

A. Procedural History

Acevedo applied for SSDI and SSI benefits on August 5, 2003, alleging disability since August 2, 1999. His applications were initially denied by the SSA on November 7, 2003. Acevedo filed a Request for Reconsideration on November 13, 2003, but this was denied on February 16, 2004. He then filed a Request for a Hearing before an Administrative Law Judge ("ALJ") on February 27, 2004. The hearing was held on June 14, 2005; Acevedo appeared and testified, as did a vocational expert. The ALJ issued his decision on October 20, 2005, finding that Acevedo was not disabled because he retained the residual functional capacity ("RFC") to perform other work that existed in significant numbers in the national economy. The SSA Appeals Council denied Acevedo's request for review of the ALJ's decision on January 31, 2006. This action for judicial review of the Commissioner's decision was commenced pursuant to 42 U.S.C. § 405(g) on April 3, 2006.

B. Medical History

Acevedo has claimed disability since August 2, 1999, stemming from an incident that took place during his employment at Dunkin' Donuts.¹ He claims that he was taking some trash out

¹ It is unclear from the record when the incident at Dunkin' Donuts actually occurred. An October 7, 1999 Emergency Room Note from Caritas Norwood Hospital states that Acevedo was injured on the job on August 26, 1999; however, medical notes from Acevedo's visits to the Arnold Pain Management Center mention the accident occurring in 1998, specifically March 15, 1998. Dr. David Ammerman's report suggests that two separate on-the-job injuries

because no one else wanted to take it out; upon taking it out to the dumpster and putting it inside, Acevedo claims that his back gave out. He has not been back to work in any form since the incident. He has received disability insurance as a result of the incident at Dunkin' Donuts, in the form of a lump-sum payment. He has claimed that his disability includes depression, migraine headaches, chronic back problems, and breathing difficulties. As a result, he is allegedly unable to lift things due to his back problems, and any other activity is limited because of his breathing problems and propensity to develop headaches.

Acevedo first reported to the Caritas Norwood Hospital on October 7, 1999, complaining of shoulder pain and requesting stronger pain medication due to being uncomfortable at night. At this time, Acevedo was reported seeing Dr. Bowman, an orthopedic surgeon, regularly and was undergoing physical therapy. Acevedo returned on October 29, 1999, this time due to back pain which he claimed had been persisting for approximately a year. The attending physician recommended an MRI of Acevedo's lower back and gave him a prescription for the MRI. Acevedo returned a few days later on November 2 for the MRI, which resulted in normal findings.

Acevedo also began seeing Dr. Megan Callahan in January of 2000, after complaining of persistent headaches for the past

occurred, one on each date.

eighteen months coupled with blurry vision. On January 31, 2000, Acevedo underwent a left shoulder arthroscopic evaluation with subacromial decompression at Sturdy Hospital. Intraoperative findings showed no rotator cuff tears and a pristine glenohumeral joint. Acevedo then had a series of follow-up appointments with Dr. Callahan starting on March 2, 2000, when she prescribed Neurontin to help with his headaches and insomnia after he reported that his Imitrex prescription was helping with his headaches but was taking a long time to work. After a period of no serious headaches, Acevedo returned to Dr. Callahan on April 27 complaining of a pounding headache received a few days earlier. A follow-up MRI on May 9 discovered a benign, non-aggressive lesion. This was later found not to be the cause of his headaches during a visit to the Beth Israel Deaconess Medical Center on June 9, 2000. However, the headaches were said to continue up to his visit with Dr. Ranbir Dhillon on July 30, 2003, in which Dr. Dhillon recorded that Acevedo had been getting four headaches per week, with the longest of these lasting three days.

Acevedo underwent evaluations of his back throughout 2000. On September 12, 2000, he underwent an initial evaluation at the Arnold Center from both a physical therapist and a psychologist. In his report, Dr. Joshua Wootton noted that Acevedo's pain picture may have been complicated by mild depressive and anxious symptomatology, but that there were few indications of severe or

major psychiatric overlay and Acevedo was not severely depressed. Physical therapist Tina Nebhnani noted multiple impairments and recommended physical therapy in conjunction with pain management intervention. Acevedo subsequently received bilateral L4-5 lumbar facet injections on November 1 and December 11 and underwent a medial branch block procedure on January 10, 2001, after pain returned post-injections. Acevedo underwent another MRI on February 2, 2001, this time of his lumbar spine which discovered small facet joint effusions at L3-4 but no disc bulge or protrusion and no central or neural foraminal stenosis.

