UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-11556-RWZ

BELINDA S. RACICOT

v.

MICHAEL J. ASTRUE,[1] COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION

MEMORANDUM OF DECISION AND ORDER

September 4, 2007

**ZOBEL, D.J.**

Plaintiff Belinda S. Racicot ("Racicot") claimed Social Security disability benefits. Defendant Michael J. Astrue, Commissioner of the Social Security Administration (the "Commissioner"), rendered a final decision denying her claim. She seeks review of his decision pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). For the reasons discussed below, the decision of the Commissioner is reversed.

## I. Background

Racicot was 30 years old at the time she ceased working in 1998. (R. 38-39.)[2]

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[1] On February 12, 2007, Michael J. Astrue replaced Jo Anne B. Barnhart as the Commissioner of Social Security and, therefore, replaces Barnhart as the defendant in the instant action. See 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d)(1).

[2] Citations to the administrative record in this case (Docket # 6) shall be to "R. __."

A high school graduate, she worked in the past as a embroiderer, cleaner, utility worker, floor clerk and cashier. (R. 136.) Since 1988, she has suffered from severe psoriasis and psoriatic arthritis; currently she also suffers from diabetes and hypertension. (R. 22, 44-46, 170-71.) At the time she stopped working, plaintiff had been employed at the Salvation Army as a floor clerk. (R. 39-40.) She testified that she left that position because she could no longer lift the bags of clothing required by her job duties due to arthritis in her left hand. (R. 39-40, 44.)

Plaintiff filed an application for disability insurance benefits with the Department of Health and Human Services, Social Security Administration ("SSA") on February 27, 2002, claiming disability as of June 11, 1998. (R. 103-05.) Her claim was denied initially and again after reconsideration. (R. 20.)

Pursuant to SSA regulations, plaintiff filed a timely request for a hearing, which was held before an Administrative Law Judge ("ALJ") on September 9, 2003. (R. 20.) Plaintiff, her counsel and a vocational expert retained by the SSA appeared at the hearing. (Id.) The ALJ found that plaintiff is unable to perform her past relevant work, but nevertheless concluded that she "retains the capacity to perform sedentary work including lifting up to ten pounds, standing and walking two hours during an eight-hour workday, sitting six hours during an eight-hour workday, but would be limited to no more than occasional extended forward or overhead reaching with her left hand (non-dominant) upper extremity, no more than occasional grasping or fine manipulation with her left (non-dominant) hand and frequent, but less than constant, grasping with her right hand." (R. 24.) The ALJ concluded that there existed work in sufficient numbers

in the national economy that plaintiff was capable of performing even with these limitations and therefore determined that she was not disabled and denied her claim. (R. 26.) This decision became final on May 27, 2004, when the Appeals Council denied further review. (R. 6.)

Plaintiff now seeks review in this court pursuant to 42 U.S.C. § 405(g). (Docket # 11.) Defendant opposes plaintiff's motion to reverse the decision of the Commissioner and seeks an order affirming the decision. (Docket # 13.)

## II. The ALJ's Findings

At the hearing, the ALJ heard the testimony of two witnesses: (1) plaintiff; and (2) Elaine Cogliano, the vocational expert. Plaintiff also submitted hospital and medical records of her treating physicians. The respondent submitted reports from non-examining medical sources asked to evaluate plaintiff's application and medical history for the SSA.

### 1. Plaintiff's Testimony

Plaintiff testified that she is unable to sit for longer than an hour or so because her legs go numb due to her diabetes and, in addition, her lower back begins to bother her. (R. 45-46.) She then walks around for 45 minutes until that causes her pain. (R. 46, 49.) She spends most of the day laying down because that is the most comfortable position for her. (R. 49.) In response to questions from her counsel, plaintiff rated the pain after sitting as an "eight, nine" on a one-to-ten scale. (R. 52.) She testified that she did not think she could walk a full city block because of the arthritis in her foot and the pain in her lower back. (R. 55.)

Racicot explained that she could do light housework such as washing the dishes and sweeping if the weather was not too wet or cold (R. 46-47) and simple cooking such as macaroni and spaghetti or microwaving food. (R. 47.) She drives a short distance to go shopping and is able to sleep well. (R. 47-48.) In addition, she takes care of her mother, in whose house she lives. (R.53-54.) Finally, she explained that she did not look for a job after the Salvation Army because when "people [see] the psoriasis that [she] had at the time which [she] still has they wouldn't hire [her]." (R. 44.)

