UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRYAN D. POWERS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-86-P-C***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that he is disabled by degenerative disc disease, is capable of performing work existing in significant numbers in the national economy. 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, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from two severe impairments, alcohol addiction

[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 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 December 9, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

and lower-back dysfunction, Finding 2, Record at 26; that his ongoing substance abuse/dependence problem precluded the performance of any gainful activity on a regular and continuing basis, Finding 3, *id*.; that substance abuse was a contributing factor material to the finding that ongoing alcohol abuse/dependence precluded performance of substantial gainful activity, Finding 4, *id*.; that irrespective of limitations imposed by substance abuse and related impairments, the plaintiff retained the residual functional capacity ("RFC") to perform the full range of work at the light level of exertion, Finding 6, *id*. at 27; that given his age (46, a "younger individual"), education (high school), work history (no transferable skills) and RFC, Rule 202.21 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") directed a conclusion of "not disabled," Findings 7-10, *id*.; and that he therefore was not under a disability at any time through the date of decision, Finding 11, *id*.[2] The Appeals Council declined to review the decision, *id*. at 11-13, 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).

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).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of

[2] The plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through June 30, 2005. *See* Record at 21.

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

The plaintiff identifies two points of error. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 6). First, he complains that the administrative law judge arrived at an RFC determination unsupported by substantial evidence inasmuch as (i) the opinions of the medical sources cited conflict with, rather than support, his RFC determination and (ii) he failed to give appropriate weight to the opinions of treating and examining physicians. *See id*. at 2-5. Second, he posits that the administrative law judge erred in finding him disabled by alcoholism. *See id*. at 5-6. I discern no reversible error.

I. Discussion

A. RFC: Contradiction with Cited Sources

The administrative law judge essentially adopted the RFC assessments of two non-examining Disability Determination Services ("DDS") physicians, Iver C. Nielson, M.D., and Richard Chamberlin, M.D., which he deemed well-supported by the medical evidence overall. *See* Record at 25 ("Claimant was denied initially and upon reconsideration based upon a finding that he is able to frequently lift and carry 10 pounds (with occasional lifting/carrying of 20 pounds) and sit, stand, or walk for 6 hours in an 8-hour work day (Exhibits B-11F and B-13F). Because these opinions are supported by the medical evidence of record and the opinions of the physicians outlined above, they are entitled to great weight."), 384-91 (Exhibit B-

11F, RFC evaluation by Dr. Nielson dated March 1, 2002), 393-400 (Exhibit B-13F, RFC evaluation by Dr. Chamberlin dated May 23, 2002).

The plaintiff contends that the administrative law judge's RFC evaluation was not in fact supported by the opinions of "the physicians outlined above" – namely, Vincent R. Guistolisi, M.D., Kenneth D. Polivy, M.D., Robert Y. Pick, M.D., Donald E. Ware, M.D., and Albert P. Shems, M.D. *See* Statement of Errors at 2-3; *see also* Record at 25, 190-92 (Guistolisi report dated January 20, 2000), 322-23 (Polivy report dated November 22, 2000), 373-77 (Pick report dated July 13, 2001), 379-83 (Shems report dated February 23, 2002), 472 (Ware letter dated January 21, 2003).

In pressing this argument, the plaintiff faces an uphill battle. The opinions of DDS non-examining reviewers such as Drs. Nielson and Chamberlin can constitute substantial evidence of RFC, particularly if those reviewers have had access to the material raw medical reports of examining and treating physicians. *See, e.g., Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) ("[T]he amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert. In some cases, written reports submitted by non-testifying, non-examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule.") (citations and internal quotation marks omitted). A reviewing court properly should be chary of a plaintiff's invitation to reweigh the raw medical evidence to arrive at an RFC conclusion different than that of the medical experts on whom the administrative law judge, as a layperson, typically must depend. *See, e.g., Roberts v. Barnhart*, 67 Fed. Appx. 621, 622-23 (1st Cir. 2003) (an administrative law judge may determine RFC "only if the evidence suggests a relatively mild impairment posing, to the layperson's eye, no significant restrictions"; otherwise, he or she must enlist the aid of a medical expert to

craft an RFC) (citation and internal punctuation marks omitted).

