

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JOSE E. SANTIAGO, )  
Plaintiff )  
)  
)  
v. )  
)  
)  
MICHAEL J. ASTRUE, )  
Commissioner of the Social )  
Security Administration, )  
Defendant )

Civil Action No. 09-30006-KPN

MEMORANDUM AND ORDER REGARDING PLAINTIFF'S MOTION TO  
REVERSE AND DEFENDANT'S MOTION TO AFFIRM THE DECISION  
OF THE COMMISSIONER (Document Nos. 9 and 11)

October 14, 2009

NEIMAN, U.S.M.J.

This is an action for judicial review of a final decision by the Commissioner of the Social Security Administration ("Commissioner") regarding an individual's entitlement to Supplemental Security Income ("SSI") pursuant to 42 U.S.C. §1383(c)(3) (referencing § 42 U.S.C. § 405(g)). Jose Santiago ("Plaintiff") asserts that the Commissioner's decision denying him such benefits -- memorialized in a August 20, 2008 decision of an administrative law judge ("ALJ") -- is in error. He has filed a motion to reverse (which motion alternatively seeks a remand) and the Commissioner, in turn, has moved to affirm.

With the parties' consent, this matter has been assigned to the undersigned for all purposes, including entry of judgment. See 28 U.S.C. § 636(c); Fed. R. Civ. P. 73(b). For the reasons that follow, the court will allow Plaintiff's motion to the extent it

seeks a remand and, in turn, will deny the Commissioner's motion to affirm.

### I. STANDARD OF REVIEW

A court may not disturb the Commissioner's decision if it is grounded in substantial evidence. See 42 U.S.C. §§ 405(g) and 1383(c)(3). The Supreme Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)) (internal quotation marks omitted). Any resolution of conflicts in the evidence is the Commissioner's responsibility, not the courts. *Ortiz v. Sec'y of Health and Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). Thus, even if the administrative record could support multiple conclusions, a court must uphold the Commissioner's findings "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion." *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

However, a denial of benefits will not be upheld if there has been an error of law in the evaluation of a particular claim. See *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999) ("The ALJ's findings of fact . . . are not conclusive when derived by ignoring evidence, misapplying the law, or judging matters entrusted to experts."); see also *Manso-Pizarro v. Sec'y of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In the end, the court maintains the power, in appropriate circumstances, "to enter . . . a judgment affirming, modifying, or reversing the [Commissioner's decision]" or to "remand[ ] the cause for a rehearing." 42 U.S.C. § 405(g).

## II. BACKGROUND

Plaintiff is forty-eight years old and has a ninth grade education. (Administrative Record (“A.R.”) at 17, 33, 314.) He worked in the construction industry, performing carpentry-related jobs, but his work history also indicates past employment as a maintenance and custodial worker. (A.R. at 17, 33, 98, 162, 320-21.) Plaintiff relocated from San Juan, Puerto Rico, in 2006 and currently resides in Springfield. (A.R. at 12, 69, 321-22.)

Plaintiff alleges he became disabled in 1997 due to back problems. (A.R. at 17-18, 30, 68, 318.) It appears that, at that time, he underwent corrective surgery of his spine, but reported that his back pain became progressively worse. (A.R. at 32, 325.) In 2003, Plaintiff attempted to reenter the work force but was unable to continue after two months and has not returned to work since. (A.R. at 17, 319-20.)

Plaintiff contends that he has chronic pain in his back and legs and experiences breathing difficulties due to asthma. (A.R. at 315, 326, 328.) He also claims that his daily activities are limited by the both the pain and medication and that he spends approximately three to four hours at a time in bed, three times a day, because lying down is his most comfortable position. (A.R. at 303, 332).

### A. Medical History

The medical record portrays Plaintiff as an individual who has complained about back pain for a number of years. The court will describe Plaintiff’s medical history in some detail if for no other reason than to set the stage for his main legal argument, *i.e.*, that the administrative law judge did not properly consider his pain when denying his

benefits.