Acevedo then underwent a radiofrequency lesioning of the medial branch nerve on the right L4-5. The post-procedure report stated that Acevedo had facet joint syndrome. After the radiofrequency procedure, Acevedo reported to the Arnold Center on March 23, 2001 and stated that the procedure had significantly reduced his pain. However, on May 3, Dr. John Donohue reported that Acevedo came into Beth Israel complaining of back pain with the addition of acute sciatic-like symptoms.

A number of disability determinations were recorded after Acevedo applied for benefits on August 5, 2003. The first was from Dr. David Ammerman, who along with his partner had been treating Acevedo since July 1997. Ammerman noted that he examined Acevedo on April 8, 2003 and that his back was nontender and that he was able to move without obvious pain, including leaning over a table for a prostatic examination. Ammerman concluded that

there was not sufficient information in Mr. Acevedo's medical record to support a disability claim.

On October 23, 2003, Acevedo also underwent a psychological evaluation by Dr. Richard Vinacco, who discussed Acevedo's depression and suicidal ideations but without significant clinical findings.

On October 29, 2003, Dr. Melvin Rodman, a non-examining Disability Determination Services ("DDS") physician, conducted a Physical Residual Functional Capacity Assessment ("PRFCA") and opined that Acevedo was able to occasionally lift and/or carry 50 pounds and stand and/or walk about 6 hours in an 8-hour work day. Dr. Rodman noted that his report was in line with the treating physician's statements that he could not find any evidence with which to support Acevedo's disability claim.

On November 4, 2003, Dr. Joan Kellerman, a non-examining DDS psychologist, concluded that Acevedo did not suffer from any psychological or behavioral abnormalities associated with a brain dysfunction, or any persistent psychotic features and deterioration. Kellerman did find that Acevedo had a disturbance of mood, but no anxiety-related disorders. In terms of functional limitation, Kellerman concluded that Acevedo had no restriction of activities of daily living, no difficulties in maintaining social functioning, and only mild difficulties in maintaining concentration, persistence, or pace.

On January 2, 2004, Dr. Carlos Carpena, a non-examining DDS

physician, conducted a PRFCA and made the same findings as Dr. Rodman with respect to exertional limitations.

On January 28, 2004, Acevedo was examined by Dr. Richard Ober, who conducted an assessment upon referral by DDS. Ober concluded that Acevedo was experiencing relatively mild dysthymia. He also stated that Acevedo's depression was compounded by his functional limitation and pain and its consequent untoward effect on his ability to work.

On February 9, 2004, Dr. Summer Stone, a non-examining DDS physician, completed a psychiatric review form in which he concluded that Acevedo was suffering from non-severe chronic depression. (AR 301, 304.) As a result, Acevedo's functional limitations consisted of only mild restriction of daily living activities, mild difficulties in maintaining social functioning, and mild difficulties in maintaining concentration, persistence, or pace.

Acevedo was then examined by his own primary care physician, Dr. Francis Powers, on March 25, 2004, soon after his initial disability application was denied. Dr. Powers noted that Acevedo suffered from chronic, debilitating migraines and depression. He added that Acevedo's limitations were primarily mental in nature; his mental activity, such as understanding and memory, sustained concentration, persistence, social interaction, and adaptation were moderately to severely limited. Dr. Powers concluded that Acevedo did not suffer from any physical limitations that he was

aware of. However, Dr. Powers later completed an assessment on March 15, 2005, in which he opined that Acevedo was severely limited physically and even unable to stand or walk in an 8-hour work day.