In this case, inasmuch as appears, Drs. Nielson and Chamberlin had access to, and reviewed, the reports of Drs. Guistolisi, Polivy, Pick and Shems. *See* Record at 384-91 (Nielson RFC), 393-400 (Chamberlin RFC). The Nielson report, in particular, reflects careful attention to the actual objective findings of examining physicians, notably Drs. Pick and Shems. *See, e.g., id*. at 386. While, as counsel for the plaintiff pointed out at oral argument, the Nielson and Chamberlin RFC reports predate the Ware materials, Dr. Ware's objective findings are cumulative of those of other physicians whose reports were available to Drs. Nielson and Chamberlin. *Compare id*. at 430 (Ware report finding "some limitation of motion of forward flexion" in plaintiff's back, with x-rays showing plaintiff suffering postoperatively from degenerative disc disease and osteophyte formation on lumbosacral spine) *with, e.g., id*. at 322-23 (Polivy report recording "[f]orward flexion is tight at 30 degrees with subjective pain complaints noted"; finding that films showed postoperative degenerative disc disease at L4-5 and L5-S1 with both anterior and posterior spurs), 382-83 (Shems report finding plaintiff could "bend forward about 30 degrees and extend backwards to about 30 degrees also, however, flexion of his back does produce some pain"; noting history of herniated disc at L4-L5).

Beyond this, the opinions of Drs. Guistolisi, Polivy, Pick, Shems and Ware, taken as a whole, provide substantial support for capacity to perform light work. Per Social Security regulations:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. § 404.1567(b). Social Security Ruling 83-10 expands on this definition as follows, in pertinent part:

> "Frequent" means occurring from one-third to two-thirds of the time. Since frequent lifting or carrying requires being on one's feet up to two-thirds of a workday, the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time.

Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* Rulings (1983-1991) ("SSR 83-10"), at 29.

As the plaintiff points out, *see* Statement of Errors at 3, no single one of the opinions in question, viewed in isolation, supports each aspect of the RFC found by Drs. Nielson and Chamberlin and adopted by the administrative law judge. However, the opinions as a whole do support that RFC. For example, while Dr. Giustolisi noted a restriction against prolonged standing, *see* Record at 192, and Dr. Ware noted a restriction against prolonged sitting or standing, *see id*. at 472, Drs. Polivy, Pick and Shems did not note any such restriction, *see id*. at 323, 377, 383. While Dr. Polivy opined that the plaintiff could not lift more than ten pounds, *see id*. at 323, and Dr. Ware stated that he could not do any lifting, *see id*. at 472, Dr. Giustolisi found him capable of lifting no more than twenty-five pounds, *see id*. at 192, and Dr. Shems found him capable of lifting no more than thirty to forty pounds, *see id*. at 383. And while Dr. Shems indicated that the plaintiff had only a part-time work capacity, *see id*. at 383 ("This person, at this point, cannot do any heavy lifting more than 30 to 40 pounds or do any heavy pushing either. However, he can do some light work where he does not have to do any physical excesses at least for four to five hours a day."), neither Dr. Giustolisi, Dr. Polivy, Dr. Pick nor Dr. Ware indicated that he had a capacity only for part-time work, *see id*. at 192, 323, 377, 472.

As counsel for the commissioner pointed out at oral argument, in this circuit an administrative law judge is not obliged to accept or reject examining physicians' opinions *in toto*; he can stitch together an RFC supported in part by each. *See, e.g., Evangelista v. Secretary of Health & Human Servs.*, 826 F.2d 136, 144 (1st Cir. 1987) ("The basic idea which the claimant hawks – the notion that there must always be some super-evaluator, a single physician who gives the factfinder an overview of the entire case – is unsupported by the statutory scheme, or by the caselaw, or by common sense, for that matter. Though it is sometimes useful to have such testimony presented, we decline to lay down an ironclad rule that, without it, a judge is powerless to piece together the relevant medical facts from the findings and opinions of multiple physicians.").

