UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICHARD C. MARTIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-64-P-C***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises several issues, including whether the administrative law judge improperly failed to consider limitations imposed by certain physical impairments, whether the residual functional capacity found by the administrative law judge is supported by substantial evidence and whether the Appeals Council wrongly failed to review the decision of the administrative law judge based on evidence submitted after the administrative law judge's decision was issued. I recommend that the commissioner's decision be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

[1] This action is properly brought under 42 U.S.C. § 405(g). 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 when 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 19, 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 (*continued on next page*)

law judge found, in relevant part, that the plaintiff had engaged in substantial gainful activity since June 2, 2000, the date on which he alleged that be became unable to work, Findings 1-2, Record at 19; that he had reactive airway dysfunction syndrome, an impairment that was severe but which did not meet or equal the criteria of any impairment listed in Appendix 1 to 20 C.F.R. Part 404, Subpart P (the "Listings"), Finding 3, *id*.; 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 to lift and carry more than 50 pounds, or more than 25 pounds on a regular basis, or to perform tasks with require depth perception and that he must use a respirator for odors, Finding 5, *id*.; that he was unable to perform his past relevant work as an equipment servicer and school custodian, Finding 6, *id*.; that given his age (51), high school education, lack of transferable skills and residual functional capacity, application of section 203.22 of Appendix 2 to 20 C.F.R. Part 404, Subpart P (the "Grid") would result in a finding of "not disabled," Findings 7-11, id. at 19-20; that given his inability to perform the full range of medium work, use of the Grid as a framework resulted in the conclusion that the plaintiff was capable of making an adjustment to work which exists in significant numbers in the national economy, including the jobs of dishwasher, warehouse worker, groundskeeper, handpacker, grocery store worker, delivery driver, fast food worker, mail clerk, security guard, office helper and toll collector, Finding 12, *id*. at 20; and that the plaintiff accordingly was not under a disability as that term is defined in the Social Security Act at any time through the date of the decision, Finding 13, *id*. The Appeals Council declined to review the decision, *id*. at 8-10, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

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administrative record.

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); *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).

Ordinarily, the administrative law judge's second finding, made at Step 1 of the sequential evaluation process, would be dispositive . *See* 20 C.F.R. §§ 404.1572, 404.1573, 404.1574(b)(2). At that stage of the process, it is the claimant's burden to show that he has not engaged in substantial gainful activity during the period in which he claims he was disabled.[2] 20 C.R.F. § 404.1571; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); *Doughty v. Apfel*, 245 F.3d 1274, 1278 (11th Cir. 2001). The administrative law judge noted that the findings she made in addition to Finding 2 were "[i]n the alternative." Record at 15. Nonetheless, counsel for the commissioner at oral argument stated that the commissioner was defending the claim solely on the basis of the administrative law judge's determination at Step 5. Accordingly, I will limit my discussion to that determination.

At Step 5 of the sequential process, 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); *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

[2] At oral argument, counsel for the plaintiff contended that this activity was "a trial period that didn't work out." Nothing in the record supports this characterization. The plaintiff testified that he was working part-time at the time of the hearing as a courier and maintenance worker. Record at 51-52. This is the position that the administrative law judge found was generating income sufficient to constitute substantial gainful activity. *Id*. at 15.

perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff first contends that the administrative law judge should have found that he had severe impairments due to a right biceps tear and sleep apnea. Statement of Errors and Fact Sheet ("Statement of Errors") (Docket No. 6) at [2]. This argument relates to Step 2 of the sequential process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination that it is not severe only when the medical evidence "establishes only a slight abnormality or combination of abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id*. at 1124 (quoting Social Security Ruling 85-28). The effects of all impairments must be considered in determining residual functional capacity. 20 C.F.R. § 404.1545(a)(2).

At the hearing before the administrative law judge, counsel for the plaintiff, who continues to represent him here, stated that the plaintiff's sleep apnea was "really . . . not disabling," Record at 31, and the only testimony concerning the right biceps tear was to the effect that the plaintiff learned to write with his left hand as a result and "still write[s] with [his] left hand most of the time," *id*. at 39. The administrative law judge's opinion does not mention either alleged impairment. The plaintiff contends that "[l]ack of sleep . . . obviously has impacted his ability to remember and has affected his concentration," citing pages 116 and