Acevedo was also examined on August 16, 2004 by Dr. Mark Robbins, a gastroenterologist, after reporting chronic diarrhea 3 to 4 times a day. Dr. Robbins noted that Acevedo's condition was most likely related to irritable bowel syndrome. One day later, Acevedo underwent a sleep study which showed moderate obstructive sleep apnea with poor sleep efficiency and low quality sleep. The study was conducted by Dr. Christopher Garofalo, who also followed up on Acevedo's other ailments. Dr. Garofalo noted that Acevedo rated his pain at 6/10 most of the time, worst at 8/10, and at 3/10 with medication. On February 18, 2005, Acevedo also described to Dr. Garofalo his continuing migraine headaches and their increasing frequency. Despite his interactions with Acevedo, Dr. Garofalo was unable to declare Acevedo disabled, noting that while he claimed many physical symptoms that would impact his functioning, there were no objective findings such as an exam or imaging to explain the existence of his many symptoms. Dr. Garofalo did note, however, that Acevedo's depression was very likely contributing to his physical symptoms.

II. DISCUSSION

A. Standard of Review

Courts 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). Substantial evidence means more than just a mere scintilla. See *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Even if the 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). The "resolution of conflicts in evidence and the determination of credibility are for the Commissioner, not for doctors or the courts." *Reeves v. Barnhart*, 263 F. Supp. 2d 154, 156 (D. Mass. 2003) (Neiman, J.) (citing *Rodriguez*, 647 F.2d at 222.).

B. Disability Standard

In order to qualify for disability benefits under the Social Security Act, an individual must suffer from a disability within the meaning of the Act. See 42 U.S.C. §§ 423 and 1382(c). An individual is considered disabled under the Act only if his physical or 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 employment 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. §§ 423(d)(2)(A) and 1382c(a)(3)(A). The burden is on the plaintiff to prove disability. See *Bowen v. Yuckert*, 482 U.S. 137, 146 (1987).

Pursuant to SSA regulations, the Commissioner must weigh the evidence in a five-step process to determine whether a plaintiff is disabled. See 20 C.F.R. § 404.1520 and 416.920. The first step is to determine whether the plaintiff is currently working; if so, then he is automatically considered not disabled. Second, if any medically determinable physical or mental impairment or impairments are not considered severe enough for at least one year, then the claimant is automatically considered not disabled. Third, the claimant must have an impairment equivalent to a specific list of impairments contained in the regulations' Appendix 1. Fourth, the claimant must not be able to perform past relevant work because of his impairment(s). If he can, he is automatically considered not disabled. For the Fifth Step, the burden is on the Commissioner to determine whether the claimant can make an adjustment to other work found in the economy. See *Goodermote v. Sec'y of Health & Human Servs.*, 690 F.2d 5, 6-7 (1st Cir. 1982).

Here, the ALJ determined that Acevedo had not engaged in substantial gainful activity since the alleged onset of disability. However, the ALJ concluded that the whole of

Acevedo's impairments were not severe and did not meet or medically equal any of the listed impairments in Appendix 1. The ALJ also found that the claimant's impairments did impair him from performing any of his past relevant work, but that there were a tens of thousands of jobs in the local area that he could perform in the light exertional or sedentary level, based on the findings of the vocational expert. Examples of these jobs included counter attendant, light maintenance worker, stone setter, polisher, or bench hand.

C. Acevedo's Contentions

Acevedo challenges the ALJ's decision in three ways. He primarily alleges that the ALJ's decision was not supported by specific facts and substantial evidence, particularly in the assessments of Acevedo's subjective complaints. He also alleges that the ALJ failed to contact two of Acevedo's treating physicians to clarify the basis of their opinions before disregarding them as ambiguous or unsupported, and that the ALJ failed to obtain all pertinent, available medical records by failing to issue a subpoena to obtain Plaintiff's psychiatric medical records.

1. Complaints of Pain

While the ALJ acknowledged Acevedo's subjective complaints of pain, he concluded that Acevedo's complaints were outweighed by the other evidence available on the record. The ALJ stated

that the medical record did not verify the alleged severity of Acevedo's medical problems, which amounted to a conclusion that Acevedo's complaints were not found to be credible.

The First Circuit has established a protocol for review of subjective complaints of pain. *See Avery v. Sec'y of Health & Human Servs.*, 797 F.2d 19, 29 (1st Cir. 1986); *see also* 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); SSR 96-7p. An ALJ must consider the following factors: (1) the nature, location, onset, duration, frequency, radiation, and intensity of pain; (2) any precipitating or aggravating factors; (3) the type, dosage, effectiveness, and adverse side effects of any pain medication; (4) any treatment, other than medication, for the relief of pain; (5) any functional restrictions; and (6) the claimant's daily activities.