Counsel for the plaintiff posited that, to the extent an administrative law judge may permissibly pick and choose from among various opinions to create an RFC, he must at a minimum explain why he is rejecting certain aspects of a treating or examining source's opinion – something the administrative law judge failed to do in this case. The handling of a treating source's opinion entails certain special considerations, which I discuss below. Apart from that, to the extent the plaintiff complains of a general opinion-writing deficiency (in this case, a failure of explication) one must go on to inquire whether the error was harmless. *See, e.g., Scott v. Barnhart*, 297 F.3d 589, 595 (7th Cir. 2002) ("[A] deficiency in opinion-writing is not a sufficient reason for setting aside an administrative finding where the deficiency had no practical effect on the outcome of the case.") (citation and internal quotation marks omitted); *Johnson v. Apfel*, 189 F.3d 561, 564 (7th Cir. 1999) ("When a claimant argues that there are fatal gaps or contradictions in the administrative law judge's opinion, thus appealing to the important principle of administrative law that the agency provide a rational articulation of the grounds of its decision, we give the opinion a commonsensical

reading rather than nitpicking at it.") (citations omitted).

In this case, the administrative law judge made clear that he credited the reports of Drs. Nielson and Chamberlin, which he found to be well-supported by the medical evidence of record. As discussed above, the Nielson and Chamberlin findings, while not wholly supported by any single report of an examining or treating physician, are substantially supported by the totality of the evidence of record. Thus, I perceive no fatal opinion-writing flaw in this case.

Finally, it is worth noting that while Drs. Giustolisi, Polivy, Pick, Ware and Shems each may have defined "light" work somewhat differently, each indicated that the plaintiff was capable of some kind of light work. *See id*. at 192 (comment of Dr. Giustolisi that "[i]t is my professional opinion at the present time, I believe he is employable only in a light duty capacity"), 323 (comment of Dr. Polivy that "[h]e is certainly capable of full-time light duty work activity at present with a lifting restriction of 10 pounds"), 377 (comment of Dr. Pick that "[b]ased on my evaluation of [the plaintiff] today he is able to engage in at least moderate work activities"), 383 (comment of Dr. Shems that "he can do some light work where he does not have to do any physical excesses at least for four to five hours a day"), 472 (comment of Dr. Ware that plaintiff "cannot work in any sort of manual labor field"). The administrative law judge properly considered the flavor of these comments, as well as the plaintiff's activities of daily living and his conservative treatment of his back pain, in arriving at his RFC conclusion. *See id*. at 25.

In short, I discern no reversible error on this ground.

B. RFC: Treatment of Treating, Examining Physicians

In a letter dated January 21, 2003 to the plaintiff's attorney, Dr. Ware stated:

> I feel that Mr. Powers cannot work in any sort of manual labor field. The patient feels that he can't do prolonged standing or sitting. I cannot put a specific number of hours on how

> long he can sit, stand or walk. It may be better for him to be evaluated by a physical therapy physician or an orthopaedic surgeon. It is certainly my opinion that he cannot do prolonged standing or sitting and cannot do any lifting.

Id. at 472.

The plaintiff posits that this opinion was not accorded proper weight given Dr. Ware's status as a treating physician. *See* Statement of Errors at 4. As an initial matter, it is debatable whether Dr. Ware qualifies as a treating source. Per Social Security regulations, a "treating source" is defined as "your own physician, psychologist, or other acceptable medical source who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you." 20 C.F.R. § 404.1502. The regulations further provide, "We will not consider an acceptable medical source to be your treating source if your relationship with the source is not based on your medical need for treatment or evaluation, but solely on your need to obtain a report in support of your claim for disability." *Id*.