As indicated, the medical record reflects a 1997 back surgery for a herniated disc. In the fall of 2006, while still living in Puerto Rico, Plaintiff again sought medical treatment for back pain. (A.R. at 171-79.) He also complained of pain radiating down his leg, which rendered him unable to walk. (*Id.*) The physician at the time diagnosed Plaintiff with discogenic disease and prescribed Tramadol for inflammation. (*Id.*)

On December 3, 2006, after moving to Massachusetts, Plaintiff sought emergency treatment for muscle spasms at Baystate Medical Center. (A.R. at 189-93.) He was discharged with prescriptions for Valium and Percocet. (*Id.*) The following day, Plaintiff sought treatment at the Caring Health Center. (A.R. at 243.) Dr. Abhishake Raina found a “dramatic” decreased range of motion in Plaintiff’s back and diagnosed muscle opacity with lower back pain; Plaintiff was prescribed Flexeril and Tramadol. (*Id.*)

On January 4, 2007, Plaintiff began working with Pioneer Spine and Sports Physicians (“PSSP”). (A.R. at 288-89.) At the time, he complained of back pain that radiated down his right leg into his foot, stated his pain had existed “for several years” and was “10/10” on a visual analog scale, complained that his pain increased with “all activities,” and indicated that medication was the only thing that helped. (*Id.*) Dr. David Bowers -- after determining that Plaintiff had lumbar pain, limitations in flexion, extension, and lateral bending, and right heel pain -- diagnosed him with reticulatus. (*Id.*)

An MRI performed on January 21, 2007, revealed that one of Plaintiff’s discs was

herniated, causing compression. (A.R. at 290-91.) Another mild disc bulge was also found but it did not cause a significant impression upon Plaintiff's dural sac or nerve roots. (*Id.*)

On January 25, 2007, Plaintiff had a follow-up examination at PSSP. Dr. Bowers found that Plaintiff had "no difficulty with ambulation" or "heel and toe walking," and that his gait was "smooth, steady, and nonantalgic." (A.R. at 286.) Plaintiff was further described as having a "minimal amount of difficulty" going from sitting to standing and experiencing "pain to palpation" in certain lumbar muscles and his right sciatic notch; Plaintiff's lower extremities were rated five out of five in terms of strength. (*Id.*) Plaintiff received an epidural injection five days later but, thereafter, reported that his pain actually increased and that the injection did not help. (A.R. at 283, 285.)

Plaintiff began physical therapy in February of 2007 but returned to the emergency room the following month complaining of excruciating pain. (A.R. at 194, 199.) He was given medication and, after approximately four weeks of physical therapy, indicated that his pain had decreased "significantly." (A.R. at 200, 279, 281.) A physical examination at the time revealed that Plaintiff had no difficulty going from a seated to a standing position, no difficulties with ambulation or heel and toe walking, and that his gait was "smooth, steady, and nonantalgic." (A.R. at 281.) Plaintiff, however, continued to have low back and right leg pain related to the disc herniation and nerve root compression. (*Id.*)

In June of 2007, Plaintiff received an epidural injection. (A.R. at 259.) A follow-up visit to Dr. Ronald Paasch at PSSP found that Plaintiff went to the emergency room

“several times over the last several weeks” for increased pain. (A.R. at 277.) Plaintiff reported, however, that Tramadol decreased his pain and that he felt the epidural had “worked very well.” (*Id.*) Plaintiff had another epidural injection in August of 2007. (A.R. at 273.)

During a visit with Dr. Paul Azimov in October of 2007, Plaintiff reported continued back pain but stated that he no longer had any leg pain. (A.R. at 271.) Plaintiff further indicated that his back pain was aggravated if he coughed, sneezed or stood but that he could walk for thirty to forty-five minutes without difficulty. (*Id.*) Dr. Azimov found that Plaintiff was able to move from a seated to standing position without difficulty noticed no significant antalgia when Plaintiff was walking around the room, and indicated that, while Plaintiff’s extension and flexion were problematic, Ultram helped reduce the pain. (*Id.*) On October 17, 2007, Plaintiff received facet joint injections in his spine. (A.R. at 269.)

