SSD analysis.

in *Bartlett v. Barnhart*, No. 05-23-B-W (D. Me. Aug. 9, 2005) (rec. dec., *aff'd* Aug. 29, 2005), the administrative law judge failed to make basic findings – in particular, the mental demands of the cook and fence-installer jobs – and that it was not self-evident he could return to this jobs given his mental impairments. *See* Statement of Errors at 2.

The administrative law judge did indeed err in failing to make any findings concerning the mental demands of the plaintiff's past relevant work. *See* SSR 82-62 at 811. However, this case is distinguishable from *Bartlett* in a critical respect. Whereas, in *Bartlett*, the administrative law judge had implicitly found the plaintiff to be suffering from a severe mental impairment that imposed a number of restrictions on his ability to function at work, *see Bartlett*, slip. op. at 3-5, in this case the plaintiff, who was 27 years old at the time of his hearing, *see* Record at 27-28, testified that the mental impairments that prevented him from holding a job had been present for most of his life (since he was a young boy), *see id.* at 31-32, 37. Therefore, in this case, the error was harmless: The plaintiff's mental impairments (which, as discussed below, the administrative law judge supportably found non-severe) did not preclude him from returning to past relevant work.

B. Mental Impairments

The plaintiff next complains that the administrative law judge erred in "cherry-pick[ing] negative information from the examining source opinions[.]" Statement of Errors at 3. In the main, he assails the administrative law judge's rejection of the opinion of his examining consultant, Brian Rines, Ph.D., in favor of the opinions of Disability Determination Services ("DDS") non-examining consultants Thomas A. Knox, Ph.D., and Scott Hoch, Ph.D. *See id.* at 3-5; *see also* Record at 15-17, 236-49 (Knox Psychiatric Review Technique Form ("PRTF") dated September 29, 2003), 263-76 (Hoch PRTF dated December

11, 2003), 341-50 (Rines report dated November 2004), 351-53 (Rines mental RFC assessment dated November 9, 2004). I discern no error.

The Record as relevant to the question of mental impairments contains (in addition to the Knox and Hoch PRTFs) a report of examining DDS consultant Donna Quinn, Ph.D., *see id*. at 222-26 (Quinn report dated September 25, 2003), notes of a treating physician's assistant, Rodney C. Kuhl, PAC, of Swift River Health Center, who first saw the plaintiff in 1998, *see id*. at 262, and first recorded complaints of depression in April 2002, *see id*. at 256,[3] and notes of Bethel Family Health Center reflecting a visit on November 21, 2002 to reestablish care, *see id*. at 287-88.[4]

Kuhl prescribed the plaintiff a series of medications to treat his complaints of depression and moodiness, including Effexor, Wellbutrin, Celexa and Cymbalta. *See id*. at 251, 253, 255, 340. As of July 8, 2002 the plaintiff reported to Kuhl that the Celexa was helping him. *See id*. at 253. However, during a November 21, 2002 visit to reestablish care with Bethel Family Health Center, he told a practitioner there that he was feeling depressed on Celexa, and his mother and brother were doing well on Effexor. *See id*. at 288. The practitioner prescribed Effexor and recommended counseling. *See id*. at 287. Bethel Family Health Center recorded the plaintiff as a no-show for two followup appointments in January 2003 to monitor his depression. *See id*.

[3] At that time, the plaintiff told Kuhl there was a strong family history of depression and he, himself, had been treated for it in the past. *See* Record at 256. The Record does indicate that in April 1996 the plaintiff reported to Bethel Area Health Center that he was having problems with his girlfriend, was depressed, not eating, not sleeping and had taken an overdose of cold medications. *See id*. at 296. He was seen by a licensed social worker that day. *See id*.

[4] The Record contains progress notes of Bethel Area Health Center (evidently the former name of the Bethel Family Health Center) covering the period 1994-98. *See* Record at 286-305. As noted above, during that time frame the plaintiff was reported to have complained of depression on one occasion in April 1996.

Dr. Quinn, the DDS examining consultant, assessed the plaintiff with dysthymic disorder, caffeine intoxication and borderline personality disorder, noting that antisocial personality disorder needed to be ruled out. *See id*. at 225. She summarized:

> Based on the available information, it appears that Mr. Morton should be able to follow work rules reasonably well, and relate adequately to co-workers, supervisors and the public. Judgment is likely negatively impacted by his personality style. He reported[] that he has repeatedly "just walked off the job." When faced with work-related stress, he reported that [he] does a lot of flaring. He prefers to function independently. He showed no difficulty understanding, remembering and carrying out details and simple job instructions. He has ability to maintain his personal appearance well. Mr. Morton may have [a] difficult time behaving in an emotionally stable manner. He reported that he has a difficult time with anger and irritability, and this appears to be a functional personality style. Mr. Morton reported that he has a history of poor reliability. He attributed this to back pain and "I just don't feel like going to work. Sometimes there is something else I wanna do or I think of reasons that I shouldn't go, like safety. Sometimes, I don't like the job. Sometimes, I don't like the people at the job."