**2. The Medical Evidence**

Plaintiff's medical records and the statements of her physicians indicate that she has a long history of psoriasis and psoriatic arthritis. (R. 22.) X-Rays show severe destructive arthritic changes in the first joint of her left hand and in the first toe on her right foot. (Id.) Her psoriasis improved while she was on Methotrexate, but she had to cease treatments due to liver toxicity. (R. 166, 193.) In September 2002, she had to be admitted to the hospital for six days due to pain and swelling in her leg, apparently due to cellulitis. (R. 23.) She currently takes several medications for psoriasis and diabetes and pain medication for arthritis, all of which she tolerates well. (R. 48, 163, 195.)

Dr. John Howland, plaintiff's physician, provided the bulk of her medical evaluations. In April 2002, he assessed her as capable of walking a quarter of a mile, standing two hours at a time, sitting two hours at a time, carrying twenty pounds frequently and fifty pounds occasionally. (R. 170-71.) He noted that because of her

psoriasis she was unable to work in customer service or food handling. (Id.) Prior to her hospitalization in September 2002, he described her condition as "[h]orrendous generalized psoriasis with heavy thick plaques and marked erythema[3] of the skin covering fifty percent of her body." (R. 270.) In his opinion, her psoriasis is "the worst case [he] ha[s] ever seen and involves the entire body" (R. 193) and, in conjunction with her psoriatic arthritis, is a disabling condition. (R. 181.)

On December 13, 2002, Dr. Howland completed a second Multiple Impairments Questionnaire in which he indicated that plaintiff could sit for two hours and stand for one hour in an eight-hour day, should get up and move around every two hours and could lift five to ten pounds "frequently" and twenty to fifty pounds "occasionally." (R. 218-19.) In addition, he described moderate limitations in using her left hand due to arthritis. (R. 219.)

The ALJ sent a letter to Dr. Howland on June 11, 2003, requesting clarification of his opinion on plaintiff's limitations. (R. 160.) In particular, the ALJ was unclear from the prior reports if the limit to sitting or standing for more than two hours was at a time or was a total during the course of an eight-hour workday. (R. 160-61.)

On August 6, 2003, Dr. Howland submitted a third Multiple Impairments Questionnaire in which he stated that plaintiff was capable of walking one-quarter mile, standing for two hours daily, sitting for eight hours daily (with breaks) and sitting and standing intermittently for eight hours. (R. 225.) He indicated that she could

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[3] An abnormal redness of the skin due to capillary dilation. Stedmans Medical Dictionary (27th ed. 2000)

bend/stoop frequently, but had significant restrictions in her arms in gross/fine motor, handling and manipulation, but could lift twenty pounds frequently. (Id.)

The ALJ also relied on evaluations of plaintiff's medical history by several non-examining SSA consultants. The first consultant reviewed the evidence through May 6, 2002, and concluded that plaintiff could stand or walk six hours in an eight-hour day, sit for six hours in an eight-hour day and frequently lift ten pounds and occasionally twenty pounds. (R. 173.) The only other limitations noted were occasional climbing and crawling and an inability to do fine manipulation. (R. 174-75.) A second SSA consultant, on July 8, 2002, came to similar conclusions on plaintiff's limitations, but also felt she needed to avoid frequent use of her left hand and movement of her left thumb and noted that she had limited feeling in her hand. (R. 185-86.)

**3. The ALJ's Evaluation**

The ALJ rejected plaintiff's assertion that she was incapable of all work activity. (R. 24.) He based his conclusion on what he described as inconsistencies between her claims that her pain was so severe she was unable to walk more than a short distance or lift more than five pounds and her descriptions of her everyday activities and the evaluations of Dr. Howland and the SSA consultants. (R. 24.) The ALJ noted that plaintiff was able to drive, shop and perform household chores. (Id.) In addition, she was able to prepare light meals, crochet and take care of her mother. (Id.) He did not find the medical evidence supported plaintiff's claimed need to recline several hours a day, concluding it was the result of her having assumed a "recumbent lifestyle," not medical necessity. (Id.) He also discounted her difficulties getting a job due to the

appearance of her condition, noting it was not considered a disability for Social Security purposes. (R. 24.)

**i. Residual Functional Capacity**

Next, the ALJ concluded that plaintiff was capable of performing sedentary work "including lifting up to ten pounds, standing and walking two hours during an eight-hour workday, sitting six hours during an eight-hour workday," but would be limited in her ability to use her left hand and, to a lesser degree, her right hand, for fine manipulation. (R. 24.) The ALJ rejected as conclusory Dr. Howland's opinion that plaintiff was disabled, but found that the medical record otherwise supported sedentary work activity. (R. 25.) The ALJ noted that Dr. Howland's evaluations were unclear on claimant's limitations, but that the most recent questionnaire supported the ability to work an eight-hour day. (Id.)

**ii. Availability of Jobs in the National Economy**

Finally, the ALJ accepted the testimony and conclusions of Elaine Cogliano, the vocational expert, that there are a significant number of jobs in the national economy that plaintiff could perform, even with her limitations. (R. 26.) The vocational expert initially identified a production inspector or a surveillance monitor position as sedentary positions available to plaintiff. (R. 59-60.) When asked what would be available if the individual were further limited to only helper hand use with the left hand and "frequent, but less than constant gasping with the right hand," the expert eliminated the inspector jobs, but only decreased the number of surveillance monitor jobs by twenty percent. (R. 62.) This would result in 140 positions available in Massachusetts and 4,400

nationwide. (R. 60.) The ALJ, however, apparently calculated 80% of the larger number of inspector positions to incorrectly attribute more than twice as many positions as available to plaintiff: "Examples of [available] jobs include work as in protective services with 280 positions statewide and 11,760 positions nationwide." (R. 27 ¶ 13.) Based on this calculation, the ALJ concluded that there were significant jobs available in the national economy that plaintiff could perform and therefore she was not under a disability as defined in the Social Security Act. (R. 27 ¶¶ 13-14.) The SSA, therefore denied her claim. (R. 17.)

## III. Discussion

### A. General Legal Standards

By statute, a plaintiff is entitled to Social Security disability benefits if he or she cannot "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 416(i)(1). In order to determine whether a plaintiff is "disabled," the SSA has promulgated regulations which require examiners to analyze the claim according to the following five steps:

(1) if the claimant is doing substantial gainful activity, he or she is not disabled;

(2) if the claimant is not performing substantial gainful work, his or her impairment(s) must be severe before the claimant can be found to be disabled;

(3) if the claimant is not performing substantial gainful work and has a "severe" impairment (or impairments) that has lasted or is expected to last

for a continuous period of at least twelve months, and his impairment (or impairments) meets or medically equals a listed impairment contained in Appendix 1 [of 20 C.F.R. Part 404] Subpart P, Regulation No. 4, that claimant is presumed disabled without consideration of age, experience and work experience;

(4) if the claimant is not performing substantial gainful work and has a "severe" impairment (or impairments) that has lasted or is expected to last for a continuous period of at least twelve months, and his impairment (or impairments) does not meet or medically equals a listed impairment contained in Appendix 1 [of 20 C.F.R. Part 404] Subpart P, Regulation No. 4, then the commission will "assess and make a finding about [claimant's] residual functional capacity" based on the evidence in the case;

(5) if the claimant's impairment (or impairments) does not prevent him from doing his past relevant work, he is not disabled; if the claimant's impairment or impairments prevent him from performing his past relevant work, he is not disabled if other work exists in significant numbers in the national economy that accommodates his residual functional capacity and vocational factors.

See 20 C.F.R. § 404.1520(b)-(g).

Applying this five-step evaluation process in the instant case, the ALJ first concluded that the plaintiff has not engaged in "substantial gainful activity" under 20 C.F.R. § 404.1520(b) since the onset of disability. (R. 26 ¶ 2.) Second, the ALJ found that plaintiff's injuries were "severe" within the meaning of the Regulations, but, with respect to step three of the regulations, not severe enough to meet or medically equal one of the impairments listed in Appendix 1, Subpart P, Regulations No. 4. (R. 26 ¶ 3; R. 27 ¶ 4.) Then, as required by step four, the ALJ examined the record and testimony to determine plaintiff's residual functional capacity. The regulations define "residual functional capacity" as "the most an individual can still do after considering the effects of physical and/or mental limitations that affect the ability to perform work-related

tasks." 20 C.F.R. § 404.1545.

Turning to the final step of the regulations, the ALJ concluded that plaintiff could not perform her former work. (R. 27 ¶ 8.) Once the ALJ concluded that plaintiff could no longer perform her former work, the burden shifted to the SSA to show that she had the residual functional capacity to perform other work existing in significant numbers in the national economy consistent with her age, education and work experience. (R. 25); 20 C.F.R. § 404.1560(c)(2). As discussed supra, the ALJ concluded that the SSA met this burden by showing that there were "280 positions statewide" for protective service jobs available to plaintiff. (R. 27 ¶ 13.)

**B. Standard of Review**

Under 42 U.S.C. § 405(g), this court's review of the decision of the Commissioner is limited. Factual findings of the ALJ must be accepted by the district court as conclusive "if supported by substantial evidence." 42 U.S.C. § 405(g). Substantial evidence exists "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support [the Commissioner's] conclusion." Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1991).

Plaintiff argues that the ALJ's decision is not supported by substantial evidence because he: (1) failed to properly analyze the vocational factors; (2) failed to properly analyze the medical evidence; and (3) failed to properly analyze the plaintiff's credibility. (See Docket # 12.)

**C. The ALJ's Determination of Adequate Jobs**

Here, the ALJ incorrectly applied the vocational expert's testimony eliminating

one position and reducing the other by 20% to the number of available positions. (See Def.'s Mem. (Docket # 14), 14 ( admitting the ALJ misstated the number of available positions but arguing the error was harmless).) The result is that his decision is based on twice as many available positions in Massachusetts and more than two-and-one-half times as many positions nationwide as supported by the expert's testimony. Because the numbers are so low to begin with, it is necessary to determine if the ALJ would have reached a different conclusion based on the proper numbers.

The vocational expert's testimony that there are only 4,400 positions available nationwide (80% of 5,500; see R. 61-62) means that there are less than ninety positions available, on average, in each state. While the First Circuit has offered no magic number or test to determine what minimum number of jobs is necessary for the SSA to meet its burden, the Sixth Circuit noted:

> A judge should consider many criteria in determining whether work exists in significant numbers, some of which might include: the level of claimant's disability; the reliability of the vocational expert's testimony; the reliability of the claimant's testimony; the distance claimant is capable of travelling to engage in the assigned work; the isolated nature of the jobs; the types and availability of such work, and so on. The decision should ultimately be left to the trial judge's common sense in weighing the statutory language as applied to a particular claimant's factual situation.

Hall v. Bowen, 837 F.2d 272, 275 (6th Cir. 1988); see also Jenkins v. Bowen, 861 F.2d 1083, 1087 (8th Cir.1988) (adopting the Sixth Circuit's factors); Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992) (same).

Plaintiff correctly notes that more than 140 positions in a state and more than 4,400 nationally are necessary to a finding of "significant numbers." See Waters v.

Secretary, 827 F. Supp. 446, 449 (W.D. Mich. 1992) (finding 1,000 jobs within Michigan is not significant); Mericle v. Secretary, 892 F. Supp. 843, 847 (E.D. Tex. 1995) (finding that 870 jobs in the entire state of Texas is not a "significant number"); Walker v. Matthews, 546 F.2d 814, 820 (9th Cir.1976) (commenting that the existence of only two scarce potential jobs, stencilling and machine packaging, cannot support a finding of substantial evidence). Cf. Martinez v. Heckler, 807 F.2d 771, 775 (9th Cir. 1986) (3,750 to 4,250 jobs in the local economy within the claimant's limitations is adequate to support ALJ's finding of "work that exists in significant numbers"); Bowen, 837 F.2d at 275 (finding 1350 to 1800 jobs in the local region adequate to meet the significant numbers burden). By contrast, defendant does not cite a single case where a court found as few as 140 jobs within a state or 4,400 nationwide adequate to meet the "significant numbers" burden.[4]