In December of 2007, Plaintiff had another follow up visit, this time with Dr. Scott Cooper, and stated that the injections had “substantially” decreased his pain, described as “mild to moderate”. (A.R. at 297.) Plaintiff characterized the pain as a “constant achiness” and indicated that his pain was made worse by lumbar extension, prolonged standing or walking, but that rest and Tramadol alleviated the pain. (*Id.*)

Three months later, in March of 2008, Plaintiff stated to Dr. Michael Woods that his low back pain was a “constant, dull, achy sensation” that was “affecting his daily life,” but indicated that he had not participated in physical therapy as recommended. He rated the pain level seven or eight out of ten. (A.R. at 295.) Dr. Woods diagnosed

“axial back pain consistent with facet arthropathy decreased after facet injections” and again advised physical therapy. (*Id.*)

Plaintiff did engage in physical therapy but, on May 19, 2008, reported little to no relief. (A.R. at 293.) Dr. Paasch indicated that Plaintiff continued to have “relatively severe axial back pain,” rated at seven to eight out of ten. (*Id.*) Plaintiff reported that his pain increased with activities and ambulation and requested facet injections to treat his symptoms. (*Id.*) The injections afforded temporary relief, but Plaintiff indicated that the pain reached its prior level within two to three weeks. (A.R. at 168.)

Meanwhile, on March 27, 2007, Dr. Romany Girgis, a state agency non-examining physician, completed a residual functional capacity assessment. (A.R. at 203-10.) Dr. Girgis concluded that Plaintiff could occasionally lift and/or carry twenty pounds, frequently lift and/or carry ten pounds, stand and/or walk for at least two hours in an eight-hour workday, and sit for about six hours in an eight-hour workday. (A.R. at 204.) Dr. Girgis also determined that Plaintiff was limited to only occasional climbing, balancing, stopping, kneeling, crouching, and crawling due to chronic pain. (A.R. at 205.) He stated further that Plaintiff must avoid concentrated exposure to extreme cold, wetness, humidity, fumes, odors, dusts, gasses, poor ventilation, and hazardous equipment due to his history of asthma. (A.R. at 207.) When analyzing the evidentiary support for his conclusions, Dr. Girgis noted that Plaintiff “appear[ed] credible.” (A.R. at 205.)

#### B. Procedural History

On December 24, 2006, in the midst of these medical benchmarks, Plaintiff

applied for SSI benefits, alleging disability due to back pain. After his application was denied initially and on reconsideration, Plaintiff requested a hearing before an administrative law judge. The hearing was held on July 16, 2008, at which Plaintiff was represented by counsel. Both Plaintiff, with the assistance of a Spanish interpreter, and a vocational expert testified. In a decision dated August 20, 2008, the ALJ found that Plaintiff was not disabled. On November 19, 2008, the Appeals Council denied Plaintiff's request for review, rendering the ALJ's decision final for present purposes.

### III. DISCUSSION

An individual is entitled to SSI benefits if, among other things, he is able to demonstrate both a disability and financial need. See 42 U.S.C. § 1381a. Plaintiff's need is not challenged.

#### A. Disability Standard and the ALJ's Decision

The Social Security Act (the "Act") defines disability, in part, as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). An individual is considered disabled under the Act

only if his physical and mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 1382c(a)(3)(B). See generally *Bowen v. Yuckert*, 482 U.S. 137, 146-49 (1987).

In determining disability, the Commissioner follows the five-step protocol described by the First Circuit as follows:

First, is the claimant currently employed? If he is, the claimant is automatically considered not disabled.

Second, does the claimant have a severe impairment? A “severe impairment” means an impairment “which significantly limits [the claimant’s] physical or mental capacity to perform basic work-related functions.” If he does not have an impairment of at least this degree of severity, he is automatically considered not disabled.

Third, does the claimant have an impairment equivalent to a specific list of impairments in the regulations’ Appendix 1? If the claimant has an impairment of so serious a degree of severity, the claimant is automatically found disabled.

....

Fourth, does the claimant’s impairment prevent him from performing work of the sort he has done in the past? If not, he is not disabled. If so, the agency asks the fifth question.

Fifth, does the claimant’s impairment prevent him from performing other work of the sort found in the economy? If so, he is disabled; if not, he is not disabled.

*Goodermote v. Sec’y of Health & Human Servs.*, 690 F.2d 5, 6-7 (1st Cir. 1982).

In the instant case, the ALJ found as follows with respect to these questions: Plaintiff had not engaged in substantial gainful activity since December 24, 2006, the application date of his disability claim (question one); Plaintiff has “severe” impairments (asthma, herniated nucleus pulposes of the lumbar spine) but these do not meet or

medically equal one of the listed impairments in Appendix 1 (questions two and three); Plaintiff is prevented from performing his past relevant work (question four); but he is able to perform a significant number of jobs in the national economy, including work as an assembler, laundry worker, or machine tender (question five). As a result, the ALJ concluded that Plaintiff does not suffer from a disability for purposes of SSI eligibility.

#### B. Plaintiff's Challenge to the ALJ's Decision

Plaintiff makes two arguments in support of his motion. First, Plaintiff argues that the ALJ did not develop the record with regard to his medications and their side effects. Second, Plaintiff asserts that the ALJ did not properly consider his pain when making his credibility determination, as required by the First Circuit in *Avery v. Sec'y of Health & Human Servs.*, 797 F.2d 19, 22-24 (1st Cir. 1986). For his part, the Commissioner argues that substantial evidence supports the ALJ's assessment of Plaintiff's subjective complaints of pain and that the ALJ did develop the record and adequately address the purported side effects of the medication.

##### 1. The Development of the Record

Plaintiff's first argument -- that the ALJ failed to develop the record with regard to medications and side effects -- can be disposed of in short order. While, as explained below, the court will find that the ALJ's analysis of the type, dosage, effectiveness, and adverse side effects of the medication was insufficient, the court does not assign the full responsibility of further developing that information to the ALJ. After all, Plaintiff was represented by counsel and had the assistance of an interpreter. Moreover, during the hearing, the ALJ made a specific exhibit known to counsel regarding Plaintiff's

medication and side effects, namely, a pain questionnaire in which Plaintiff had indicated that he experienced no side effects. Thus, counsel had ample opportunity to address this document, the discrepancy it presented with Plaintiff's testimony, as well as the claim that Plaintiff told his doctors that he experienced side effects from the medication. Although Plaintiff's responses to counsel's questions may not have been fully understandable, the responsibility for that is as much on counsel as counsel wishes to place on the ALJ. In any event, the record was developed enough so as to enable the court to address Plaintiff's second argument.

## 2. Pain Analysis and Credibility Determination

Plaintiff next contends that the ALJ failed to fully and properly consider his subjective complaints of pain and the evidence contained in his medical records which support the limitations that such pain places on his daily functions. In particular, Plaintiff contends that the ALJ did not follow the guidelines set forth in the Program Operations Manual System ("POMS") instructions which were appended to *Avery*. Plaintiff argues that the ALJ's inquiry into the factors described in *Avery* was inadequate and that the ALJ did not thoroughly discuss and analyze Plaintiff's daily activities when considering his subjective complaints of pain. Relatedly, Plaintiff finds fault with the ALJ's conclusion that his statements concerning the intensity, persistence, and limiting effects of his symptoms were "not entirely credible."