Dr. Ware first examined the plaintiff on August 16, 2002, at which time he noted: "The patient comes in because he needs a primary care physician, but he also comes in primarily because he has disability because of his back from a workman's comp issue, and his attorney told him to come see a doctor." Record at 428. The Record indicates that he saw the plaintiff in followup on only one further occasion, on December 16, 2002, before penning the above-quoted letter. *See id*. at 427. The question is close: As counsel for the plaintiff noted at oral argument, this was not a one-time visit merely for disability evaluation.

In any event, even assuming *arguendo* that Dr. Ware does qualify as a treating source, I find no reversible error in the administrative law judge's handling of his opinion letter. The Ware letter touched on

the subject of RFC – a determination reserved to the commissioner with respect to which even opinions of a treating source are accorded no "special significance." *See* 20 C.F.R. § 404.1527(e)(1)-(3). Nonetheless, such an opinion is entitled to consideration based on six enumerated factors: (i) length of the treatment relationship and frequency of examination, (ii) nature and extent of the treatment relationship, (iii) supportability – *i.e*., adequacy of explanation for the opinion, (iv) consistency with the record as a whole, (v) whether the treating physician is offering an opinion on a medical issue related to his or her specialty, and (vi) other factors highlighted by the claimant or others. *Id*. § 404.1527(d)(2)-(6); Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2004) ("SSR 96-5p"), at 124 ("In evaluating the opinions of medical sources on issues reserved to the Commissioner, the adjudicator must apply the applicable factors in 20 CFR 404.1527(d) and 416.927(d)."). Even as to issues reserved to the commissioner, "the notice of the determination or decision must explain the consideration given to the treating source's opinion(s)." SSR 96-5p at 127.

While the administrative law judge unfortunately did not expressly consider Dr. Ware's lifting, standing and sitting limitations, he did discuss the opinion letter, which he evidently found vague. As he noted, although Dr. Ware stated that the plaintiff could not work in any sort of manual-labor field, he said he could not "put a specific number of hours on how long [the plaintiff] can sit, stand or walk." *Id*. at 23 (quoting Ware letter). The Ware letter is, at best, equivocal, with Dr. Ware seemingly signaling that he was not in a solid position to opine on the plaintiff's remaining capacity to perform work.

In addition, the administrative law judge reasonably construed Dr. Ware's progress note of the August 16, 2002 examination as supporting a capacity for some kind of lighter duty work. *See id*. at 25. At that time Dr. Ware had observed: "The patient is only trying to do manual labor. Obviously he can't do

manual labor with the kind of back problems that he has. I suspect he could be re-trained to do some other sedentary work . . . . I think it is in his best interest . . . to try to get a job and to work." *Id*. at 430. Further, as the administrative law judge stated, the examination was notable for "excessive pain behavior," *id*. at 25, with the plaintiff groaning with any movement and Dr. Ware noting, as an objective matter, only "some limitation of motion of forward flexion" with respect to his back, *see id*. at 22, 429-30.

In short, due consideration was given to the Ware opinion and progress notes.

The plaintiff next posits that the administrative law judge failed to give appropriate weight to the opinions of examining physicians Drs. Giustolisi, Polivy, Pick and Shems. *See* Statement of Errors at 4. While it is true, as noted above, that the administrative law judge did not acknowledge that each of these opinions was in one or more particulars inconsistent with his RFC determination, he properly found them, as a whole, supportive of it.

The plaintiff also faults the administrative law judge for rejecting the opinion of another examining physician, Roland R. Caron, M.D., that he was "totally disabled from work as an auto mechanic and just about any other occupation as he cannot sit for a prolonged period of time nor stand without moving." *Id*. at 4 (citation and internal quotation marks omitted); *see also* Record at 321. As the plaintiff points out, *see* Statement of Errors at 4:

> [O]pinions from any medical source on issues reserved to the Commissioner [such as whether a claimant is "disabled"] must never be ignored. The adjudicator is required to evaluate all evidence in the case record that may have a bearing on the determination or decision of disability, including opinions from medical sources about issues reserved to the Commissioner. If the case record contains an opinion from a medical source on an issue reserved to the Commissioner, the adjudicator must evaluate all the evidence in the case record to determine the extent to which the opinion is supported by the record.

SSR 96-5p at 124. This is precisely what the administrative law judge did in this case with respect to the

Caron disability opinion, reasonably finding it "not supported by the opinions of the examining and reviewing physicians" and accordingly "entitled to very little weight." Record at 25.

The plaintiff finally asserts that the administrative law judge failed to give appropriate consideration to the opinion of a treating chiropractor, Howard Austrager, D.C., that he was totally disabled. *See* Statement of Errors at 5; *see also* Record at 378. However, as the plaintiff acknowledges, *see* Statement of Errors at 5, a chiropractor is not considered an "acceptable medical source," *see, e.g.*, 20 C.F.R. § 404.1513(a), as a result of which his opinion "may" – but need not – be taken into consideration, *see, e.g., id*. § 404.1513(d). As the administrative law judge observed, an opinion of an unacceptable medical source, especially one at variance with the weight of other evidence of record, is entitled to little weight. *See* Record at 26.

C. Alcoholism Disability Determination

The plaintiff finally complains that the administrative law judge erred in finding him disabled by alcoholism, asserting:

> The unsupported finding of disability due to alcoholism clouds the determination of functional status due to back pain and provides an additional reason for remand. The ALJ indicated at the hearing that he would order a neurological or orthopaedic consultative evaluation in addition to a psychological evaluation. (R. 63-64) No neurological or orthopaedic evaluation was ordered, suggesting that the discussion of alcohol use in the psychological evaluation caused prejudgment of the back impairment issue.

Statement of Errors at 6. This argument notwithstanding, I am persuaded that any error in finding the plaintiff disabled by alcoholism was harmless. As counsel for the plaintiff conceded at oral argument, the only impact of this finding was to remove mental impairment from the list of potentially disabling conditions the administrative law judge considered. *See* Record at 23-24. Yet, as counsel for the plaintiff also

acknowledged at oral argument, the plaintiff himself does not claim disability stemming from mental impairment. *See* Fact Sheet for Social Security Appeals: Plaintiff, attached to Statement of Errors.[3]

While the administrative law judge did state at hearing that he intended to obtain not only a psychological consultation but also an orthopaedic or neurological consultation, he did so *sua sponte* rather than in response to any request or motion by the plaintiff, who was represented at hearing by his current attorney. *See id*. at 63-64. Although the plaintiff speculates that the administrative law judge failed to follow through on requesting an orthopaedic or neurological consultation because the psychological evaluation caused him to "prejudge" the back-pain issue, it is equally (if not more) plausible that the administrative law judge simply decided, upon further consideration, that the Record as it stood contained sufficient evidence to make a determination regarding the impact of the plaintiff's back condition on his ability to perform work-related activities.

I therefore find no reversible error either in the determination that the plaintiff was disabled by alcoholism or in the administrative law judge's decision not to obtain a post-hearing neurological or orthopaedic consultation.

II. Conclusion

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

NOTICE

[3] In his Statement of Errors, the plaintiff does contend that the administrative law judge erred in ignoring non-alcoholism-related limitations found by the psychological consultant, Roger S. Zimmerman, Ph.D. – specifically, a moderate limitation in ability to deal with work stresses due to back pain and the observation that back pain might frequently interrupt pace. *See* Statement of Errors at 6; *see also* Record at 480. Nonetheless, Dr. Zimmerman made reasonably clear that these opinions were based on acceptance of the proposition that the plaintiff suffered from ongoing, severe back pain. *See* Record at 480 ("Claimant appears to have ongoing + severe back pain.").

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 13th day of December, 2004.

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

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