534 of the record. Statement of Errors at [3]. Page 116 is part of an Adult Function Form filled out by the plaintiff on which he reports some lack of memory and concentration but does not tie it to his difficulty sleeping. Page 534 is part of the report of a psychological evaluation by Joseph F. Wojcik, Ph.D., conducted for the state disability determination service which repeats the plaintiff's report of lack of memory and concentration "since his recent exposure to chemicals." Again, nothing ties the lack of memory or concentration to the sleep apnea. The only other citation to the record by the plaintiff is to the report of Lewis Golden, M.D., who found that the plaintiff has "[m]ild sleep apnea with marked worsening during REM sleep." Record at 484. Medical evidence is necessary to support a finding at Step 2 that a severe impairment exists. Social Security Ruling 85-28, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 393. Nothing in Dr. Golden's record or the plaintiff's own cited reports demonstrates that the plaintiff's sleep apnea significantly limited his ability to do basic work activities. *See* 20 C.F.R. § 404.1521.

With respect to the right biceps tear, the plaintiff cites pages 234, 324, 329-42, 344, 527 and 596 of the record. Statement of Errors at [2]-[3]. Page 234 is a form used by Pratt & Whitney, where the plaintiff was employed from February 1986 through June 2000, Record at 133, in which the plaintiff's "medical care provider" reported that he had limited use of his right hand, limited only by decreased strength, and limiting him to lifting 26 to 30 pounds, at some unstated time and for an unknown duration. Page 342, rather than page 324 as cited by the plaintiff, is a note of William C. Meade, M.D., which states that on March 10, 1999 the plaintiff "still has very weak strength in the ring finger profundus and also some problems with the long finger profundus." There is no indication of the effect of these problems, if any, on the plaintiff's ability to do basic work activities. Pages 329-42 are Dr. Meade's records concerning his treatment of the plaintiff's biceps tear. Dr. Meade noted on June 18, 1998 that the weakness in the

plaintiff's hand "is probably due to immobilization and the surgical approach and not the problems with the biceps," that his primary problem would be that he could not fully turn a doorknob, and that he "should go back to full duty." *Id*. at 336. On page 344, John R. Belden, M.D., concluded on October 20, 1998 that the plaintiff had "some mild weakness of the deep flexors of the 4th and 5th digits," but that the "chance of recovery is normal." Again, there is no suggestion of any impact on the plaintiff's ability to do basic work activities. Page 527 is part of the residual functional capacity assessment of the plaintiff by a reviewer for the state disability determination agency, Robert Hayes, D.O., where Dr. Hayes notes the biceps injury and medical reports of "slight weakness" in the right arm, inability to make a fist and strength otherwise normal. Dr. Hayes did not complete the section of the form addressing lifting limitations. *Id*. at 525. Finally, page 596 is part of the report of Peter K. Esponnette, M.D., dated five weeks after the administrative law judge issued her decision, *id*. at 20, 598, in which Dr. Esponnette concludes that using both arms together, the plaintiff is limited by his right arm injury to lifting 25 pounds frequently or 50 pounds occasionally.[3] That limitation, contrary to the plaintiff's argument, Statement of Errors at [3], fully supports the residual functional capacity found by the administrative law judge, Record at 17. None of the other citations supports any other impact on the plaintiff's ability to do basic work activities as a result of the right biceps tear.

The plaintiff next contends that the asserted failure of the Appeals Council to consider Dr. Esponnette's report, which included an expectation that "he would be disabled according to the criteria of

[3] The plaintiff asserts that Dr. Esponnette "found that [he] could not lift or carry more than 10 pounds frequently or 25 pounds occasionally." Statement of Errors at [3]. In fact, Dr. Esponnette stated that the plaintiff had these limitations only when "[u]sing just the right arm." Record at 596. The weight limitations imposed at the light and medium exertional levels by the applicable regulations are not limited to a single arm. 20 C.F.R. § 404.1567(b) & (c). Dr. Esponnette also concludes that "it would be difficult to explain" how the biceps tear caused the plaintiff's inability to make a fist. *Id*. at 595.

the Social Security Administration," *id*. at 596, requires remand. Statement of Errors at [4]-[5]. Without citation to authority, counsel for the plaintiff asserts that this failure "was legal error, not supported by substantial evidence and an abuse of discretion." *Id*. at [5]. At oral argument, counsel for the commissioner asserted that the Appeals Council did consider Dr. Esponnette's report, but found that it would not result in a change based on the entire record. The letter from the Appeals Council to the plaintiff states that it "considered the additional evidence listed on the enclosed Order of Appeals Council," Record at 8, and Dr. Esponnettte's report is listed as Exhibit AC-2 on a document entitled AC Exhibits List, *id*. at 7. The Appeals Council specifically found that "this information does not provide a basis for changing the Administrative Law Judge's decision." *Id*. at 8-9. In the absence of any evidence to the contrary, I must assume that the Appeals Council did in fact consider Dr. Esponnette's report. To the extent that counsel for the plaintiff means to contend that Dr. Esponnette's report is inconsistent with the findings of the administrative law judge, he cites specifically only Dr. Esponnette's conclusions that the plaintiff "should avoid kneeling, crawling, squatting, or continuous walking. He may walk on an occasional basis." Statement of Errors at [4]; Record at 596. Dr. Esponnette's expectation that the plaintiff would be considered disabled under "the criteria of the Social Security Administration," Record at 596, is of course an opinion on the issue reserved to the commissioner and must be disregarded, 20 C.F.R. 404.1527(e).

Neither of the state-agency physicians who reviewed the plaintiff's medical records found any limitations on kneeling, crawling, squatting or walking. Record at 487-88, 525-26. Dr. Esponnette apparently had the benefit of two x-rays of the plaintiff's left knee which were performed after the state-agency reviewers completed their reports, *id*. at 433, 531, 594; this is the only medical information that appears to bear on these limitations that was not available to the state-agency physicians. The Appeals Council did not err in concluding that these limitations would not change the administrative law judge's

decision because they are not inconsistent with several of the jobs found by the administrative law judge to be available to the plaintiff. Those jobs include dishwasher, warehouse worker, hand packer, grocery store worker, mail clerk, security guard, office helper and toll collector. Record at 18. *See, e.g.*, *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. rev. 1991), §§ 209.687-026 (mail clerk; stooping, kneeling, crouching, crawling all not present); 211.462-038 (toll collector; same); 372.667-034 (security guard; same). Thus there is no basis for requiring remand for further review of Dr. Esponnette's report. *See also Mills v. Apfel*, 244 F.3d 1, 5 (1st Cir. 2001) (refusal of Appeals Council to review administrative law judge's opinion reviewable by courts where Appeals Council "gives an egregiously mistaken ground" for doing so).

Dr. Esponnette's limitation to walking "on an occasional basis" is also cited by the plaintiff in support of his final argument: that the evidence does not support the administrative law judge's conclusion that the plaintiff retained the residual functional capacity for work at the medium exertional level. Statement of Errors at [5]-[6]. He first asserts that his treating physicians and Dr. Esponnette "all limited him to light work" as a result of the biceps tear. *Id*. at [5]. As discussed above, none of the medical evidence cited by the plaintiff in fact imposed such a limitation. Even if that were the case, a finding of a capacity for medium work necessarily includes a finding that the claimant can perform work at the light exertional level, 20 C.F.R. § 404.1567(c). Several of the jobs listed by the administrative law judge are classified at the light level. Record at 18. While light work may involve "a good deal of walking or standing," 20 C.F.R. § 404.1567(b), it need not do so, and the administrative law judge in this case did not find that the plaintiff was capable of a full range of medium or light work, Record at 18-20, so it is not necessary that the record provide evidence that the plaintiff was able to do "a good deal of" walking or standing, 20 C.F.R. § 404.1567(c). It is also important to note that the regulation is phrased in the alternative: "a good deal of

walking *or* standing." (Emphasis added.) The plaintiff states that "[s]omeone who can only walk or stand on an occasional basis as reflected in Dr. Esponnnette's narrative cannot do light work," Statement of Errors at [5]-[6], but this assertion misstates both the regulation, which can only reasonably be interpreted to the effect that such an individual cannot perform the full range of light work, and Dr. Esponnette's report, which contains no reference to any limitations on standing, Record at 589-98. The plaintiff speculates that two of the five light jobs found by the administrative law judge to be available to him — toll collector and office helper — would in fact be unavailable to him due to exposure to airborne pollutants. Statement of Errors at [6]. Since the administrative law judge specifically found that "the job must allow for respirator for odors," Record at 19, and included this limitation in his question to the vocational expert who identified the jobs at issue, *id*. at 43-44, the plaintiff's speculation is irrelevant. Even if this were not the case, three jobs remain, a sufficient number to meet the commissioner's burden at Step 5.[4]

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.

[4] In addition, the vocational expert testified that mail clerk, office helper and toll collector, three of the five light positions, would remain available to the plaintiff "[i]f there were no prolonged standing." Record at 46.

Dated this 24th day of November, 2004.

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

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