The court begins with some basics on credibility, as set forth in its previous decision of *Arroyo v. Barnhart*, 295 F. Supp. 2d 214 (D. Mass. 2003):

The First Circuit has long acknowledged that an

administrative law judge is not required to take a claimant's subjective allegations at face value. See *Bianchi v. Sec'y of Health & Human Servs.*, 764 F.2d 44, 45 (1st Cir. 1985) (citation omitted). Moreover, it is well established that a court must generally defer to credibility determinations made by an administrative law judge. See *Frustaglia v. Sec'y of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987); *Brown v. Sec'y of Health & Human Servs.*, 740 F. Supp. 28, 36 (D. Mass. 1990). Nonetheless, a court must review an administrative law judge's determination to see if it comports with the law. In essence, the court must ensure that an administrative law judge made specific findings to the "relevant evidence" when deciding to disbelieve a claimant. See *Da Rosa v. Sec'y of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986). See also Social Security Ruling (SSR) 96-7p, Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements, 61 Fed. Regs. 34, 483, 34, 485-86 (1996) (requiring that "[w]hen evaluating the credibility of an individual's statements, the adjudicator must . . . give specific reasons for the weight given to the individual's statements"; and "the reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision").

*Id.* at 223. The First Circuit has explained as well that, "in assessing [a claimant]'s subjective complaints and determining his residual functional capacity," an administrative law judge's analysis must be "consistent with the interpretive guidelines set forth in the POMS instructions." *Da Rosa*, 803 F.2d at 26.

Quoting the POMS, the First Circuit in *Avery* was careful to note the importance of the pain assessment, *i.e.*, the administrative law judge "must be aware that symptoms, such as pain, can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder." *Avery*, 797 F.2d at 23. When the claimant indicates that pain is a significant factor of his inability to work, and the allegation is not supported by objective findings in the file, an

administrative law judge “*shall obtain* detailed descriptions of daily activities by directing *specific inquiries* about the pain and its effects to the claimant.” *Id.* at 28 (emphasis added). In evaluating the claimant’s subjective complaints of pain, the administrative law judge must “investigate *all avenues* presented that relate to subjective complaints, including the claimant’s prior work record and information and observations by treating and examining physicians and third parties.” *Id.* (emphasis added). See also *Cinq Mars*, 2006 WL 961913, at \*9 (D. Mass Apr. 6, 2006). The First Circuit court then identified the following “*Avery*” factors to be considered:

1. The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
2. Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);
3. Type, dosage, effectiveness, and adverse side-effects of any pain medication;
4. Treatment, other than medication, for relief of pain;
5. Functional restrictions; and
6. The claimant’s daily activities.

*Avery*, 797 F.2d at 28-29. See also 20 C.F.R. § 416.929(c)(3) (2009) (further describing process for evaluating pain and other symptoms).

In the instant case, the ALJ raised each of the *Avery* factors at the administrative hearing. Nevertheless, the ALJ failed in his subsequent written decision to provide the required analysis of Plaintiff’s subjective complaints of pain.

The ALJ first elicited testimony at the administrative hearing regarding Plaintiff’s

back impairment and the associated pain and also established that Plaintiff suffered from asthma. (A.R. at 315, 325-26, 328-29). The ALJ then inquired as to why Plaintiff could not work jobs that did not require him to lift more than fifteen or twenty pounds and would allow him to change positions when necessary. (A.R. at 322-23.) The ALJ also asked about Plaintiff's current and past medications, including side effects, although the types and dosages were not discussed. (A.R. 323-24, 326.) In this regard, it should be noted that the ALJ raised the fact that Plaintiff had claimed on a pain questionnaire that there were no side effects, although Plaintiff testified that the medicine made him sleepy and that he needed to spend three to four hours at a time in bed due to the medication. (A.R. at 105, 325-28, 332.) The ALJ also asked Plaintiff about non-medication treatment and specifically inquired about physical therapy and injections. (A.R. at 329-30.) The ALJ inquired as well into Plaintiff's limitations with respect to sitting and standing. (A.R. at 332-33.) Finally, the ALJ inquired about Plaintiff's daily activities. (A.R. at 331-32, 334-35.)