Avery makes clear that statements of the Plaintiff or his doctor, can be a part of the review as long as they are consistent with the medical findings. 797 F.2d at 21. When conflicts of evidence exist however, the ALJ may determine that the Plaintiff's subjective complaints "are not consistent with the objective medical findings of record," if the ALJ's determination is supported by relevant evidence. *Makuch v. Halter*, 170 F. Supp. 2d 117, 126 (D. Mass. 2001) (quoting *Evangelista v. Sec'y of Health & Human Servs.*, 826 F.2d 136, 141 (1st Cir. 1987)). Credibility determinations "must be supported

by substantial evidence and the ALJ must make specific findings as to the relevant evidence he considered in determining to disbelieve the [claimant]." *Rohrberg v. Apfel*, 26 F. Supp. 2d 303, 309 (D. Mass. 1998) (quoting *DaRosa v. Sec'y of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986)). The Court must show deference to the ALJ's findings as long as this support exists. *Frustaglia v. Sec'y of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

Acevedo argues that the ALJ did not adequately use the *Avery* standard with respect to his subjective complaints of pain because the ALJ's conclusion was not supported with specific facts and substantial evidence. This argument mischaracterizes the ALJ's effort in evaluating his claims. The ALJ clearly notes the relevance 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3), SSR 96-7p and *Avery* in his opinion. (AR 16.) While the ALJ did not specifically run through each *Avery* factor step-by-step and by name in his decision, he did discuss the factors and gave specific reasons for finding that Plaintiff's subjective complaints were not credible.

First, the ALJ addressed the nature, location, duration, onset, frequency, radiation, and intensity of Acevedo's pain and mental limitations. At various points in the opinion, the ALJ discussed Acevedo's chronic lumbar strain/sprain with facet syndrome; severe back pain; migraine headaches; irritable bowel

syndrome; depression; and sleep apnea. He also mentioned Acevedo's claims that his conditions are aggravated or precipitated by concentrations of pulmonary irritants or temperature or humidity extremes.

The ALJ addressed Acevedo's various treatments and medications, including the shoulder surgery, his conservative back treatment including lumbar facet injections, his use of the CPAP device for his sleep apnea, and his experience with various medications prescribed by his primary care physician and with regards to his migraines. The ALJ also considered and discussed Acevedo's functional restrictions, particularly in the context of the PRFCAs filled out by the DDS physicians, the PRTFs from the DDS psychologists, and the reports from Acevedo's primary care physicians including Dr. Garofalo.

Also, contrary to Acevedo's allegations, the ALJ did in fact develop testimony from Acevedo regarding his daily activities. During the hearing, Acevedo testified about the times he had spent inside and outside of his house and the restrictions that his pain placed on his activities. The ALJ then referred to Acevedo's questioning in his opinion, when he determined Acevedo's residual functional capacity. The ALJ also cited Acevedo's own reports of his activities, which included household work and odd jobs, disassembling appliances, cooking and grocery shopping, and caring for his children. The ALJ's explicit questioning and consideration of that testimony demonstrates that

he did indeed address the sixth Avery factor in his decision. See *Reeves*, 263 F. Supp. 2d at 163 (ALJ relied on claimant's testimony in assessing claimant's credibility).

In addressing the Avery factors, the ALJ primarily used the medical record to refute Acevedo's subjective claims. For example, in terms of Acevedo's back problems, the ALJ relied on the November 1999 and February 2002 MRIs that were negative for disc herniation imposing nerve root impingement, disc bulge or protrusion, or spinal stenosis and demonstrated normal vertebral body height and alignment, indicating that Acevedo's back problems did not meet the standard for any Appendix 1 listing. The ALJ also discussed Acevedo's conservative back treatment, the positive results of the injections, and the lack of need for surgery. While the ALJ did note Acevedo's limitation of back motion, he concluded that the medical findings, in addition to Acevedo's response to medication, Ultram in particular, demonstrated that Acevedo's condition was objectively not severe enough to warrant disability.