Id. Dr. Quinn gave the plaintiff a Global Assessment of Functioning, or GAF, score of 70. *See id*.[5]

With the benefit of the Kuhl progress notes and the Quinn report, Drs. Knox and Hoch both found the plaintiff's mental impairments non-severe, with a mild degree of restriction of activities of daily living, mild restriction in maintaining social functioning, mild difficulties in maintaining concentration, persistence or pace, and no episodes of decompensation of extended duration. *See id*. at 246, 248, 273, 275. Dr. Knox disagreed with Dr. Quinn's diagnosis of borderline personality disorder, stating that it was unsupported by her narrative or by other medical evidence of record. *See id*. at 248.

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[5] A GAF, or Global Assessment of Functioning, score represents "the clinician's judgment of the individual's overall level of functioning." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (4th ed., text rev. 2000) ("DSM-IV-TR"). The GAF score is taken from the GAF scale, which "is to be rated with respect only to psychological, social, and occupational functioning." *Id*. The GAF scale ranges from 100 (superior functioning) to 1 (persistent danger of severely hurting self or others, persistent inability to maintain minimal personal hygiene, or serious suicidal act with clear expectation of death). *Id*. at 34. A score of 70 reflects "[s]ome mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships." *Id*. (boldface omitted).

Following the plaintiff's October 5, 2004 hearing, *see id*. at 23, he submitted a report dated November 2004 by Dr. Rines, with whom he had twice met at the request of his attorney, *see id*. at 341. After interviewing the plaintiff, reviewing records and administering a mental-status examination and the revised edition of the Minnesota Multiphasic Personality Inventory ("MMPI-2"), *see id*. at 341, 345-46, Dr. Rines concluded that the plaintiff met the criteria for major depression, likely linked to post-traumatic stress disorder, as well as social phobia with panic and alcohol dependence in sustained remission, and that he had elements of borderline, avoidant and counter-dependent personality adjustments, *see id*. at 347. Dr. Rines also gave the plaintiff a GAF score of 48, "which is representative of a serious impairment to adult functioning[.]" *Id*. at 348.[6] Dr. Rines added that he suspected based on the plaintiff's narrative that there were times in the prior five years when his GAF would have been in the 60s, although not in the past year since he became unemployed. *See id*.

Dr. Rines stated that, in his opinion, the plaintiff's mental impairments sufficed to meet Listings 12.04, 12.06 and possibly 12.08. *See id*. He also completed a mental RFC assessment in which he indicated that the plaintiff had a number of marked to extreme limitations in work-related functioning, including ability to follow work rules, use judgment, interact with supervisors, deal with work stresses and maintain attention, concentration, persistence or pace. *See id*. at 351-53.

The administrative law judge rejected Dr. Rines' Listings and mental RFC opinions, stating:

> [I]t should be noted that Dr. Rines saw the claimant [on] only two occasions at the request of his representative. The undersigned finds that these opinions are not supported or consistent with the record as a whole, and appear to be based on the claimant's subjective allegations rather than objective findings. Furthermore, the determination of whether an impairment meets a listing is an issue reserved to the Commissioner. Although Dr. Rines

[6] A GAF score of 48 reflects "[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). DSM-IV-TR at 34 (boldface omitted).

> gave the claimant a global assessment of functioning score of 48, he did state that one would expect based on the claimant's narrative that there were times in the last five years that it would have been in the 60's.

Id. at 15. She agreed with Dr. Quinn's assessment that, while the plaintiff might have difficulty behaving in an emotionally stable manner, he could follow work rules, maintain personal appearance, relate adequately to co-workers, supervisors and the public and understand, remember and carry out simple and detailed job instructions. *Id*. She adopted the PRTF findings of Drs. Knox and Hoch. *See id*. at 16-17.

The plaintiff, noting that reports of examining consultants are entitled to more weight than those of non-examining sources, posits that the administrative law judge's analysis was too conclusory and – worse, inaccurate – to justify rejection of the Rines opinion in favor of those of the non-examining DDS consultants. *See* Statement of Errors at 3-5. This assertion is without merit.

While it is true, as a general proposition, that opinions of examining sources are entitled to more weight than those of non-examining sources, *see* 20 C.F.R. §§ 404.1527(d)(1), 416.927(d)(1), this is but one of several factors relevant to evaluation of a medical source's opinion, *see id*. §§ 404.1527(d), 416.927(d), and an administrative law judge is entitled – indeed, directed – to resolve conflicts in the medical evidence, *see, e.g*., *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.").