These six inquiries were sufficient to develop the record with respect to Plaintiff's subjective complaints of pain. However, when making his decision to disbelieve Plaintiff, the ALJ was required to make "specific findings as to the 'relevant evidence'." *Arroyo*, 295 F. Supp. 2d at 223 (quoting *Da Rosa*, 803 F.2d at 26). See also Social Security Ruling (SSR) 96-7p, Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements, 61 Fed. Regs. 34, 483, 34, 485-86 (1996) (requiring that "[w]hen evaluating the credibility of an individual's statements, the adjudicator must ... give specific reasons for the weight given to the individual's

statements”; and “the reasons for the credibility finding must be grounded in the evidence and *articulated in the determination or decision*”) (emphasis added). This the ALJ failed to do. He simply found, in a conclusory fashion, that Plaintiff’s statements concerning the intensity, persistence, and limiting effects of his symptoms were not credible because they were “inconsistent with the residual functional capacity assessment.” (A.R. at 20.) The ALJ did not discuss Plaintiff’s testimony in his decision nor how Plaintiff’s statements were inconsistent with the objective medical evidence.

The ALJ’s decision was particularly lacking in its discussion regarding the adverse side effects of Plaintiff’s medication. His conclusion that Plaintiff did not experience any side effects was based on a questionnaire where Plaintiff responded in the negative. (A.R. at 18, 105.) Standing alone, however, medical questionnaires “are entitled to little weight in the evaluation of disability” and do not constitute substantial evidence. *Lacroix v. Barnhart*, 352 F. Supp. 2d 100, 112 (D. Mass. 2005) (citing *Anderson v. Sec’y of Health & Human Servs.*, 634 F. Supp. 967, 972 (D. Mass. 1984)). Moreover, Plaintiff’s testimony at the hearing indicated that the medication “ma[de] him sleepy.” (A.R. at 324-25, 328). And when asked how much time he spent in bed on an average day, Plaintiff responded “three or four hours because of the medication.” (A.R. at 332.) This testimony needed to be addressed by the ALJ, particularly given the vocational expert’s conclusion that, if Plaintiff’s testimony was to be believed, his job opportunities “would be completely eroded.” See *Phillips v. Barnhart*, 421 F. Supp. 2d 272, 279 (D. Mass. 2006) (administrative law judge’s findings on pain “were hardly specific, detailed, or complete”). The analysis of two other *Avery* factors was also

lacking in the ALJ's decision. The fourth factor, *i.e.*, treatment other than medication for relief of pain, received but a single statement on the ALJ's part, "Facet injections were recommended." (A.R. at 18.) And the sixth factor, *i.e.*, Plaintiff's daily activities, was not discussed at all. The ALJ's failure to fully assess these factors rendered his analysis insufficient. See *Phillips*, 421 F. Supp. 2d at 279; see also *Bazile v. Apfel*, 113 F. Supp. 2d 181, 188 (D. Mass. 2000) (holding that a consideration of "most" of the Avery factors is insufficient -- all six must be considered).

As this court has held, an administrative law judge's failure to discuss the weight given to a claimant's testimony is "particularly problematic" when the record is "replete with references to [the claimant]'s daily activities, degree of pain, medications (including side effects), and functional limitations." *Avery v. Astrue*, 2007 WL 2028881, at \*7 (D. Mass. July 10, 2007). As was true in that case, remand is appropriate here as well so that the ALJ can undertake the required analysis and make specific findings as to the relevant evidence concerning Plaintiff's claimed disability.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion to reverse is ALLOWED to the extent it seeks a remand, and the Commissioner's motion to affirm is DENIED.

IT IS SO ORDERED.

DATED: October 14, 2009

/s/ Kenneth P. Neiman  
KENNETH P. NEIMAN  
U.S. Magistrate Judge