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[4] Defendant's parenthetical descriptions of the cases he cites in support of his contention that 4,400 jobs nationwide are adequate to carry his burden mislead the reader into believing that the numbers cited similarly refer to a nationwide requirement. When properly cited to make clear that the numbers refer to local, regional or (in one case) statewide figures, those cases actually support plaintiff's contention that 140 statewide jobs are not adequate to show "significant numbers:"

> In this case, the existence of 4,400 surveillance system monitor positions nationally met this requirement. See, e.g., Lee v. Sullivan, 988 F.2d 789, 794 (7th Cir. 1993) (1,400 positions [(apparently regionally based on cited cases)] are significant number); Trimiar v. Sullivan, 966 F.2d 1326, 1330-32 (10th Cir. 1992) (refusing to draw any bright line, but finding 850-1,000 potential jobs [in the state of Oklahoma] to be significant number); Nix v. Sullivan, 744 F. Supp. 855, 863 (N.D.Ill. 1990) (675 jobs ["in the regional area alone"] are significant number), aff'd, 936 F.2d 575 (7th Cir. 1991); Barker v. Sec'y of HHS, 882 F.2d 1474, 1479 (9th Cir. 1989) (1,266 positions ["in . . . the Los Angeles/Orange County area"] fall within parameters of significant number); see also Jenkins v. Bowen, 861 F.2d 1083, 1087 (8th Cir. 1988) (500 jobs ["in the region"] are significant

Given the inability of plaintiff to drive long distances and her difficulties walking in cold or wet weather (R. 47-48), it is more reasonable to look at the number of jobs available in her region, not the number statewide. See Hall v. Bowen, 837 F.2d at 275 (noting factors to consider include the level of claimant's disability and the distance claimant is capable of traveling). While the ALJ did not question the vocational expert on the issue, if there are only 140 potential jobs statewide, the number of jobs available in the central Massachusetts region where plaintiff resides are likely to be smaller, possibly significantly smaller. (See R. 67 (listing plaintiff's address in Charlton, MA).)

In addition, while the ALJ is correct that plaintiff's disfigurement due to her condition does not constitute a disability for Social Security purposes (R. 24), it is a factor that should be considered in determining the availability of jobs and her ability to obtain the jobs identified by the vocational expert. Given plaintiff's limitations in standing and sitting for long periods of time, her inability to use her hands for fine manipulation, her difficulty in traveling long distances, her susceptibility to damp and

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> number); Hall v. Bowen, 837 F.2d 272, 275 (6th Cir. 1988) (1,350 positions ["in the Dayton area"] are significant number).
>
> Notwithstanding, 140 surveillance system monitor positions in Massachusetts constituted a significant number of jobs. See Craigie v. Bowen, 835 F.2d 56, 58 (3d Cir.1987) (200 jobs in region); Allen v. Bowen, 816 F.2d 600, 602 (11th Cir. 1987) (one job with 174 positions locally[, 1,600 in state and 80,000 nationwide] was significant number); Hicks v. Califano, 600 F.2d 1048, 1051 n.2 (4th Cir. 1979) (110 jobs [within the region] are not an insignificant number).

(Def.'s Mem. in Supp. of its Mot. for an Order Affirm. the Commissioner's Decision and in Opp. to Pl.'s Mot. for J. on the Pleadings (Docket # 14), 13 (underscored text added).)

cold, the limited number of only 140 jobs available statewide with an unknown, but likely fewer, available locally and the difficulty she faces in securing a job due to her condition, I find the ALJ's determination that "there are a significant number of jobs in the national economy that she could perform" is not supported by substantial evidence. (R. 27 ¶ 13.) Therefore, even if the ALJ's determinations concerning the credibility and physical limitations of the plaintiff are correct, the SSA has failed in its burden to show that there are jobs available which plaintiff is capable of performing, and therefore plaintiff is disabled within the meaning of the Social Security Act.

## IV. Conclusion

Accordingly, plaintiff's Motion for Judgment on the Pleadings (Docket # 11) is ALLOWED, and defendant's Motion for an Order Affirming the Decision of the Commissioner (Docket # 13) is DENIED. I remand the case for the sole purpose of determining benefits. Judgment may be entered for the plaintiff.

September 4, 2007
DATE

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