The plaintiff cites no authority in support of the proposition that the administrative law judge was obliged to discuss her reasons for rejecting the Rines opinion (which touched on the Listings and RFC, issues reserved to the commissioner, *see* 20 C.F.R. §§ 404.1527(e)(1)-(3), 416.927(e)(1)-(3)) in any particular detail, and I am aware of none. She appropriately viewed his findings with skepticism given that he had been consulted specifically to bolster the plaintiff's case and had met with him only twice. Most

importantly, she provided a compelling reason for rejecting the eleventh-hour Rines opinion: that it was inconsistent with the evidence of record as a whole. The plaintiff struggles to make a case that the Rines and Quinn opinions are consistent, *see* Statement of Errors at 3-4; however, their bottom-line conclusions are strikingly different, as reflected in the GAF assessments of 70 versus 48. Without question, the Rines opinion is sharply at odds with the conclusions of Drs. Knox and Hoch. There is no indication in the notes of Dr. Kuhl, the treating physician's assistant, that the plaintiff's depression was debilitating, as Dr. Rines found. Finally, as the administrative law judge noted in the context of assessing the plaintiff's credibility, he had demonstrated capability to perform a wide range of daily activities, some of which involved interaction with others (including caring for children, preparing meals and maintaining membership in the Eagles club, which he attended two to three times a month). *See id*. at 17, 139-41.

In short, the administrative law judge committed no error in rejecting the Rines opinion in favor of those of Drs. Knox and Hoch.[7]

C. Development of Record

The plaintiff finally faults the administrative law judge for failing to obtain records of previous psychotherapy at Tri-County Mental Health Clinic despite the plaintiff's mention to Dr. Rines that he had undergone such therapy. *See* Statement of Errors at 6-7; Record at 344. He points out that the

[7] The plaintiff makes an additional, tangential argument on the subject of mental impairments, asserting that the administrative law judge failed to follow the prescribed technique for assessing such impairments because (in contrast to an administrative law judge in a form from a different case that the plaintiff appends to his brief) she failed to detail the reasons why she assessed his impairment as mild. *See* Statement of Errors at 5-6 & Exh. A thereto; *see also* 20 C.F.R. §§ 404.1520a, 416.920a. The plaintiff's Exhibit A is just as conclusory as is the administrative law judge's discussion. *Compare* Record at 15-16 *with* Exhibit A to Statement of Errors. In any event, in this case, the administrative law judge made clear that she accorded significant weight to the opinions of the DDS consultants because they were well-supported and consistent with the record as a whole. *See* Record at 17. Her discussion indicates careful review of that evidence, which she summarized in considerable detail. *See id*. at 13-17. By following the prescribed technique, the administrative law judge supportably found the plaintiff's mental impairments non-severe.

administrative law judge held against him the apparent absence of any psychotherapeutic treatment. *See* Statement of Errors at 6; Record at 15. This final plaint is without merit.

As the First Circuit has explained:

> In most instances, where appellant himself fails to establish a sufficient claim of disability, the Secretary need proceed no further. Due to the non-adversarial nature of disability determination proceedings, however, the Secretary has recognized that she has certain responsibilities with regard to the development of evidence and we believe this responsibility increases in cases where the appellant is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence necessary to a reasoned evaluation of the claim, and where it is within the power of the administrative law judge, without undue effort, to see that the gaps are somewhat filled ? as by ordering easily obtained further or more complete reports or requesting further assistance from a social worker or psychiatrist or key witness.

Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991) (citation and internal quotation marks omitted).

While a record (including this one) always could be better developed, I conclude that this record was adequately developed as a matter of law. First and foremost, the plaintiff was represented by counsel as of March 2004, *see* Record at 65 – well before the hearing held in this matter. Inasmuch as appears, he never obtained the missing records himself or directly requested that the administrative law judge obtain them. He offers no explanation whatsoever for this default. *See* Statement of Errors at 6-7.[8] Second, he offers no convincing argument that the missing records, if indeed they exist, would have made a material difference in this case. He posits that the lack of such records was a "critical issue," *id*. at 7; however, his apparent failure to seek counseling treatment was merely one of several reasons cited for discounting his claim of disabling mental impairment, *see* Record at 16-17.

II. Conclusion

[8] At oral argument, counsel for the plaintiff suggested that the plaintiff (and his counsel) did not appreciate the significance of the missing records until the administrative law judge, in his written decision, made an issue of the plaintiff's seeming lack of psychotherapy. Be that as it may, the plaintiff's mental impairments clearly were in issue, and he and his counsel could have and should have anticipated that the missing records might bolster his case.

For the foregoing reasons, I recommend that the decision of the commissioner 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 November, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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