The ALJ took the same approach to Acevedo's reported long-term headache problems. The ALJ noted that Acevedo had been diagnosed with migraines and cluster headaches with superimposed chronic tension headaches. However, he cited Acevedo's neurological examination taken on June 9, 2000, which showed normal mental status, alertness, and normal response to

questions. The ALJ also cited Acevedo's MRI taken on May 5, 2000, which did not contain any abnormal findings beyond a benign cholesterol granuloma unrelated to the headaches and was determined to be "unremarkable" by Dr. Callahan, Acevedo's examining neurologist at Sturdy Hospital. In addition, the ALJ relied on Acevedo's positive response to various medications that he had been prescribed to deal with his headaches, such as Wellbutrin, Ultram, Zomig, and Atonolol.

The ALJ relied heavily on the findings of the DDS physicians and psychologists, as well as reports from other professionals such as Acevedo's treating physicians. The ALJ used the findings of the non-examining state agency physicians who maintained that Acevedo was capable of: (1) sitting for about 6 hours in an 8 hour work day, (2) standing/walking for about 6 out of 8 hours in an 8 hour work day, and (3) lifting and carrying 10 pounds frequently and 20 pounds occasionally to determine that Acevedo had the ability to perform light work activity. (AR 17.) The ALJ also cited the opinions of Drs. Ammerman and Garofalo, two of Acevedo's treating physicians, both of whom opined that Acevedo could not be declared disabled based on their interactions with him, primary because Acevedo had no supporting objective findings on the medical record, such as an exam or imaging, to help explain his myriad of symptoms.²

² The ALJ also addressed the findings and opinions of Dr. Powers, one of Acevedo's other primary care physicians, who

In assessing Acevedo's credibility, the ALJ plainly relied on the objective medical evidence as well as medical opinions, Acevedo's own testimony regarding his daily activities and his response to medication. The ALJ did not rely on speculation but instead based his ruling on substantial evidence. Consequently, I find that a reasonable mind could reach the same conclusion that the ALJ reached here.

2. Duty to Recontact Treating Professionals

Acevedo also challenges the ALJ's decision on the grounds that he failed to contact both Dr. Powers and Dr. Garofalo to clarify the basis of some of their statements before disregarding them as ambiguous or unsupported. As previously explained, see Note 2 *supra*, the ALJ concluded that Dr. Powers' March 2005 assessment was entitled to diminished probative weight because it directly contradicted his previous assessment taken the year before. The ALJ further determined that a portion of Dr. Garofalo's June 14, 2005 opinion, which stated that Acevedo would

opined on March 15, 2005 that Acevedo was unable to sit for more than 1 hour at a time or during an entire 8 hour work day, could not stand or walk at all, and could not lift or carry more than 5-10 pounds occasionally, could not do repetitive activities with his hands, and had severe restriction of daily activities. The ALJ found that this assessment not only contradicted with Powers' own statement dated March 25, 2004 in which he stated that Acevedo had no physical limitations, but also the assessments of the DDS physicians and Dr. Garofalo, which were taken during the same time period. In this connection, the ALJ concluded that Dr. Powers' March 2005 assessment may have been influenced by patient accommodation and did not control the entire medical record.

require improvement in his psychiatric and social functioning to return to work, was entitled to diminished probative weight because Dr. Garofalo was not a mental health professional and this aspect of his opinion was inconsistent with the record as a whole.

Acevedo looks to 20 C.F.R. §§ 404.1512(e) and 416.912(e), which state that an ALJ must recontact a treating physician or psychologist when evidence received from those professionals is inadequate or ambiguous for the ALJ to determine whether a disability exists. Acevedo also refers to 20 C.F.R. § 404.15278(d)(1) and the importance of the duty to recontact treating physicians because more weight must be afforded to treating physicians versus non-treating physicians.

Here, I find that Acevedo has misinterpreted the requirements of 20 C.F.R. §§ 404.1512(e) and 416.912(e) and that the ALJ utilized the treating physicians' reports in a proper manner according to the regulations. First, there is nothing to indicate that the ALJ has not adhered to the requirements of 20 C.F.R. § 404.15278(d)(1) in granting more weight to treating physicians than non-treating ones. The ALJ relied heavily on a separate portion of Dr. Garofalo's March 2005 opinion in which Garofalo concluded that there was no supporting objective findings to explain Acevedo's multiple physical symptoms. The ALJ also cited Dr. Ammerman's September 1, 2003 opinion in which Ammerman concluded that there was not sufficient information in

Acevedo's medical record to support the claim of disability. The ALJ considered both opinions in his decision to reject Acevedo's subjective claims of pain.

The ALJ also did not find the treating physicians' opinions insufficient, unsupported, or ambiguous, as Acevedo alleges. Where the ALJ did not give controlling weight to the opinions, it was because they were internally inconsistent, were not supported by medically acceptable clinical and laboratory findings or were inconsistent with the other evidence on the record.³ Sections 404.1527(d)(2) and 416.927(d)(2) explain that a treating source's opinion is controlling only when (1) it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and (2) is not inconsistent with the other substantial evidence in the record. Here, the ALJ carefully determined that statements of Drs. Garofalo and Powers were inconsistent with the other substantial evidence in the record, such as the opinions of the DDS physicians and psychologists, Acevedo's primary care physicians, and that Acevedo retained the RFC to perform light

³ The Commissioner also argues that even if the opinions were internally inconsistent, the ALJ is not required to recontact the physicians in question. She points to 20 C.F.R. §§ 404.1527(c)(2) and 416.927(c)(2), which direct that "if any of the evidence in [the] case record, including any medical opinion(s), is inconsistent with other evidence or is internally inconsistent, we will weigh all of the evidence and see whether we can decide whether you are disabled based on the evidence we have." Because the ALJ was able to establish substantial evidence to support his findings, he would not have needed to recontact Garofalo and Powers even if their opinions were internally inconsistent.

work. Accordingly, I find the ALJ properly weighed Acevedo's treating physicians' reports and did not need to recontact them in order to make his decision.

3. Development of the Record

Acevedo contends that the ALJ failed his duty to obtain all pertinent, available medical records by failing to issue a subpoena to obtain Acevedo's psychiatric medical records from Dr. Joshua Golden, Acevedo's treating psychologist. Acevedo alleges that he requested the ALJ subpoena his psychiatric medical records, which was not thereafter done and that this significantly impacted his application for disability benefits because the ALJ concluded that Acevedo's depression was not severe without viewing the missing records.

The record indicates that the ALJ did not subpoena Dr. Golden because Acevedo's counsel failed to heed the ALJ's instructions in order to obtain the subpoena. Plaintiff's counsel first told the ALJ of Dr. Golden's refusal to hand over his records at the administrative hearing, leading the ALJ to instruct counsel to request a subpoena in writing, with reference to the specific information and dates of service being sought. The ALJ then heard back from counsel on July 28, 2005 by letter, which stated that Dr. Golden was still refusing to release Acevedo's medical records and requested that the ALJ issue a subpoena to obtain those records. The ALJ replied the following

day, noting that he had received counsel's request but instructing that counsel resubmit his request: with copies of his written requests for records to Dr. Golden; any written response he had received to such requests; a brief recitation of any other communications between him, Acevedo, and Dr. Golden regarding any requests for records; and a detailed description of the records and dates covered by your request.

Acevedo claims that his counsel then forwarded the specifically requested documents to the ALJ on August 4, 2005, but nothing in the record indicates that the ALJ ever received the documentation.⁴ The next correspondence between the ALJ and counsel verified by the record took place on September 2, 2005, when a voice mail was left for counsel referencing the July 29 letter and informing him that if the records were not received by September 10, the ALJ would consider the record complete. Because he never received the requested information nor any other response from counsel thereafter, the ALJ closed the record.

Counsel similarly failed to inform the Appeals Counsel that he sent a resubmitted subpoena request August 4, 2005, or to attach that request and any corroborative documentation in connection with Acevedo's request for review of the ALJ's decision. In any event, even if counsel did send a resubmitted

⁴ Plaintiff refers to an "Attachment A" but this is nowhere to be found in the record. The Commissioner states that the Attachment was never served, despite numerous telephone calls to Plaintiff's counsel.

request on August 4, he was on notice on September 2, 2005 that the request had not been received yet. Counsel then failed to resend the alleged August 4 request, despite the fact that he had until September 10 to do so. Consequently, I conclude that Acevedo's counsel did not comply with the ALJ's instructions to subpoena Dr. Golden's records even though he had several opportunities to do so and that the ALJ did not err in failing to issue that subpoena.

III. CONCLUSION

For the reasons discussed above, Plaintiff's motion to reverse the Commissioner's decision is denied, and Defendant's motion for order affirming decision of the Commissioner is granted.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE