10-4351

To Be Argued By:
ANN M. NEVINS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-4351

WILLIAM C. ROMA,
Plaintiff-Appellant

-vs-

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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DAVID B. FEIN
United States Attorney
District of Connecticut

ANN M. NEVINS
SANDRA S. GLOVER *(of counsel)*
Assistant United States Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

OTHER AUTHORITIES

RULES

Statement of Jurisdiction

The district court (Warren E. Eginton, J.) had subject matter jurisdiction over this social security case under 42 U.S.C. § 405(g). Judgment entered on September 3, 2010. PA347.[1]. On October 25, 2010, the plaintiff, William Roma ("Roma"), filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). PA348. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] The appellant filed the record in this case which is referred to as the "Plaintiff-Appellant's Appendix." Citations to the appendix will be noted as "PA [page number]."

Statement of Issues Presented for Review

I. When considering whether the plaintiff had a "severe impairment," did the administrative law judge properly discount statements by the plaintiff's treating physician when those statements were not well supported by the record and were inconsistent with the evidence?

II. Did the administrative law judge err by failing to consider SSR 85-15 when that ruling does not apply, on its terms, to cases such as Roma's where the claimant alleges both exertional and nonexertional impairments?

III. Was the administrative law judge's determination of Roma's residual functional capacity based on application of the correct legal standards and based on substantial evidence?

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Preliminary Statement

Through this appeal William Roma seeks social security disability benefits from the Social Security Administration ("SSA"). In particular, Roma seeks allowance of a period of disability from no later than December 31, 2003, through the present, and an award of social security disability insurance benefits ("DIB") for the

closed period from August 19, 2002 through August 18, 2003.[2]

An administrative law judge ("ALJ") denied Roma's claim for benefits, finding that Roma was not disabled. In this appeal, Roma advances three theories in support of his contention that substantial evidence does not support the ALJ's decision: (1) the ALJ improperly disregarded the opinions of treating physicians; (2) the ALJ failed to follow Social Security Ruling ("SSR") 85-15 when he evaluated stress as a factor; and (3) the ALJ improperly used the medical-vocational guidelines and vocational evidence to determine that there are jobs that Roma can perform in the national economy.

For the reasons set forth below, these arguments lack merit. The ALJ properly concluded, based on substantial evidence, that Roma had not met his burden of demonstrating that he was disabled on or before December 31, 2003. The district court's judgment should be affirmed.

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[2] Retrospective awards of DIB are limited to an amount equal to twelve months of payments. Roma first applied for DIB on or about September 2, 2003, however, the application was assigned a protective filing date of August 18, 2003. PA68. Accordingly, any post-entitlement determinations involving the application filing date would utilize the protective filing date of August 18, 2003.

Statement of the Case

William Roma filed an application for a period of disability and Disability Insurance Benefits on September 2, 2003, alleging that he had been disabled since February 5, 1998, due to physical injuries resulting from a car accident which occurred in 1995, as well as chronic depression, anxiety, severe headaches, fatigue, fibromyalgia with neuritis, and DeQuervain's Syndrome. PA65-67, 77. His application was denied initially and on reconsideration. PA37-40, 42-44.

Roma requested a hearing before an ALJ which was held on June 17 , 2005. PA51-60, 312-43. Roma, who was represented by counsel, appeared and testified at the hearing. PA312-43. Two Connecticut Department of Disability Services ("DDS") professionals – an adjudicator and a disability examiner – provided vocational evidence in the form of reports prepared after reviewing medical evidence of record. PA110, 127. Upon reviewing all of the evidence of record, the ALJ issued a decision on October 26, 2005, in which he found that Roma was not entitled to a period of disability or DIB because he retained the capacity to perform a significant range of light work through December 31, 2003, the date his insured status for disability benefits expired. PA16-31.

Roma filed a request for review of the ALJ's decision, which was denied by the Appeals Council on May 15, 2007. PA5-7. On July 11, 2007, Roma filed a complaint for judicial review with the district court as provided in

Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). PA344.

On March 12, 2010, Magistrate Judge Holly B. Fitzsimmons issued a Recommended Ruling granting the government's motion to affirm the ALJ's decision and denying Roma's motion to reverse and remand the ALJ's decision. PA346, 349-84. Roma filed a timely objection to the Recommended Ruling on March 25, 2010. PA346, 385-401.[3]

On August 24, 2010, the district court (Warren W. Eginton, J.) approved and adopted the Recommended Ruling and affirmed the Commissioner's decision. PA402-13. Judgment entered September 3, 2010. PA347. Roma filed a timely notice of appeal on October 25, 2010. PA348.

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[3] As explained more completely below, Roma did not raise several of his arguments before the district court and therefore, they are waived. *See Poupore v. Astrue*, 566 F.3d 303, 306 (2d Cir. 2009) (per curiam); PA385-401.

Statement of Facts and Proceedings Relevant to this Appeal

A. The medical evidence

1. The motor vehicle accident

Born in 1962, Roma was 41 years old on his date last insured, December 31, 2003. PA69. On July 3, 1995, Roma was involved in a car accident which left him with left anterior chest wall injury and pain. PA77, 149. Roma's cervical spine x-ray, lower lumbar spine, abdomen and upper pelvis x-ray, right ankle x-ray, and computed tomography of the brain were all normal after the accident. PA150-53.

In October 1995, Roma returned to his work as a real estate appraiser, at first for four hours per day and then for six hours per day. PA77, 165. In February 1998, Roma ceased working because he "could not perform his job duties." PA77.

2. Post-accident medical evidence

a. Treating physician reports

(1) Dr. Mathias, Opthamologist

On April 1, 1997, Dr. Mathias, an ophthalmologist, provided a report of his treatment of Roma, which was

summarized by Dr. Schuster.[4] PA174. Dr. Mathias diagnosed traumatic intermittent extropia which caused Roma's eyes to have difficulty keeping in focus, resulting in blurred vision, headaches, tiredness, reading difficulties, and double vision. PA174. Dr. Mathias eventually prescribed prism lenses for Roma, which allowed him to see well enough to drive. PA168, 169. On June 2, 2000, Roma underwent a chemodenervation for his ocular misalignment. PA191. Dr. Mathias was hoping for a good result and only a small residual prism in his glasses. PA191.

(2) Dr. Prywes, M.D.

On January 8, 1997, Mitchell Prywes, M.D. saw Roma for a physiatric evaluation. PA172, 275 (Dr. Prywes's report). At that time, Roma was complaining of severe pain within the intrascapular and rib cage region as well as the neck, shoulder girdles, lower back and legs. PA172. In addition, Roma reported difficulties in concentration and memory with occasional blurry vision. PA172, 275 (Dr. Prywes's report). Importantly, Dr. Prywes noted a right-

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[4] Roma was apparently referred by a law firm to Richard Schuster, Ph.D., of Comprehensive Rehabilitation Consultants, for the purpose of creating an assessment of Roma's current status, the effect of his condition upon his vocational potential, his future rehabilitation needs, and the effect of his condition upon his quality of life. PA162. Dr. Schuster prepared a 59-page report addressed to a law firm summarizing the medical evidence before him. PA162-220. Unless otherwise indicated, the descriptions of the treating physician evidence come from Dr. Schuster's summary.

sided convergence dysfunction which produced right frontal headaches. PA173.

On February 19, 1997, Dr. Prywes's records indicated that cortisone injections had proved helpful to Roma. PA173.

On January 15, 1998, Dr. Prywes wrote a letter concerning his treatment and evaluation of Roma which stated that although there had been therapeutic efforts that had been helpful and allowed Roma to maintain employment, Roma still suffered from chronic pain. PA179. Dr. Prywes anticipated that Roma would have a permanent disability and that many of his conditions would persist even after completion of treatment. PA179.

On August 25, 1998, Dr. Prywes reported that Roma had completed surgery for his left hand problems on August 17, 1998, and that Roma reported a gradual improvement of the thumb and hand function with better dexterity. PA185.

On January 5, 2000, Dr. Prywes noted that Roma had a passing score on his driver's assessment performed at Gaylord Hospital. PA189.

On August 1, 2000, Dr. Prywes indicated that he was uncertain whether Roma would be capable of returning to any gainful employment at that time, and any effort to do so should be coordinated through his physicians. PA191.

On February 14, 2002, Dr. Prywes completed a physical capacity evaluation. PA194. Roma was able to lift 10 to 20 pounds, but 20 pounds only occasionally. In an 8-hour work day he could sit and stand no more than 2 hours, with 4 hours of walking. Dr. Prywes reported significant impairments in climbing, balancing and reaching with moderate impairments in stooping, kneeling, handling, fingering and feeling, as well as severe restrictions in all environmental work settings, except heat. PA194. Dr. Prywes concluded that, "[g]iven the severity of the physical limitations, [Roma] would be for all practical purposes medically precluded from the competitive labor market." PA194-95.

Dr. Prywes's treatment records for Roma continue after the date of Dr. Schuster's 2002 summary report. From July 2003 to February 2004, on at least twelve separate occasions, Dr. Prywes's office administered acupuncture treatments, which were well-tolerated and resulted in an increase in active pain-free range of motion. PA258-73. In several of these treatments, the acupuncture incorporated electrical stimulation, which increased pain-free range of motion. PA263-65, 268-69.

(3) Dr. Ligorski, M.D.

Mark Ligorski, M.D., treated Roma from January 1998 through August 2003. PA222 (information directly from Dr. Ligorski).

On January 26, 1998, Dr. Ligorski saw Roma, who complained of problems with depression, anxiety,

disturbed sleep and appetite, poor concentration and poor attention. PA179. Roma reported that he was a real estate appraiser who was having a hard time at work. PA179.

On February 5, 1998, Dr. Ligorski reported that Roma was in treatment for major depression. PA180. Dr. Ligorski indicated that Roma should take a rest from work and opined that he could not presently work at that time. PA180. Dr. Ligorski further stated that it would be at least two to three months before Roma could work again. PA181.

By April 1998, according to Dr. Schuster's report, Roma had had various medication adjustments, remained in occupational therapy for his wrist, and in cognitive rehabilitation therapy. PA181. Roma had a nurse case manager who was focusing on reintegrating him into the workplace. PA181.

Approximately twenty-two months later, on February 2, 2000, Dr. Ligorski reported that it appeared Roma would no longer be able to return to his past work and would need to look elsewhere for something to do. PA190.

Ten months later, on December 22, 2000, Dr. Ligorski indicated that unless there was a significant improvement in Roma's condition, he did not envision Roma returning to work. PA193. According to Dr. Schuster's summary, Dr. Ligorski stated that Roma could not "apply himself to any paid job for the requisite amount of time and give it the needed amount of attention." PA193.

Approximately 32 months later, on September 15, 2003, Dr. Ligorski completed a DDS form for Roma. PA222. Among other observations, Dr. Ligorski noted that Roma's diagnosis was major depression and traumatic brain injury, and that his emotional condition had stabilized, albeit at a low level. PA222-24. Dr. Ligorski stated that Roma's task performance was "severely impaired" because he could not stay with a task due to pain and low concentration. PA224. Dr. Ligorski further stated that Roma's stress tolerance was very limited. PA224.

Dr. Ligorski also stated in the DDS form that Roma's hygiene is good, concentration is good within counseling sessions of 20 minutes, Roma's speech is "clear, coherent [and] nonpressured; Roma has no psychotic symptoms; Roma has good judgment and insight; and the treatment regimen with Roma was to see him once every two months. PA222-24.

b. Consultative medical examinations

On October 29, 1998 and November 2, 1998, at the request of Dr. Prywes, Patricia Mitchell, Psy.D., a clinical neuropsychologist, performed a neuro-psychological evaluation of Roma. PA158-61. At that time, Roma reported severe stress and depression, ongoing neck, shoulder, hand and back pain, difficulty with concentration and memory, and a medical history significant for arthritis and fibromyalgia. PA159-60.

Ms. Mitchell determined that Roma had "high average verbal-comprehension abilities" and "more average range

perceptual-organizational abilities." PA159. Further, Ms. Mitchell found that Roma's "[v]erbal expression appeared generally within normal limits," while his academically and environmentally related fund of general information, and word knowledge were in the high average range compared to age peers. PA159. Roma's arithmetic achievement, however, was in the borderline deficient range. PA159. For a task requiring sequencing of visual material to relate a logical story Roma performed in the average range compared to age peers, and his non-verbal abstract reasoning was in the high average range compared to age peers. PA159. Ms. Mitchell found that Roma was able to learn new auditory information although his performance in testing indicated mild to moderate impairment in this area. PA160. Roma's "ability to plan, organize, and execute goal directed behavior was below expectations." PA160. He tended to be easily pulled off task, and cognitive inflexibility appeared to interfere with his performance on a moderately complex problem-solving task. PA160.

Ms. Mitchell noted that Roma reported a large number of clinical symptoms and appeared to be in a high level of emotional distress in 1998. PA160. Ms. Mitchell recommended that Roma consider a referral to the Bureau of Rehabilitation Services "to assist with return to work activities at such time as he is physically and psychologically cleared to do so." PA161.

On May 5, 1998, as reported by Dr. Schuster, Roma was seen by David Kloth, M.D. at Connecticut Pain Care. PA183. Dr. Kloth identified several issues with Roma,

including "fibromyalgia/chronic myofascial pain syndrome; degenerative disk disease both cervical and lumbar spine with small herniations and possible cervical and lumbar radiculopathy; depression/anxiety/post traumatic stress disorder; bilateral carpal tunnel syndrome; left ulnar neuropathy; left shoulder impingement syndrome; possible cervical and lumbar facet syndrome; TMJ disorder." PA184. Dr. Kloth's report indicated that Roma had not yet reached maximum medical improvement, and he wondered if there was symptom amplification.[5] PA184.

Over the next months, Dr. Kloth gave Roma a series of cervical facet injections and radio frequency denervation treatments. PA185-89. On October 5, 1999, Dr. Kloth "believed Mr. Roma he [sic] was capable of sedentary work with periods of time at the computer for approximately 45 minutes to an hour separated by a 15 to 20 [minute] break (which could include other activities such as walking around, talking, etc.) . . . ." PA189.

According to Dr. Schuster's summary, Roma saw Mark Rubenstein, M.D., for a psychiatric evaluation on April 24, 1998. PA182. Dr. Rubenstein noted a report by a social worker which stated that on Roma's best day he was functioning at 75% of his capacity prior to his motor vehicle accident, and on his worst day at only 25% of his pre-accident capacity. PA182. Dr. Rubenstein's report, as

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[5] Dr. Kloth's records regarding examination for trigger points relating to a fibromyalgia diagnosis, should there be any, are not in the administrative record before SSA.

reported through Dr. Schuster's summary, noted that it did not appear realistic that Roma could return to work as a real estate appraiser.[6] PA183.

According to Dr. Schuster's summary, on August 25, 2000, Dr. Rubenstein saw Roma for an additional evaluation. PA191. He did not think that Roma had suffered a traumatic brain injury; rather, he described a chronic pain situation throughout his entire body and noted that Roma was exceedingly pain focused. PA191-92. Dr. Rubenstein noted that Roma, "presented with a permanent partial psychiatric disability that to a significant extent was contingent upon his physical sensations of pain." PA192.

According to Dr. Schuster's report, on November 7, 2000, Eric Olson, M.D., provided an independent medical evaluation. PA192. Dr. Olson diagnosed "residual myofascial pain syndrome involving cervical spine and scapulothoracic articulations; mechanical low back pain; extremely mild symptoms of left C7 radiculopathy, possible faint radiculopathy in the left C7; closed head injury with residual processing deficits and cognitive deficits; depression and anxiety." PA192. Although orthopedically Roma could do light duty work for short periods of time with frequent breaks, longer periods of sitting would exacerbate his discomfort and problems. PA192. Moreover, Roma's "underlying neuropsychological issues as well as his psychological problems made him unable to work effectively." PA192.

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[6] Neither Dr. Rubenstein's report nor the social worker's report are in the administrative record before SSA.

On January 9, 2001, according to Dr. Schuster's report, Dr. Lunt reviewed Roma's treatment for his hands and wrists. PA193-94. Although it is unclear whether Dr. Lunt examined Roma, Dr. Lunt stated that it was quite likely that Roma would need surgery for his bilateral carpal tunnel syndrome, and he believed Roma could return to work, but not as an appraiser. PA193-94.

c. DDS opinions

The record includes several opinions prepared by or for DDS. Most of these opinions are based on the author's review of Roma's medical records and other documents in the record. The opinion of Dr. Chirunomula, however, was based on his examination of Roma in May 2004. Those opinions are summarized below:

On October 21, 2003, Edward Moreau, a DDS Adjudicator, prepared a Vocational Analysis Summary Form. PA110. Mr. Moreau opined that Roma's residual function capacity "reveals he can perform work at the light level of exertion. [Mental residual function capacity] indicates he is able to complete simple tasks, [and] maintain a regular schedule. He might have difficulty interacting with the public. He is unable to return to past relevant work. However, he is a younger worker with a college education who can be expected to make an adjustment to other work . . . ." PA110. Mr. Moreau identified three possible light exertional level jobs: (1) charge account clerk; (2) order clerk; and (3) addresser. PA110. Because he found jobs someone with Roma's residual function capacity could perform other than as an

appraiser, Mr. Moreau determined that Roma was not disabled. PA110.

Kevin Murphy, Ph.D., prepared a Psychiatric Review Technique Form for DDS dated October 1, 2003. PA225-38. Dr. Murphy concluded that a residual function capacity assessment was necessary, and that coexisting nonmental impairments were present which required referral to another medical specialty. PA225. He also determined that medically determinable impairments were present – traumatic brain injury and major depressive disorder – which did not precisely satisfy the diagnostic criteria for an organic mental disorder or affective disorders. PA226-28. Dr. Murphy also determined that Roma had moderate restrictions of activities of daily living, difficulties in maintaining social functioning and difficulties in maintaining concentration, persistence or pace. PA235.

In performing a Mental Residual Functional Capacity Assessment, also on October 1, 2003, Dr. Murphy determined that Roma's residual functional capacity included, the ability "to understand information of average complexity but [Roma] would need cueing for delayed recall." PA241, 239-43. Dr. Murphy also determined that Roma "retains the ability to carryout [sic] 1-2 step instructions," is "socially isolative and may not be suited to public contact work," although he would "be able to interact appropriately with other persons in a work setting." PA241. Finally, Dr. Murphy noted that Roma's treating physician (Dr. Ligorski) described his stress tolerance as very limited, and determined that Roma

"continues to drive independently and would be alert to the routine hazards of a workplace." PA241.

Katharine Tracy, M.D., completed a Residual Functional Capacity Assessment for DDS dated October 21, 2003. PA244-52. Dr. Tracy determined that Roma's exertional limitations included: occasionally lifting and/or carrying 20 pounds, frequently lifting and/or carrying 10 pounds, standing and/or walking for 6 hours in an 8-hour workday, sitting for 6 hours in an 8-hour workday, and unlimited pushing and/or pulling. PA245. Dr. Tracy also stated that Roma could never climb ramps, stairs, ladders, ropes or scaffolds, and could occasionally balance, stoop, kneel, crouch and crawl. PA246. Roma's overhead reaching and handling (gross manipulation) would also be limited. PA247. As for visual limitations, Dr. Tracy stated that Roma's depth perception would be limited. PA247. Dr. Tracy's only environmental limitation for Roma was to avoid concentrated exposure to hazards, such as machinery or heights. PA248.

Dr. Tracy noted that there were treating physician conclusions about Roma's limitations or restrictions which were significantly different from her conclusions. PA249-50. She noted that Roma's "psychiatric issues play major role as well as mult[iple] med[ication]s," and that Roma "may be disabled based on *combination* of both." PA249 (emphasis in original).

On March 24, 2004, Tim Schumacher, Ph.D., prepared a DDS Residual Functional Capacity Assessment and a Psychiatric Review Technique Form. PA281-84, 285-99.

Dr. Schumacher determined that Roma was moderately limited in the following areas: the ability to understand, remember, and carry out detailed instructions, the ability to maintain attention and concentration for extended periods, the ability to complete a normal workday and workweek without interruptions, and the ability to interact appropriately with the general public. PA281-82.

On May 21, 2004, Sekhar Chirunomula, M.D., prepared a report for DDS after examining Roma. PA300-301. Dr. Chirunomula noted that Roma reported to him that "[h]e drives himself locally to his doctor's appointments, to the drug store and the [] supermarket." PA300. Physical examination revealed "well-preserved muscle tone, grip strength, balance, dexterity, and gait." PA301. Dr. Chirunomula stated "I am unable to extract any significant cognitive dysfunction in this gentleman." PA301.

On June 1, 2004, Arthur L. Waldman, M.D. completed a Residual Functional Capacity Assessment for DDS. PA302-11. Dr. Waldman, like Dr. Tracy, determined that Roma's exertional limitations included: occasionally lifting and/or carrying 20 pounds, frequently lifting and/or carrying 10 pounds, standing and/or walking for 6 hours in an 8-hour workday, sitting for 6 hours in an 8-hour workday, and unlimited pushing and/or pulling. PA303. Dr. Waldman also stated that Roma could occasionally climb, balance, stoop, kneel, crouch and crawl. PA304. Roma's overhead reaching would be limited. PA305. Dr. Waldman's only environmental limitation for Roma was

to avoid concentrated exposure to hazards, such as machinery or heights. PA306.

Dr. Waldman's notes state "Chronic Pain Syndrome, few objective limitations – Light [residual functional capacity] [illegible] appropriate *Large psych component*" [sic]. PA307. Further, Dr. Waldman , like Dr. Tracy, noted that there were treating physician conclusions about Roma's limitations or restrictions which were significantly different from his conclusions. PA307-308. His notes explaining this discrepancy state as follows: "Physical findings and [illegible] report do not support total disability, rather light [residual function capacity.] A psych. component is present, however" [sic]. PA308.

d. Roma's testimony

A hearing was held before the ALJ on June 17, 2005, at which Roma appeared with an attorney and testified under oath. PA312-43. Roma testified that he had earned a B.S. in business administration from Eastern Connecticut State University, and until approximately February 1998 had worked as a real estate appraiser. PA317-18. Roma testified that as a result of a car accident in 1995, he suffered from body pain, brain damage, vision problems, stomach problems, headaches, dizziness, nausea and stiffness, problems with his hands, his left shoulder, his forearms, fatigue and confusion. PA318-19.

Roma testified that he could drive for thirty minutes, and that he daily cleaned up breakfast dishes, straightened up the house, watched his two children after they returned

from school, did some laundry, did fill-in grocery shopping, and read email and looked at the internet on a home computer for short intervals. PA330-40.

B. The ALJ's decision

ALJ Ronald J. Thomas found that Roma was involved in a motor vehicle accident which resulted in multiple trauma with multiple contusions, muscle strains and hematoma in July 1995. PA22-27; *see also* PA164-65. The ALJ further determined that from October 2, 1995, the date Roma returned to work after his July 1995 auto accident, Roma could perform physical activity at essentially the light exertional level. PA22-28, 31 at Finding 6. This functional capacity, however, was reduced by additional non-exertional restrictions which precluded the performance of work activity involving more than simple, routine repetitive job functions or which required high-stress interactions with the general public, as well as any work activity which required more than occasional bending, stooping, twisting, squatting, kneeling, crawling, climbing and balancing, or more than occasional overhead lifting. PA27-29, 30 at Finding 6.

Since Roma's past relevant work as a licensed real estate appraiser required the performance of work-related activities precluded by the established functional capacity, the ALJ found that Roma could not return to his former work. PA27-29, 30 at Finding 7.

Relying upon Roma's work history reports, PA77-78, 87-88, 138, and his hearing testimony, PA317-19, 322-23,

327-29, as well as the assessments by a vocational adjudicator and a disability examiner from the DDS, PA110-11, 127, the ALJ determined that Roma's non-exertional limitations did not significantly limit the range of unskilled light work permitted by his other limitations. PA27-29, 30-31 at Findings 8-11.

The ALJ also determined that Roma's subjective allegations regarding his symptoms and functional limitations were not fully credible. PA24-28, 30 at Finding 5.

Applying the Medical-Vocational Guidelines ("Grid rules"), *see* 20 C.F.R. Part 404, Subpart P, Appendix 1, as a framework for decision-making, the ALJ found that Roma was not disabled within the meaning of the Act on or before December 31, 2003. PA29, 31 at Finding 12. Accordingly, the ALJ concluded that Roma was not entitled to DIB under Title II of the Act. PA29, 31 at Finding 13.

The Appeals Council denied Roma's request for review on May 15, 2007, PA5-7, thereby rendering the hearing decision dated October 26, 2005, the final decision of the Commissioner, subject to judicial review.

C. The district court's decision

Magistrate Judge Holly B. Fitzsimmons issued a Recommended Ruling, dated March 12, 2010, in which she determined, *inter alia*, that the ALJ could rely solely on the grid Rules to meet the Commissioner's burden at step five of his analysis because there was no evidence of any non-exertional limitation that so narrowed Roma's possible range of work as to deprive him of meaningful employment opportunity. PA382. Further, the magistrate judge found that the ALJ's decision to discount Dr. Prywes's March 2004 letter, as inconsistent with other substantial evidence in record, made plaintiff's case an "ordinary" one, in which reliance on grids was appropriate. PA382-83.

By order dated August 24, 2010, the district court (Warren W. Eginton, J.) accepted the recommended ruling of the magistrate judge. PA347, 402-13. In doing so, the district judge rejected Roma's claim that the magistrate judge had made material misstatements of fact in her decision, finding instead that each of the errors Roma alleged had minimal relevance to the magistrate judge's final conclusion. PA409. The district judge also overruled Roma's objection that the ALJ and the magistrate judge failed to give controlling weight to his treating physician's statements of disability, finding that the ALJ's ruling adhered to the treating physician rule in light of substantial evidence in the record. PA409-11. Finally, the district court rejected Roma's argument that the ALJ was required to obtain testimony of a vocational expert to determine whether jobs exist in the economy which the claimant can

obtain and perform. PA411-12. The district court determined that the ALJ appropriately relied on the opinion of a DDS "adjudicator" and a "disability examiner," based on a provision of SSR 85-15, and accepted them as "vocational experts." PA411-12.

Judgment entered in favor of the government on September 3, 2010. PA347, 414.

Summary of Argument

The ALJ's determination, that Roma had failed to meet his burden to establish that he was disabled under the Act, and that the Commissioner had met the government's burden to show that Roma was capable of performing other work which existed in substantial numbers in the national economy, was supported by substantial evidence in the record. The district court properly affirmed, determining that the record before the ALJ contained substantial evidence supporting the ALJ's application of the five-step analysis set forth in the SSA regulations. *See* 20 C.F.R. § 416.920(a)(4).

This Court should decline any invitation to substitute its judgment for that of the ALJ, as substantial evidence supports the ALJ's decision.

Roma's first argument, that the ALJ improperly rejected opinions of two of Roma's treating physicians, is without merit because the ALJ applied the correct legal standard to his evaluation of the opinions and substantial evidence before the ALJ supports his determination. In particular, the ALJ compared record evidence regarding

Roma's activities of daily living, physical capabilities, ability to function independently, and his physical and psychiatric treatment regimens to the opinions of Drs. Prywes and Lugorski that Roma was completely and permanently disabled. Using the proper legal standard, the ALJ determined that Dr. Prywes's opinion on disability was not entitled to controlling weight and that Dr. Lugosrki's opinion was entitled to extra weight.

Roma's second argument, that the ALJ erred by not applying SSR 85-15 in evaluating Roma's limitations due to stress, was waived because it was not argued to the district court. Notwithstanding waiver, however, the argument lacks merit because SSR 85-15 only applies when a claimant has only non-exertional impairments. Here, Roma admits he has both exertional limitations and non-exertional limitations. Thus, SSR 85-15 by its terms does not apply to this case.

Roma's third argument, that the ALJ erred by incorrectly applying the Medical-Vocational Guidelines to find that the Commissioner met his burden at step five has three parts, none of which has merit. First, the ALJ did not need to consider testimony from a vocational expert because he properly concluded that Roma had no nonexertional impairments that significantly diminished his ability to work over and above the incapacity caused from the exertional limitations. Second, Roma waived any argument that he did not get an opportunity to cross-examine the Commissioner's vocational witnesses because he had notice of the Commissioner's vocational evidence, but never subpoenaed those witnesses or objected to the

absence of those witnesses at his hearing. Finally, the ALJ used the correct residual function capacity when evaluating the vocational evidence, and he was not required to apply SSR 00-4p because that ruling is only implicated in situations when a vocational source's job category determinations are in conflict with the Dictionary of Occupational Titles.

The judgment of the district court affirming the ALJ's decision should therefore be affirmed.

Argument

I. The ALJ applied the correct legal standards and properly used the SSA's decisional framework to determine that Roma was not disabled.

A. Standard of review and governing law

1. Standard of review

This Court reviews the Commissioner's denial of disability benefits using the same standard as that applied by the district court: it is limited to determining whether the denial was premised on an error of law or is otherwise not supported by substantial evidence. *See* 42 U.S.C. § 405(g); *Veino v. Barnhart*, 312 F.3d 578, 586 (2d Cir. 2002); *Yancey v. Apfel*, 145 F.3d 106, 111 (2d Cir. 1998). "'Where there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability

determination made according to the correct legal principles.'" *Schaal v. Apfel*, 134 F.3d 496, 504 (2d Cir. 1987) (quoting *Johnson v. Bowen*, 817 F.2d 983, 986 (2d Cir. 1987)). Where, however, "the Commissioner's decision rests on adequate findings supported by evidence having rational probative force, [this Court] will not substitute [its] judgment for that of the Commissioner." *Veino*, 312 F.3d at 586; *see also Yancey*, 145 F.3d at 111.

To enable a reviewing court to decide whether the determination is supported by substantial evidence, the ALJ must set forth the crucial factors in any determination with specificity. *Ferraris v. Heckler*, 728 F.2d 582, 587 (2d Cir. 1984). Thus, although the ALJ is free to accept or reject the testimony of any witness, a finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible review of the record. *Williams ex rel. Williams v. Bowen*, 859 F.2d 255, 260-61 (2d Cir. 1988). Moreover, when a finding is potentially dispositive on the issue of disability, there must be enough discussion to enable a reviewing court to determine whether substantial evidence exists to support that finding. *See generally Ferraris*, 728 F.2d at 587.

The Social Security Act provides that "[t]he findings of the Commissioner . . . as to any fact, if supported by substantial evidence, shall be conclusive . . . ." 42 U.S.C. § 405(g). *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Veino*, 312 F.3d at 586. A court does not "determine *de novo* whether [a claimant] is disabled . . . ; [instead, the court] ascertain[s] whether the decision was supported by substantial evidence." *Halloran v. Barnhart*,

362 F.3d 28, 31 (2d Cir. 2004) (per curiam) (internal citations and quotation marks omitted). Where the Commissioner's determination is supported by substantial evidence, the decision must be upheld. *See Alston v. Sullivan*, 904 F.2d 122, 126 (2d Cir. 1990).

The term "substantial" does not require that the evidence be overwhelming, but it must be "'more than a mere scintilla.'" *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence need not compel the Commissioner's decision; rather substantial evidence need only be evidence that "'a reasonable mind might accept as adequate to support [the] conclusion.'" *Id.* (quoting *Consol. Edison*, 305 U.S. at 229); *Veino*, 312 F.3d at 586.

2. Governing law

The Social Security Act creates an entitlement program for qualifying persons who are "disabled" within the meaning of the Act. *See* 42 U.S.C. § 423. "To show 'disabled' status a claimant must establish 'inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . .which has lasted or can be expected to last for a continuous period of not less than 12 months.'" *Shaw v. Chater*, 221 F.3d 126, 131 (2d Cir. 2000) (quoting 42 U.S.C. § 423(d)(1)(A)). "The impairment must be of 'such severity that [the claimant] 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.'" *Id.* at 131-32 (quoting 42 U.S.C. § 423(d)(2)(A)). *See also Draegert v. Barnhart,* 311 F.3d 468, 472 (2d Cir. 2002) (same).

In light of the foregoing standards, the Commissioner has issued regulations prescribing a five-step analysis for the consideration of disability claims. *See* 20 C.F.R. § 404.1520 (reproduced in Statutory Addendum to this brief). "In essence, if the Commissioner determines (1) that the claimant is not working, (2) that he has a 'severe impairment,' (3) that the impairment is not one that conclusively requires a determination of disability, and (4) that the claimant is not capable of continuing in his prior type of work, the Commissioner must find him disabled if (5) there is not another type of work the claimant can do." *Draegert*, 311 F.3d at 472; *see also Shaw*, 221 F.3d at 132 (outlining 5-step analysis); *Curry v. Apfel*, 209 F.3d 117, 122 (2d Cir. 2000) (same). "The Commissioner bears the burden of proof on th[e] last step, while the claimant has the burden on the first four steps." *Shaw*, 221 F.3d at 132; *see Butts v. Barnhart*, 388 F.3d 377, 381 (2d Cir. 2004); *Curry*, 209 F.3d at 122.[7]

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[7] This Court recently agreed with the Commissioner that new SSA regulations abrogate the *Curry v. Apfel* standard of review and clarify that there is only a limited burden shift to the Commissioner at step five. *Poupore v. Astrue*, 566 F.3d 303, 306 (2d Cir. 2009) (per curiam). Under the applicable new regulation, the Commissioner need only show that there is work in the national economy that the claimant can do; he need not provide additional evidence of the claimant's residual functional capacity. 20 C.F.R. § 404.1560(c)(2). However, as (continued...)

In considering opinions by a claimant's treating physician on the issue of disability, SSA will afford controlling weight if the opinion is supported by medical tests and clinical evidence found to be consistent with other substantial evidence in the record. *Schisler v. Sullivan*, 3 F.3d 563, 567 (2d Cir. 1993); *see also Shaw*, 221 F.3d at 134; *see* 20 C.F.R. § 404.1527(d). "[S]ome kinds of findings," however, "including the ultimate finding of whether a claimant is disabled and cannot work – are reserved to the Commissioner . . . ." *Snell v. Apfel*, 177 F.3d 128, 133 (2d Cir. 1999) (internal citations and quotations omitted); *see* 20 C.F.R. § 404.1527(e). Accordingly, "[a] treating physician's statement that the claimant is disabled cannot itself be determinative." *Snell*, 177 F.3d at 133.

The factors an ALJ should consider when deciding how much weight a treating physician's opinion should be given are articulated in 20 C.F.R. § 404.1527(d). The regulation provides that regardless of its source, the ALJ will evaluate every medical opinion received. Unless a treating source's opinion is given controlling weight under

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[7] (...continued)
these regulations abrogate *Curry v. Apfel* in cases where the onset of disability was after the regulations were promulgated on August 26, 2003, they are inapplicable to this case because the alleged onset of disability is February 1998.

paragraph 20 C.F.R. § 404.1527(d)(2), the ALJ considers all of the following factors in deciding the weight to give to any medical opinion: (1) examining relationship; (2) treatment relationship including (i) length of the treatment relationship and the frequency of examination; and, (ii) nature and extent of the treatment relationship; (3) supportability; (4) consistency; (5) specialization; and (6) any factors the claimant or bring to the attention of the ALJ, or of which the ALJ is aware, which tend to support or contradict the opinion.

After considering the factors for determining how much weight the treating physician's opinion should receive in social security disability proceedings, an ALJ "must 'comprehensively set forth [his] reasons for the weight assigned to a treating physician's opinion.'" *Burgess v. Astrue*, 537 F.3d 117, 129 (2d Cir. 2008) (quoting *Halloran v. Barnhart*, 362 F.3d 28, 33 (2d Cir. 2004)). "Failure to provide . . . good reasons for not crediting the opinion of a treating physician is a ground for remand." *Id.*; 20 C.F.R. § 404.1527(d)(2).

To the extent that a claimant alleges that his functional capacity was limited to less than light work, the ALJ is not bound by a claimant's subjective complaints and is entitled to make an independent judgment regarding the degree of impairment caused by the claimant's condition. *Aponte v. Secretary of Health and Human Services*, 728 F.2d 588, 591-92 (2d Cir. 1984); *Parker v. Harris*, 626 F.2d 225, 231 (2d Cir. 1980).

At step 3 in the regulatory process, in considering whether a claimant has a "severe impairment," an ALJ may consult the Listings, which contain diagnostic criteria for impairments which are of *per se* disabling severity. *See* 20 C.F.R. § 416.925(a) ("The Listing of Impairments . . . describes . . . impairments that we consider to be severe enough to prevent an individual from doing any gainful activity . . . ."). The step 3 inquiry must be decided on the basis of objective medical evidence. *See* 20 C.F.R. §§ 416.908, 416.925(d), 416.926(c).

At step 4, a determination of whether the claimant can perform past relevant work and, if not, a determination of the claimant's residual functional capacity for work is the prime responsibility of the trier of fact. 20 C.F.R. § 404.1527(e).[8]

To meet the government's burden at step 5 of the decisional framework, the Commissioner, in promulgating rules, has taken administrative notice of the substantial numbers of unskilled jobs existing in the national economy

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[8] A claimant's "residual functional capacity" ("RFC") is an administrative assessment of what work-related activities a claimant is able to perform despite his or her impairments. Although residual functional capacity is a medical question, its purpose is to describe the claimant's residual abilities, or what the claimant can do, and not the maladies the claimant suffers. It measures the claimant's ability to perform the physical acts required in a competitive work environment on a daily basis. *See* 81 C.J.S. Social Security and Public Welfare § 113, Individual capabilities – Residual functional capacity.

at each exertional level and established Medical-Vocational Guidelines (referred to as the "grid" or the "Rules"). 20 C.F.R. Part 404, Subpart P, Appendix 2, § 200.00(b). The Medical-Vocational Guidelines place claimants with severe exertional impairments who can no longer perform past work into grid categories according to their residual functional capacity, age, education and work experience. The grid then dictates a conclusion of disabled or not disabled. *See* 20 C.F.R. § 404.1520(f). Under the regulations, a proper application of the grid makes vocational testing – and testimony by a vocational expert – unnecessary.

The Rules are applicable in those cases where a claimant is unable to perform past relevant work due to his impairments, or has no past relevant work experience, but remains capable of performing other work. The Rules take into account the specific vocational factors such as age, education and work experience that Congress has identified as relevant in determining whether or not a claimant is capable of performing substantial gainful activity. *See* 20 C.F.R. Part 404, Subpart P, Appendix 2, § 200.00(a)-(c). When the findings of fact made with respect to a claimant's vocational factors and residual functional capacity coincide with the criteria of a given Rule, the Rule directs a conclusion of "disabled" or "not disabled." The grid Rules have been consistently recognized by the courts as an appropriate method of satisfying the Commissioner's burden at step 5 of the sequential evaluation process. *See Heckler v. Campbell*, 461 U.S. 458, 467 (1983); *Pratts v. Chater*, 94 F.3d, 34,

38-39 (2d Cir. 1996); *Bapp v. Bowen*, 802 F.2d 601 (2d Cir. 1986).

In some cases, however, the grid Rules may not be controlling. Specifically, when a claimant suffers from both "exertional" impairments (*i.e.*, limitations of physical strength), and "nonexertional" impairments, the grid Rules are a consideration, but may not dictate an outcome. In this context, section 200.00(e)(2) provides:

> [W]here an individual has an impairment or combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations. Also, in these combinations of nonexertional and exertional limitations which cannot be wholly determined under the rules in this Appendix 2, full consideration must be given to all of the relevant facts in the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations, which will provide insight into the adjudicative weight to be accorded each factor.

20 C.F.R., Pt. 404, Subpt. P, App. 2 § 200.00(e)(2).

Similarly, § 200.00(a) provides that "[w]here any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled." § 200.00(a). "Consequently, the language of these sections indicates that in a case where both exertional and nonexertional limitations are present, the guidelines cannot provide the exclusive framework for making a disability determination." *Bapp*, 802 F.2d at 605. Rather, in this context, evidence from a vocational expert ("VE") or vocational specialist ("VS") may be required. "[T]he question of whether expert testimony is necessary presents a question of law . . . ." *Id.* at 604.

This Court explained the role of the grids in this context in *Bapp*:

> [T]he mere existence of a nonexertional impairment does not automatically require the production of a vocational expert nor preclude reliance on the guidelines. A more appropriate approach is that *when a claimant's nonexertional impairments significantly diminish his ability to work – over and above any incapacity caused solely from exertional limitations – so that he is unable to perform the full range of employment indicated by the medical vocational guidelines, then the Secretary must introduce the testimony of a vocational expert* (or other similar evidence) that

> jobs exist in the economy which claimant can obtain and perform.

802 F.2d at 603 (emphasis added).

In 2000, SSA issued SSR 00-4p to clarify the decision making process in cases involving both exertional limitations and nonexertional limitations. SSR 00-4p provides in relevant part,

> When a VE or VS provides evidence about the requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible conflict between that VE or VS evidence and information provided in the [Dictionary of Occupational Titles ("DOT")].[9] In these situations, the adjudicator will:
>
> > Ask the VE or VS if the evidence he or she has provided conflicts with information provided in the DOT; and if the VE's or VS's evidence appears to conflict with the DOT, the adjudicator will obtain a reasonable explanation for the apparent conflict.

SSR 00-4p.

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[9] The Dictionary of Occupational Titles is a publication of the United States Department of Labor used by the Social Security Administration to evaluate the description and existence of jobs in the national economy.

B. Discussion

1. The ALJ correctly applied the treating physician rule when he declined to give controlling weight to the opinions of Dr. Prywes and Dr. Ligorski.

Roma claims that the ALJ misapplied the treating physician rule by not affording controlling weight to two treating sources, Dr. Prywes (a pain specialist) and Dr. Ligorski (a psychiatrist). Contrary to Roma's claims, however, the ALJ here properly considered each treating source's examining relationship, treatment relationship, the length and frequency of examination, the nature and extent of the treatment relationship, the supportability of the opinion by medical signs and laboratory findings, the consistency of each opinion with the record as a whole, and the specialist nature of the treating source, if any. *See* 20 C.F.R. §§ 404.1527(d) (1) through (5); *See also see also Shaw*, 221 F.3d at 132. Roma also argues that the ALJ "cherry-picked" the evidence to support his decision, *Brief* at 13, 22-24, but that charge is not substantiated by the record. Indeed, the ALJ's decision was well-supported by the record evidence.

The ALJ specifically articulated his considerations of the treating sources opinions and the specific reasons he declined to follow the opinions in whole or in part. In short, the ALJ in this case discussed the treating source opinions and gave specific reasons why he did or did not give the opinions controlling weight, as required by

regulation and by *Burgess*. *Burgess,* 527 F.3d at 129; 20 C.F.R. § 404.1527(d); PA22-28.

a. Dr. Prywes's opinion

The ALJ found that Dr. Prywes's opinion that Roma was permanently unable to perform work of any kind was not supported by the weight of the medical evidence in the case as a whole, and was not supported by specific, objective medical findings that were nearly contemporaneous with Dr. Prywes's opinion of disability. PA22-26. The ALJ's conclusion was based on a correct application of controlling legal principles and was supported by substantial evidence.

Based on the ALJ's review of the entire medical record, the ALJ noted that Roma was able to work from October 1995 to February 1998 and then no longer worked. PA21-22, 70-75, 77. No particular change in Roma's exertional residual functional capacity ("RFC") explained why Roma was no longer working. Rather, the record supported the hypothesis that Roma's non-exertional limitations prevented him from continuing his work as an appraiser by February 1998, but that on his date last insured of December 31, 2002, he retained a combined exertional and non-exertional RFC to perform light work with some restructions. PA22.

As support for this conclusion, the ALJ considered specific objective evidence in the record, including Roma's return to work, at "substantially gainful activity" level wages, for over two years from October 1995

through January 1998. PA22. The ALJ noted that several key problems improved or stabilized with specialized treatment, including Roma's vision and his anxiety. PA23, 168-69, 222-24. The ALJ also pointed to Dr. Binditsky's neuropsychological tests in the summer of 1996 on which Roma achieved IQ scores of 95 to 97, and to Dr. Chirunomula's 2004 examination for DDS which found clinical signs that were relatively normal or mild compared to Roma's widespread subjective complaints. PA23, 300-301. In addition, the ALJ noted Roma's own testimony in June 2005 that he "conducts a reasonably broad range of 'light,' nonstressful activities at and near his home," including driving, reading and sending email on his home computer, and staying on his own while his wife works full-time. PA23, 330-40.

In further support, the ALJ relied on Dr. Mitchell's neuropsychological assessment of October 1998, finding that her more specific comments about Roma's reasoning ability and his various testing scores to be more persuasive than Dr. Prywes's more general comments. PA26. Finally, the ALJ also relied on two separate DDS physicians' opinions that Roma's combined disorders did not meet, nor medically equal, Listing severity. PA26, 239-43, 244-52.

The ALJ compared this broad reading of the record with the opinions of disability described by treating source Dr. Prywes and found Dr. Prywes's opinions to be unsupported by the record as a whole. PA23-26. The ALJ articulated several specific reasons for not assigning controlling weight to Dr. Prywes's opinions. For example, the ALJ noted that a May 2004 examination report by a

DDS physician (Dr. Chirunomula) found key RFC and clinical signs were relatively normal or mild, compared to Roma's widespread subjective complaints. PA23, 300-301. In March 2004, by contrast, Dr. Prywes opined that Roma was "unable to tolerate any sustained activity which would allow him to undertake any type of gainful employment." PA25. The ALJ noted that, "[i]f Dr. Prywes' opinion was well-supported by objective findings, then the reader would expect Dr. Chirunomula to find more positive back, wrist, shoulder, elbow, foot and ankle sign," in his May 2004 examination. PA26, 300-301.

Applying 20 C.F.R. § 404.1527(d)(2), the ALJ considered the length of the treatment relationship with Dr. Prywes and noted that the treatment did not include the years when Roma was working after his motor vehicle accident (1995 to 1997), and did not overcome the balance of the record. Instead, the medical record indicated that, "[t]he diagnostic tests, such as repeated MRI's, CT scans, muscle testing, IQ tests, and neurological signs, simply [did] not support disability from all cognitive and exertional activities." PA24. The ALJ credited Dr. Prywes's opinion to the extent that he determined at Step four that Roma could not perform his past relevant work as an appraiser. PA30, findings 3 and 7.

However, as the ALJ explained, Dr. Prywes's 2004 opinion that Roma was disabled and could not perform any work relied largely upon Roma's subjective response to prolonged treatment. PA25. In view of a lack of clinical tests and results, the ALJ appropriately viewed Dr. Prywes's opinion that Roma was unable to perform any

work as unsupported by objective findings. PA25-26. *See also*, 20 C.F.R. § 404.1527(e) (stating that the ultimate opinion as to disability is reserved to the Commissioner).

Roma erroneously relies on language in *Balsamo v. Chater*, 142 F.3d 75, 80-82 (2d Cir. 1998), arguing that the ALJ here committed the same error as the ALJ in that case. However, the ALJ in *Balsamo* disregarded medical evidence and substituted his own medical opinion. *Id.* at 81 ("[I]n this case the Commissioner failed to offer and the ALJ did not cite *any* medical opinion to dispute the treating physicians' conclusions that Balsamo could not perform sedentary work."). In Roma's case, however, unlike in *Balsamo*, the ALJ relied on the objective medical findings, including the findings of DDS physician Dr. Chirunomula made after examining Roma in May 2004, and Dr. Mitchell's neuropsychological assessment of October 1998, Roma's testimony about activities of daily living, and other evidence in the record probative to Roma's ability to function during a day. PA26-28. The ALJ compared this evidence to Dr. Prywes's opinion of total disability dated March 2004. Dr. Prywes did not report any clinical findings to support his opinion of total disability and the near-contemporaneous opinion of Dr. Chirunomula did not support the treating source's opinion. Moreover, Dr. Prywes's treatment records indicated there was an ongoing regimen of acupuncture treatments once or twice a month, but no other intervention or treatment. Thus, *Balsamo* is not controlling.

b. Dr. Lugorski's opinion

Roma also argues that the ALJ improperly failed to credit the opinion of Dr. Lugorski, a psychiatrist and another of Roma's treating sources. *Appellant's Brief,* pp. 21-22. Although the ALJ made clear that he did credit the opinion of Dr. Ligorski with extra weight, PA23, Roma argues that the ALJ rejected his opinions "solely based on the treater's own allegedly conflicting medical findings." *Appellant's Brief,* pp. 21-22. Roma points to four alleged errors the ALJ made in evaluating Dr. Ligorski's opinions: (a) the ALJ determined that Roma's social limitations were moderate despite Dr. Ligorski's report that Roma was socially isolated except for his family; (b) the ALJ erred when he characterized Roma's concentration impairment as moderate when Dr. Ligorski stated that Roma cannot stay on task due to pain and diminished concentration; (c) the ALJ stated the Roma had only one decompensation despite Dr. Ligorski's report stating that Roma had frequent episodes of decompensation; and (d) the ALJ erred in saying that Dr. Ligorski's treatment had shown a positive response in Roma. *Appellant's Brief,* pp. 21-22; PA26, 223-24.

As to Roma's first contention that the ALJ improperly determined that Roma's social limitations were moderate despite Dr. Ligorski's report that Roma was socially isolated except for his family, the ALJ noted that despite the alleged social limitation, "[i]n examinations by Dr. Chirunomula, and numerous insurance consultants, which are potentially stressful settings, [Roma] has displayed memory for details; answered questions cooperatively; and

shown stable affect." PA28, 162-220, 300-301. The ALJ also noted that, "[t]he medication and frequency of treatment prescribed by Drs. Prywes and Ligorski would not prevent an individual from performing work at the SGA level." PA28, 253-55, 256-80. For example, Dr. Ligorski's report for DDS in 2003 indicated that he treated Roma once every two months. This evidence of Roma's ability to function appropriately with medical professionals and others in settings outside his home, notwithstanding his anxiety and depression, is substantial evidence supporting ALJ's finding of moderate limitations of social functioning notwithstanding Dr. Ligorski's reports.

Similarly, the ALJ's characterization of Roma's concentration impairment as moderate when Dr. Ligorski stated that Roma cannot stay on task due to pain and diminished concentration was supported by other credible evidence in the record, including: evidence that Roma could sit for several hours of neuropsychological evaluation, PA158-61; evidence that Roma could participate in a lengthy vocational assessment by litigation consultants, PA162-20; and evidence that Roma was able to attend and participate appropriately with numerous medical doctors and evaluators, PA158-61, 162-220, 221, 253-55, 256-80, 300-301.

The record supports the ALJ's determination that Roma's activities of daily living – which are probative as to the ability to stay on task and concentrate – were mildly limited. PA26. For example, in addition to the essentially normal clinical testing performed by Dr. Chirunomula in May 2004, Roma testified at his hearing before the ALJ

that he could drive for up to 30 minutes at a time, he stayed home alone during the day and spent his time straightening up the house, doing laundry, doing some grocery shopping and looking at the computer. PA330-40, 300-301. The ALJ also properly took notice of the record indicating that, as discussed above, Roma could remember details in potentially stressful interviews and consultations with multiple professionals. PA28. The ALJ took note that, "[t]he medication and frequency of treatment prescribed by Drs. Prywes and Ligorski would not prevent an individual from performing work at the SGA level." PA28. The ALJ also noted that Roma had returned to work after his motor vehicle accident and was engaged in substantially gainful employment from October 1995 through February 1998. PA22.

To the extent that Roma alleged that his functional capacity was limited to less than light work, the ALJ reasonably found that such subjective statements were not fully credible. PA22-28, 30 at Finding 5. In this regard, the ALJ is not bound by a claimant's subjective complaints and is entitled to make an independent judgment regarding the degree of impairment caused by the claimant's condition. *Aponte*, 728 F.2d at 591-92; *Parker*, 626 F.2d at 231. Indeed, it was well within the discretion of the Commissioner to disbelieve Roma's testimony in light of other competent evidence.

Here, the ALJ cited and relied upon the findings and clinical observations as reported by Roma's treating and examining medical specialists, PA20-28, as well as the opinions of the Commissioner's DDS medical consultants,

see PA25-26, 27, 29, as support for his determination that Roma retained a functional capacity to engage in a wide range of physical activity at the light exertional level. PA20-31. Such a determination is the prime responsibility of the trier of fact. 20 C.F.R. § 404.1527(e)

With regard to Dr. Ligorski's 2003 DDS form, Roma argues that the ALJ improperly stated that Roma had suffered one episode of decompensation rather than adopting Dr. Ligorski's statement that Roma had "frequent decompensation." PA222. The ALJ did not err here, however, since the report of decompensation in 1998 was recounted in numerous medical records before the ALJ, and was included in Roma's testimony, while Dr. Ligorski's contemporaneous treatment records showing frequent episodes of decompensation (if any) were not before the ALJ. PA26, 222, 329.

Finally, Roma also argues that the ALJ had no basis for saying that Ligorski's treatment showed a positive response to medication and counseling. *Appellant's Brief,* pp.20-21. However, Dr. Ligorski's reports and other evidence in the record do indicate that Roma's coping abilities and physical condition improved during the period from 1998 through 2003. For example, although Roma's emotional condition was not back to his pre-accident status, by 2003 it had stabilized. PA222. Also, Dr. Ligorski stated in the 2003 DDS form that Roma's hygeine was good, his concentration was good within counseling sessions of 20 minutes, and his speech was "clear, coherent [and] nonpressured." PA223. Continuing, Dr. Ligorski stated that Roma had no psychotic symptoms, that

he had good judgment and insight, and that the treatment regimen with Roma was to see him once every two months. PA222-24. All of this information is an improvement from the condition Roma experienced immediately after his 1995 car accident, and after he stopped working as a real estate appraiser in 1998.

In sum, the ALJ appropriately considered and weighed the medical evidence offered by Roma's treating physicians, and considered their opinions as to his ability to perform work. The ALJ gave specific reasons for rejecting that portion of the treating physicians' opinions that are reserved to the Commissioner – the ultimate determination of disability – and cited to substantial evidence in the record which supported the ALJ's determination that Roma was not disabled.

2. Roma waived any argument that the ALJ erred by failing to apply SSR 85-15, and in any event, that ruling is inapplicable to Roma's case.

Roma argues for the first time on appeal to this Court that the ALJ committed reversible error by failing to consider the effect of stress on Roma's ability to perform work.[10] *Appellant's Brief*, pp. 27-28. Because Roma did not raise the argument that the ALJ failed to follow Social Security Ruling (SSR) 85-15 when he evaluated stress as a factor before the district court, it is waived. *See Poupore v. Astrue*, 566 F.3d 303, 306 (2d Cir. 2009) (per curiam); PA 385-401.

In any event, Roma's argument that the ALJ erred by failing to consider SSR 85-15 should be rejected.

Roma argues the ALJ committed reversible error by failing to consider the effect of stress on Roma's ability to perform work under SSR 85-15. *Appellant's Brief,* pp. 27-28; PA398-99. The ALJ committed no error, however, because SSR 85-15 does not apply to a case in which the claimant suffers from a combination of exertional and non-exertional impairments, as its title implies: "The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments." *See Roberts v. Shalala*,

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[10] Although Roma mentioned SSR 85-15 in his objection to the magistrate judge's ruling, it was only in relation to his argument that a "vocational expert" is not the same as a "vocational adjudicator." PA398-99.

66 F.3d 179, 183 (9th Cir.1995); *see also Schaal v. Commissioner of Social Security*, 969 F. Supp. 822, 832 (N.D.N.Y.1996), *vacated on other grounds*, 134 F.3d 496 (2d Cir.1998). The purpose of the ruling is "to clarify how the regulations . . . provide a framework for decisions concerning persons who have only a nonexertional limitation(s) of function or an environmental restriction(s)." *See* SSR 85-15. Here, Roma alleged both exertional and non-exertional impairments. *Appellant's Brief,* p. 29. On this record, SSR 85-15 is inapplicable on its own terms. Accordingly, the ALJ committed no error by not applying SSR 85-15 during his consideration of Roma's case.

3. The ALJ correctly applied the Medical-Vocational Guidelines when he found that the Commissioner had met his burden at step five to show that there are jobs Roma can perform in the national economy.

Once a claimant proves he cannot return to his former work, the Commissioner must show that there are jobs in the national economy that the claimant can perform. "'In the ordinary case,' the Commissioner meets his burden at the fifth step [of the disability determination analysis] 'by resorting to the applicable medical vocational guidelines (the grids), 20 C.F.R. § 404, Subpt. P, App. 2 (1986).'" *Rosa v. Callahan*, 168 F.3d 72, 78 (2d Cir. 1999) (quoting *Bapp*, 802 F. 2d at 604). The grids "take into account the claimant's residual functional capacity in conjunction with the claimant's age, education, and work experience." *Id.*

(internal citations and quotations omitted). "Based on these considerations, the grids indicate whether the claimant can engage in any substantial gainful work existing in the national economy." *Id.* However, "if a claimant's non-exertional impairments, 'significantly limit the range of work permitted by [her] exertional limitations,' then the grids obviously will not accurately determine disability status . . . ." *Bapp*, 802 F.2d at 605. In that context, expert testimony from a vocational expert may be required. *Id.* at 606. In *Bapp*, this Court held that the necessity of vocational expert testimony must be determined on a "case-by-case basis." *Id.* at 605.

Here, Roma relies on *Bapp* and *Pratts* to argue that the existence of non-exertional limitations mandated the presentation of vocational expert testimony at the hearing. *Appellant's Brief*, pp. 29-31, 33. Roma also argues that the failure to present vocational testimony deprived Roma the right to cross-examine the Commissioner's vocational expert, the ALJ erred by relying on a vocational adjudicator's report[11] which used a different residual

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[11] To the extent Roma argues that a "vocational adjudicator" or a "disability specialist" is not a "vocational expert," that argument is without merit. The grid rules expressly provide for the use of different nomenclature in describing vocational sources, as follows:

> e) Use of vocational experts and other specialists. If the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or

(continued...)

function capacity from that determined by the ALJ, and the ALJ erred by not inquiring as to conflicts between the vocational evidence and the information provided in the DOT as set forth in SSR 00-4p. *Appellant's Brief*, pp. 35-42. As set forth below, these claims lack merit.

a. The testimony of a vocational expert was not required.

Because the ALJ correctly determined that Roma's non-exertional limitations did not "significantly limit" the range of work permitted by his exertional limitations, there is no error under *Bapp* or *Pratts.*

Although Roma does not mention it in his argument, the *Bapp* Court acknowledged that "the mere existence of a nonexertional impairment does not automatically require the production of a vocational expert nor preclude reliance on the guidelines." *Bapp,* 802 F.2d at 603. The Court explained that, "[a] more appropriate approach is that when a claimant's nonexertional impairments *significantly diminish* his ability to work – over and above any incapacity caused solely from exertional limitations – so that he is unable to perform the full range of employment

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[11] (...continued)
there is a similarly complex issue, *we may use the services of a vocational expert or other specialist. We will decide whether to use a vocational expert or other specialist.*

20 C.F.R. §§ 404.1566(e) (emphasis added).

indicated by the medical vocational guidelines, then the Secretary must introduce the testimony of a vocational expert (or other similar evidence) that jobs exist in the economy which claimant can obtain and perform." *Id.* (emphasis added). "A claimant's work capacity is 'significantly diminished' if there is an 'additional loss of work capacity . . . that so narrows a claimant's possible range of work as to deprive him of a meaningful employment opportunity.'" *Pratts*, 94 F.3d at 39 (quoting *Bapp*, 802 F.2d at 606).

When this additional rationale and analysis of the *Bapp* decision is taken into account, it is clear that the ALJ here appropriately determined that Roma's non-exertional limitations did not significantly diminish his ability to perform light work, PA28-29, and therefore that the Commissioner was not required to produce vocational expert testimony at the hearing.

In determining that Roma was capable of performing "light exertion for a regular work day and work week," the ALJ relied on Rule 202.00 of the grids as well as the opinions of two vocational adjudicators. Rule 202.00 essentially requires a finding of not disabled for individuals who remain capable of doing light work. *See* 20 C.F.R. § 404 Subpt. P, App. 2, Sec. 202.00. "Light work" requires that a person have the ability to lift up to twenty pounds and the ability to do a good deal of walking or standing. "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." *See* SSR 83-10, Titles II and XVI: Determining Capability to Do Other Work – The Medical-Vocational Rules of Appendix 2.

With respect to nonexertional impairments, the ALJ found that Roma's nonexertional impariments had not significantly diminished his ability to perform light work. PA28-29. The ALJ found that Roma had a history of depression and anxiety which was severe, but that it had stabilized at a low level. PA28-30, 222-24. Importantly, the ALJ determined the level of depression and anxiety in Dr. Ligorski's reports did not support a restriction from all workplace interactions. PA28. Moreover, the ALJ found that Roma's depression and anxiety did not result in major functional limitations of Listings severity. PA26. The ALJ noted that Roma's activities of daily living were only mildly limited. PA26.

Edward Moreau, a DDS vocational adjudicator, provided support for the ALJ's conclusion that Roma's nonexertional limitations did not significantly diminish his ability to perform light work. Mr. Moreau reviewed Roma's medical records and determined that Roma could perform work at the light level of exertion. PA110. Mr. Moreau specifically found that Roma's mental residual function capacity (referred to as MRFC in Moreau's report) indicated he was able to complete simple tasks and maintain a regular schedule. PA110. Mr. Moreau concluded that, even though Roma was unable to return to his past work as an appraiser, he was a "younger worker with a college education who can be expected to make an adjustment to other work such as: . . . order clerk or

addresser." PA110. A disability examiner, Sheila Chunis, affirmed Mr. Moreau's findings after receipt of additional information from Dr. Prywes. PA127, 256-80.

The ALJ found that Roma's age, college diploma, history of successful work, and successful interactions in a job setting (only two employers in a long period) were all favorable factors for a successful vocational adjustment. PA29. The ALJ also noted that Roma drives and uses his computer during the day, and took note of the record indicating that "[i]n the examinations by Dr. Chirunomula, and numerous insurance consultants, which are potentially stressful settings, [Roma] has displayed memory for details; answered questions cooperatively; and shown stable affect." PA28, 151-61, 162-220, 300-301. The ALJ also noted that, "[t]he medication and frequency of treatment prescribed by Drs. Prywes and Ligorski would not prevent an individual from performing work at the SGA level." PA28. The ALJ appropriately credited record evidence to determine that Roma's non-exertional limitations caused by depression and anxiety did not create an additional loss of Roma's work capacity that so narrowed Roma's possible range of work as to deprive him of a meaningful employment opportunity.

Here, there was no evidence of any non-exertional limitation that so significantly diminished Roma's ability to work over and above any incapacity caused solely from exertional limitations such that Roma would be unable to perform the full range of employment indicated by the medical vocational guidelines. Accordingly, under *Bapp*, and *Pratts* there was no requirement that the ALJ here

introduce testimony of a vocational expert to meet the Commissioner's burden of demonstrating that jobs exist in the economy which Roma can obtain and perform. Rather, the ALJ properly applied the grid Rules when he considered the occupational titles identified by the vocational adjudicator. PA110.

Having made the factual finding regarding the impact of Roma's non-exertional impairments based on substantial evidence in the record, the ALJ's application of the grid Rules as a framework for decision-making was appropriate under the governing legal standard. *Bapp*, 802 F.2d at 604-605.

b. Roma waived any due process argument by failing to object during the ALJ hearing.

With regard to Roma's argument that the failure to present vocational testimony deprived Roma the right to cross-examine the Commissioner's vocational witness, Roma relies on a 2005 decision by the United States Court of Appeals for the Third Circuit, *Allen v. Barnhart*, 417 F.3d 396, 407 (3d Cir. 2005). Roma's reliance on that case is misplaced, however. In *Allen*, the claimant's first notice that the ALJ intended to rely solely on a social security ruling in support of his analysis at step 5 – and would not consider any vocational specialist's opinion – was in the ALJ's final decision. Here, however, Roma had notice of both vocational specialists' opinions prior to the hearing before the ALJ and would have been able to request testimony at that hearing. PA110, 127.

Importantly, it is clear from the record that Roma's counsel during the administrative proceedings before the agency had notice of the ALJ hearing and of the vocational evidence from the vocational adjudicator and the disability specialist, *before* the ALJ hearing. For example, Michael R. Pohl, Esq. was Roma's first attorney PA36, 45, and by the time of the Notice of Hearing, PA51-54, Andrew I. Schaffer, Esq., had entered his appearance as Roma's representative. Attorney Schaffer was advised, via the Notice of Hearing letter, that he could request that the ALJ issue a subpoena for the production of documents or for the appearance of witnesses. PA53. *See also* 20 C.F.R. §§ 404.950(d)(2). Counsel acknowledged receipt of the Notice of Hearing, but did not indicate any objection to the proposed issues and did not request subpoenas for the appearance of any witnesses. PA32, 64. Nor did counsel indicate any concern over the vocational aspects of Roma's claim in the pre-hearing memorandum submitted with the acknowledgment of receipt of the Notice of Hearing letter. PA140-43. Similarly, at the hearing convened on June 17, 2005, PA312-43, neither Roma nor his attorney expressed any concern regarding vocational development and there is no indication that Roma believed or desired the appearance and participation of a vocational expert. Under the governing regulations, Roma could have requested the ALJ's assistance in developing the evidentiary record or requested that the proceeding be continued until such time as a vocational expert was available. Roma could also have requested the use of interrogatories for purposes of vocational development. Roma did not, however, do so.

Here Roma also relies upon *Allen* for the argument that the ALJ improperly used SSR 83-14 as the basis for determining that Roma's nonexertional limitations did not significantly compromise the exertional occupational base for which Roma qualified. *Appellant's Brief, pp.* 34-36. Contrary to Roma's characterization of the ALJ's decision, the ALJ opinion indicates that the ALJ cited to SSR 83-14 as a guide on how the table rules in the Grid Rules provide a framework for decision making concerning persons who have both a severe exertional impairment and nonexertional limitation or restriction. PA29. Unlike the decision in *Allen*, the ALJ here did not rely upon the social security ruling in summary fashion to conclusively determine the relationship between the type and degree of nonexertional limitation and the size of the occupational base, but rather proceeded to address the various aspects of Roma's medical-vocational profile and the impact on the occupational base as described in Section 202.00(a) of the Grid Rules, as well as relying upon existing vocational evidence of record, to determine that Roma's nonexertional limitations did not significantly erode the occupational base for which he qualified. PA29.

Roma's reliance on the *Allen* case to argue that SSR 85-15 imposed a requirement on the ALJ to provide expert testimony at the hearing is also misplaced because the facts in that case are different from the facts in this case. The *Allen* claimant had no exertional limitations but had severe non-exertional limitations due to a manic-depressive disorder and schizoid condition. *Allen*, 417 F.3d at 397. The *Allen* court noted that, "the ALJ's use of the guidelines as a framework in this case, and his reliance

upon an SSR [SSR 85-15] at Step 5 to determine Allen's occupational job base is not an improper application of either the case law or rules established by the Agency. Further, from the standpoint of common sense, the grids' use for exertion level are not totally irrelevant if a claimant has only a nonexertional impairment, for there would still be an applicable exertional level, *i.e.*, the claimant could do work requiring heavy exertion." *Allen*, 417 F.3d at 404. The problem the *Allen* court had with the ALJ's decision was that he relied solely on an SSR when determining the claimant's mental residual functional capacity.

On this record it is simply not the case that Roma was deprived of any process to which he was entitled. Accordingly, this argument should be rejected.

c. The ALJ was not required to apply SSR 00-4p in this case and used the correct residual function capacity in evaluating vocational evidence.

1. SSR 00-4p

Roma did not raise the argument that the ALJ failed to follow SSR 00-4p by not inquiring as to conflicts between the vocational evidence and the information provided in the DOT at either the agency level or the district court level. As discussed in section (b) above, Roma had notice of the evidence before the ALJ prior to the hearing and had the right to raise at the agency level any conflict between the vocational evidence and the information provided in the DOT. Roma did not do so. The issue is therefore

waived. *See Poupore*, 566 F.3d at 306; PA 385-401. In any event, this argument lacks merit.

The relevant portion of SSR 00-4p provides:

> When a VE or VS provides evidence about the requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible conflict between that VE or VS evidence and information provided in the DOT. In these situations, the adjudicator will:
>
> > Ask the VE or VS if the evidence he or she has provided conflicts with information provided in the DOT; and
> >
> > If the VE's or VS's evidence appears to conflict with the DOT, the adjudicator will obtain a reasonable explanation for the apparent conflict.

Under this standard, the ALJ was not required to make inquiry of the vocational adjudicator about any conflict between the jobs he identified and the DOT, because the jobs he identified *were* DOT job titles.

2. The ALJ used the correct residual function capacity in evaluating vocational evidence.

Roma argues that the ALJ erred by relying on a vocational adjudicator's report which was premised on a different RFC than that determined later by the ALJ. *Appellant's Brief*, pp. 37-38; PA110, PA28-29. As a

preliminary matter, the Commissioner notes that the two RFC determinations were essentially the same, as summarized as follows:

Vocational Adjudicator PA110	*ALJ* PA28-29
Light level of exertion	Light level of exertion Postural limits that involve only occasional bending, stooping, twisting, squatting, kneeling, crawling, climbing and balancing; Only occasional overhead lifting with nondominant left shoulder
Difficulty interacting with public	Avoid high-stress interactions with public
Unable to return to past relevant work	Unable to return to past relevant work
Able to complete simple tasks	Duties should involve Simple, routine, repetitive work with one or two step instructions
Younger worker, college education, expect to adjust to other work	Younger worker, college education, good work history, expect to adjust to other work

The vocational adjudicator also found that Roma could

be expected to make an adjustment to the following types of employment based on the RFC he determined:

Charge Account Clerk	DOT 205.367-014
Order Clerk	DOT 209.567-014
Addresser	DOT 209.587-014

PA110.[12] The ALJ, however, rejected the selection of the job of Charge Account Clerk, DOT 205.367-014, noting that Roma reported to job consultants that math had been a difficult area for him and that job title required more than a basic level of math. PA29. The ALJ adopted the two remaining job titles, Order Clerk and Addresser. PA29.

Both the Order Clerk job title and the Addresser job title are classified as sedentary jobs, requiring less than light work. *See* DOT 209.567-014 and DOT 209.587-014. The Order Clerk job title requires the ability to exert up to 10 pounds of force occasionally, to lift, carry, push, pull or otherwise move objects, and involves sitting more of the time, but may involve walking or standing for brief periods of time. *See* DOT 209.567-014. These exertional requirements take into account Roma's exertional limitations. PA28-29. The Addresser job title, contrary to Roma's argument to this Court, does not require significant contact with the public, but rather only requires personal interaction with others. DOT 209.587-014. It also

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[12] The Dictionary of Occupational Title sections referenced here are reproduced in the Addendum.

requires only basic level math, basic level reading, writing and speaking. *Id.* Accordingly, the Addresser job title meets Roma's combined exertional and non-exertional RFC.

In addition, the ALJ found that Roma's age, college diploma, history of successful work, and successful interations in a job setting (only two employers in a long period) were all favorable factors for a successful vocational adjustment. PA29; 20 C.F.R. § 404.1560.

Because the ALJ's RFC and the vocational adjudicator's RFC were almost identical, with the ALJ's RFC determination being more detailed but not more limiting than that of the vocational adjudicator, there is no error.

Accordingly, the Commissioner's decision should be affirmed.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 14, 2011

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

ANN M. NEVINS
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,354 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

ANN M. NEVINS
ASSISTANT U.S. ATTORNEY

ADDENDUM

20 C.F.R. Pt 404, Subpt P, Appendix 1—Listing of Impairments

The body system listings in parts A and B of the Listing of Impairments will no longer be effective on the following dates unless extended by the Commissioner or revised and promulgated again.

1. Growth Impairment (100.00): July 1, 2010.
2. Musculoskeletal System (1.00 and 101.00): February 18, 2011.
3. Special Senses and Speech (2.00 and 102.00): February 20, 2015.
4. Respiratory System (3.00 and 103.00): July 1, 2010.
5. Cardiovascular System (4.00 and 104.00): January 13, 2011.
6. Digestive System (5.00 and 105.00): October 19, 2012.
7. Genitourinary Impairments (6.00 and 106.00): September 6, 2013.
8. Hematological Disorders (7.00 and 107.00): July 1, 2010.
9. Skin Disorders (8.00 and 108.00): July 9, 2012.
10. Endocrine System (9.00 and 109.00): July 1, 2010.
11. Impairments That Affect Multiple Body Systems (10.00 and 110.00): October 31, 2013
12. Neurological (11.00 and 111.00): July 1, 2010.
13. Mental Disorders (12.00 and 112.00): July 1, 2010.
14. Malignant Neoplastic Diseases (13.00 and 113.00): November 5, 2017
15. Immune System Disorders (14.00 and 114.00): June 16, 2016.

20 C.F.R., Pt. 404, Subpt. P, App. 2 § 200.00

200.00 Introduction. (a) The following rules reflect the major functional and vocational patterns which are encountered in cases which cannot be evaluated on medical considerations

alone, where an individual with a severe medically determinable physical or mental impairment(s) is not engaging in substantial gainful activity and the individual's impairment(s) prevents the performance of his or her vocationally relevant past work. They also reflect the analysis of the various vocational factors (i.e., age, education, and work experience) in combination with the individual's residual functional capacity (used to determine his or her maximum sustained work capability for sedentary, light, medium, heavy, or very heavy work) in evaluating the individual's ability to engage in substantial gainful activity in other than his or her vocationally relevant past work. Where the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled. However, each of these findings of fact is subject to rebuttal and the individual may present evidence to refute such findings. Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled. In any instance where a rule does not apply, full consideration must be given to all of the relevant facts of the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations.

(b) The existence of jobs in the national economy is reflected in the "Decisions" shown in the rules; i.e., in promulgating the rules, administrative notice has been taken of the numbers of unskilled jobs that exist throughout the national economy at the various functional levels (sedentary, light, medium, heavy, and very heavy) as supported by the "Dictionary of Occupational Titles" and the "Occupational Outlook Handbook," published by the Department of Labor; the "County Business Patterns" and "Census Surveys" published by the Bureau of the Census;

and occupational surveys of light and sedentary jobs prepared for the Social Security Administration by various State employment agencies. Thus, when all factors coincide with the criteria of a rule, the existence of such jobs is established. However, the existence of such jobs for individuals whose remaining functional capacity or other factors do not coincide with the criteria of a rule must be further considered in terms of what kinds of jobs or types of work may be either additionally indicated or precluded.

(c) In the application of the rules, the individual's residual functional capacity (i.e., the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of jobs), age, education, and work experience must first be determined. When assessing the person's residual functional capacity, we consider his or her symptoms (such as pain), signs, and laboratory findings together with other evidence we obtain.

(d) The correct disability decision (i.e., on the issue of ability to engage in substantial gainful activity) is found by then locating the individual's specific vocational profile. If an individual's specific profile is not listed within this appendix 2, a conclusion of disabled or not disabled is not directed. Thus, for example, an individual's ability to engage in substantial gainful work where his or her residual functional capacity falls between the ranges of work indicated in the rules (e.g., the individual who can perform more than light but less than medium work), is decided on the basis of the principles and definitions in the regulations, giving consideration to the rules for specific case situations in this appendix 2. These rules represent various combinations of exertional capabilities, age, education and work experience and also provide an overall structure for evaluation of those cases in which the judgments as to each factor do not coincide with those of any specific rule. Thus,

when the necessary judgments have been made as to each factor and it is found that no specific rule applies, the rules still provide guidance for decisionmaking, such as in cases involving combinations of impairments. For example, if strength limitations resulting from an individual's impairment(s) considered with the judgments made as to the individual's age, education and work experience correspond to (or closely approximate) the factors of a particular rule, the adjudicator then has a frame of reference for considering the jobs or types of work precluded by other, nonexertional impairments in terms of numbers of jobs remaining for a particular individual.

(e) Since the rules are predicated on an individual's having an impairment which manifests itself by limitations in meeting the strength requirements of jobs, they may not be fully applicable where the nature of an individual's impairment does not result in such limitations, e.g., certain mental, sensory, or skin impairments. In addition, some impairments may result solely in postural and manipulative limitations or environmental restrictions. Environmental restrictions are those restrictions which result in inability to tolerate some physical feature(s) of work settings that occur in certain industries or types of work, e.g., an inability to tolerate dust or fumes.

(1) In the evaluation of disability where the individual has solely a nonexertional type of impairment, determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in this appendix 2. The rules do not direct factual conclusions of disabled or not disabled for individuals with solely nonexertional types of impairments.

(2) However, where an individual has an impairment or

combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations. Also, in these combinations of nonexertional and exertional limitations which cannot be wholly determined under the rules in this appendix 2, full consideration must be given to all of the relevant facts in the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations, which will provide insight into the adjudicative weight to be accorded each factor.

20 C.F.R. § 404.950 Presenting evidence at a hearing before an administrative law judge.

. . . (d) Subpoenas.

(1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 5 days before the hearing date. The written

request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

(3) We will pay the cost of issuing the subpoena.

(4) We will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court.

(e) Witnesses at a hearing. Witnesses may appear at a hearing in person or, when the conditions in § 404.936(c) exist, by video teleconferencing. They shall testify under oath or affirmation, unless the administrative law judge finds an important reason to excuse them from taking an oath or affirmation. The administrative law judge may ask the witnesses any questions material to the issues and shall allow the parties or their designated representatives to do so.

§ 404.1520 Evaluation of disability in general.

(a) General--

(1) Purpose of this section. This section explains the five-step sequential evaluation process we use to decide whether you are disabled, as defined in § 404.1505.
(2) Applicability of these rules. These rules apply to you if you file an application for a period of disability or disability insurance benefits (or both) or for child's insurance benefits based on disability. They also apply if you file an application for widow's or widower's benefits based on disability for months after December 1990. (See §

404.1505(a).)
(3) Evidence considered. We will consider all evidence in your case record when we make a determination or decision whether you are disabled.
(4) The five-step sequential evaluation process. The sequential evaluation process is a series of five "steps" that we follow in a set order. If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step. Before we go from step three to step four, we assess your residual functional capacity. (See paragraph (e) of this section.) We use this residual functional capacity assessment at both step four and step five when we evaluate your claim at these steps. These are the five steps we follow:
(i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. (See paragraph (b) of this section.)
(ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 404.1509, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. (See paragraph (c) of this section.)
(iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 of this subpart and meets the duration requirement, we will find that you are disabled. (See paragraph (d) of this section.)
(iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that

you are not disabled. (See paragraph (f) of this section and § 404.1560(b).)

(v) At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled. (See paragraph (g) of this section and § 404.1560(c).)

(5) When you are already receiving disability benefits. If you are already receiving disability benefits, we will use a different sequential evaluation process to decide whether you continue to be disabled. We explain this process in § 404.1594(f).

. . .

(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

. . .

(e) When your impairment(s) does not meet or equal a listed impairment. If your impairment(s) does not meet or equal a listed impairment, we will assess and make a finding about your residual functional capacity based on all the relevant medical and other evidence in your case record, as explained in § 404.1545. (See paragraph (g)(2) of this section and § 404.1562 for an exception to this rule.) We use our residual functional capacity assessment at the fourth step of the sequential evaluation process to determine if you can do your past relevant work (paragraph (f) of this section) and at the fifth step of the

sequential evaluation process (if the evaluation proceeds to this step) to determine if you can adjust to other work (paragraph (g) of this section).

. . .

(g) Your impairment(s) must prevent you from making an adjustment to any other work.

(1) If we find that you cannot do your past relevant work because you have a severe impairment(s) (or you do not have any past relevant work), we will consider the same residual functional capacity assessment we made under paragraph (e) of this section, together with your vocational factors (your age, education, and work experience) to determine if you can make an adjustment to other work. (See § 404.1560(c).) If you can make an adjustment to other work, we will find you not disabled. If you cannot, we will find you disabled.

(2) We use different rules if you meet one of the two special medical-vocational profiles described in § 404.1562. If you meet one of those profiles, we will find that you cannot make an adjustment to other work, and that you are disabled.

20 C.F.R. § 404.1527 Evaluating opinion evidence.

(a) General.

(1) You can only be found disabled if you are unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. See § 404.1505. Your impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. See § 404.1508.

(2) Evidence that you submit or that we obtain may contain

medical opinions. Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions.

(b) How we consider medical opinions. In deciding whether you are disabled, we will always consider the medical opinions in your case record together with the rest of the relevant evidence we receive.

(c) Making disability determinations. After we review all of the evidence relevant to your claim, including medical opinions, we make findings about what the evidence shows.

(1) If all of the evidence we receive, including all medical opinion(s), is consistent, and there is sufficient evidence for us to decide whether you are disabled, we will make our determination or decision based on that evidence.

(2) If any of the evidence in your 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.

(3) If the evidence is consistent but we do not have sufficient evidence to decide whether you are disabled, or if after weighing the evidence we decide we cannot reach a conclusion about whether you are disabled, we will try to obtain additional evidence under the provisions of §§ 404.1512 and 404.1519 through 404.1519h. We will request additional existing records, recontact your treating sources or any other examining sources, ask you to undergo a consultative examination at our expense, or ask you or others for more information. We will consider any additional evidence we receive together with the evidence we already have.

(4) When there are inconsistencies in the evidence that

cannot be resolved, or when despite efforts to obtain additional evidence the evidence is not complete, we will make a determination or decision based on the evidence we have.

(d) How we weigh medical opinions. Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

(1) Examining relationship. Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you.

(2) Treatment relationship. Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (d)(2)(i) and (d)(2)(ii) of this section, as well as the factors in paragraphs (d)(3) through (d)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination

or decision for the weight we give your treating source's opinion.

(i) Length of the treatment relationship and the frequency of examination. Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(ii) Nature and extent of the treatment relationship. Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment(s), we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(3) Supportability. The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion. The better an explanation a

source provides for an opinion, the more weight we will give that opinion. Furthermore, because nonexamining sources have no examining or treating relationship with you, the weight we will give their opinions will depend on the degree to which they provide supporting explanations for their opinions. We will evaluate the degree to which these opinions consider all of the pertinent evidence in your claim, including opinions of treating and other examining sources.

(4) Consistency. Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion.

(5) Specialization. We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist.

(6) Other factors. When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the opinion. For example, the amount of understanding of our disability programs and their evidentiary requirements that an acceptable medical source has, regardless of the source of that understanding, and the extent to which an acceptable medical source is familiar with the other information in your case record are relevant factors that we will consider in deciding the weight to give to a medical opinion.

(e) Medical source opinions on issues reserved to the Commissioner. Opinions on some issues, such as the examples that follow, are not medical opinions, as

described in paragraph (a)(2) of this section, but are, instead, opinions on issues reserved to the Commissioner because they are administrative findings that are dispositive of a case; i.e., that would direct the determination or decision of disability.

(1) Opinions that you are disabled. We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that you are "disabled" or "unable to work" does not mean that we will determine that you are disabled.

(2) Other opinions on issues reserved to the Commissioner. We use medical sources, including your treating source, to provide evidence, including opinions, on the nature and severity of your impairment(s). Although we consider opinions from medical sources on issues such as whether your impairment(s) meets or equals the requirements of any impairment(s) in the Listing of Impairments in appendix 1 to this subpart, your residual functional capacity (see §§ 404.1545 and 404.1546), or the application of vocational factors, the final responsibility for deciding these issues is reserved to the Commissioner.

(3) We will not give any special significance to the source of an opinion on issues reserved to the Commissioner described in paragraphs (e)(1) and (e)(2) of this section.

(f) Opinions of nonexamining sources. We consider all evidence from nonexamining sources to be opinion evidence. When we consider the opinions of nonexamining sources, we apply the rules in paragraphs (a) through (e) of this section. In addition, the following rules apply to State

agency medical and psychological consultants, other program physicians and psychologists, and medical experts we consult in connection with administrative law judge hearings and Appeals Council review:

(1) In claims adjudicated by the State agency, a State agency medical or psychological consultant may make the determination of disability together with a State agency disability examiner or provide one or more medical opinions to a State agency disability examiner when the disability examiner makes the initial or reconsideration determination alone (see § 404.1615(c) of this part). The following rules apply:

(i) When a State agency medical or psychological consultant makes the determination together with a State agency disability examiner at the initial or reconsideration level of the administrative review process as provided in § 404.1615(c)(1), he or she will consider the evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or medically equals the requirements for any impairment listed in appendix 1 to this subpart, and your residual functional capacity. These administrative findings of fact are based on the evidence in your case but are not in themselves evidence at the level of the administrative review process at which they are made.

(ii) When a State agency disability examiner makes the initial determination alone as provided in § 404.1615(c)(3), he or she may obtain the opinion of a State agency medical or psychological consultant about one or more of the medical issues listed in

paragraph (f)(1)(i) of this section. In these cases, the State agency disability examiner will consider the opinion of the State agency medical or psychological consultant as opinion evidence and weigh this evidence using the relevant factors in paragraphs (a) through (e) of this section.

(iii) When a State agency disability examiner makes a reconsideration determination alone as provided in § 404.1615(c)(3), he or she will consider findings made by a State agency medical or psychological consultant at the initial level of the administrative review process and any opinions provided by such consultants at the initial and reconsideration levels as opinion evidence and weigh this evidence using the relevant factors in paragraphs (a) through (e) of this section.

(2) Administrative law judges are responsible for reviewing the evidence and making findings of fact and conclusions of law. They will consider opinions of State agency medical or psychological consultants, other program physicians and psychologists, and medical experts as follows:

(i) Administrative law judges are not bound by any findings made by State agency medical or psychological consultants, or other program physicians or psychologists. State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists are highly qualified physicians, psychologists, and other medical specialists who are also experts in Social Security disability evaluation. Therefore, administrative law judges must consider findings and other opinions of State agency medical and psychological consultants and other program physicians, psychologists, and other medical

specialists as opinion evidence, except for the ultimate determination about whether you are disabled (see § 404.1512(b)(8)).

(ii) When an administrative law judge considers findings of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, the administrative law judge will evaluate the findings using the relevant factors in paragraphs (a) through (e) of this section, such as the consultant's medical specialty and expertise in our rules, the supporting evidence in the case record, supporting explanations the medical or psychological consultant provides, and any other factors relevant to the weighing of the opinions. Unless a treating source's opinion is given controlling weight, the administrative law judge must explain in the decision the weight given to the opinions of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, as the administrative law judge must do for any opinions from treating sources, nontreating sources, and other nonexamining sources who do not work for us.

(iii) Administrative law judges may also ask for and consider opinions from medical experts on the nature and severity of your impairment(s) and on whether your impairment(s) equals the requirements of any impairment listed in appendix 1 to this subpart. When administrative law judges consider these opinions, they will evaluate them using the rules in paragraphs (a) through (e) of this section.

(3) When the Appeals Council makes a decision, it will follow the same rules for considering opinion evidence as administrative law judges follow.

20 C.F.R. § 404.1566 Work which exists in the national economy.

(a) General. We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country. It does not matter whether--

(1) Work exists in the immediate area in which you live;

(2) A specific job vacancy exists for you; or

(3) You would be hired if you applied for work.

(b) How we determine the existence of work. Work exists in the national economy when there is a significant number of jobs (in one or more occupations) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications. Isolated jobs that exist only in very limited numbers in relatively few locations outside of the region where you live are not considered "work which exists in the national economy". We will not deny you disability benefits on the basis of the existence of these kinds of jobs. If work that you can do does not exist in the national economy, we will determine that you are disabled. However, if work that you can do does exist in the national economy, we will determine that you are not disabled.

(c) Inability to obtain work. We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of--

(1) Your inability to get work;

(2) Lack of work in your local area;

(3) The hiring practices of employers;

(4) Technological changes in the industry in which you have worked;

(5) Cyclical economic conditions;

(6) No job openings for you;

(7) You would not actually be hired to do work you could otherwise do; or

(8) You do not wish to do a particular type of work.

(d) Administrative notice of job data. When we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers either in the region where you live or in several regions of the country), we will take administrative notice of reliable job information available from various governmental and other publications. For example, we will take notice of--

(1) Dictionary of Occupational Titles, published by the Department of Labor;

(2) County Business Patterns, published by the Bureau of the Census;

(3) Census Reports, also published by the Bureau of the Census;

(4) Occupational Analyses, prepared for the Social Security Administration by various State employment agencies; and

(5) Occupational Outlook Handbook, published by the Bureau of Labor Statistics.

(e) Use of vocational experts and other specialists. If the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or there is a similarly complex issue, we may use the services of a vocational expert or other specialist. We will decide whether to use a vocational expert or other specialist.

20 C.F.R. § 416.908 What is needed to show an impairment.

If you are not doing substantial gainful activity, we always look first at your physical or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms (see § 416.927). (See § 416.928 for further information about what we mean by symptoms, signs, and laboratory findings.)

20 C.R.R. § 416.920(a)

(a) General--
(1) Purpose of this section. This section explains the five-step sequential evaluation process we use to decide whether you are disabled, as defined in § 416.905.
(2) Applicability of these rules. These rules apply to you if you are age 18 or older and you file an application for Supplemental Security Income disability benefits.
(3) Evidence considered. We will consider all evidence in your case record when we make a determination or decision whether you are disabled.
(4) The five-step sequential evaluation process. The sequential evaluation process is a series of five "steps" that we follow in a set order. If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on

to the next step. Before we go from step three to step four, we assess your residual functional capacity. (See paragraph (e) of this section.) We use this residual functional capacity assessment at both step four and at step five when we evaluate your claim at these steps. These are the five steps we follow:

(i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. (See paragraph (b) of this section.)

(ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 416.909, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. (See paragraph (c) of this section.)

(iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 to subpart P of part 404 of this chapter and meets the duration requirement, we will find that you are disabled. (See paragraph (d) of this section.)

(iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled. (See paragraph (f) of this section and § 416.960(b).)

(v) At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled. (See paragraph (g) of this section and §

416.960(c).

20 C.F.R. § 416.925 Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter.

(a) What is the purpose of the Listing of Impairments? The Listing of Impairments (the listings) is in appendix 1 of subpart P of part 404 of this chapter. For adults, it describes for each of the major body systems impairments that we consider to be severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education, or work experience. For children, it describes impairments that cause marked and severe functional limitations.

. . . .

20 C.F.R. § 416.926 Medical equivalence for adults and children.

(a) What is medical equivalence? Your impairment(s) is medically equivalent to a listed impairment in appendix 1 of subpart P of part 404 of this chapter if it is at least equal in severity and duration to the criteria of any listed impairment.

(b) How do we determine medical equivalence? We can find medical equivalence in three ways.

(1) (i) If you have an impairment that is described in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, but--

(A) You do not exhibit one or more of the findings specified in the particular listing, or

(B) You exhibit all of the findings, but one or more of the findings is not as severe as specified in the particular listing,

(ii) We will find that your impairment is medically equivalent to that listing if you have other findings related to your impairment that are at least of equal medical significance to the required criteria.

(2) If you have an impairment(s) that is not described in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, we will compare your findings with those for closely analogous listed impairments. If the findings related to your impairment(s) are at least of equal medical significance to those of a listed impairment, we will find that your impairment(s) is medically equivalent to the analogous listing.

(3) If you have a combination of impairments, no one of which meets a listing described in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter (see § 416.925(c)(3)), we will compare your findings with those for closely analogous listed impairments. If the findings related to your impairments are at least of equal medical significance to those of a listed impairment, we will find that your combination of impairments is medically equivalent to that listing.

(4) Section 416.929(d)(3) explains how we consider your symptoms, such as pain, when we make findings about medical equivalence.

(c) What evidence do we consider when we determine if your impairment(s) medically equals a listing? When we determine if your impairment medically equals a listing, we consider all evidence in your case record about your impairment(s) and its effects on you that is relevant to this finding. We do not consider your vocational factors of age, education, and work experience (see, for example, § 416.960(c)(1)). We also consider the opinion given by one or more medical or psychological consultants designated by the Commissioner. (See § 416.1016.)

(d) Who is a designated medical or psychological consultant? A medical or psychological consultant designated by the Commissioner includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. A medical consultant must be a physician. A psychological consultant used in cases where there is evidence of a mental impairment must be a qualified psychologist. (See § 416.1016 for limitations on what medical consultants who are not physicians can evaluate and the qualifications we consider necessary for a psychologist to be a consultant.)

(e) Who is responsible for determining medical equivalence? In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (see § 416.1016 of this part) has the overall responsibility for determining medical equivalence. For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining medical equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 416.1418 of this part, with the Associate Commissioner for Disability Programs or his or her delegate. For cases at the administrative law judge or Appeals Council level, the responsibility for deciding medical equivalence rests with the administrative law judge or Appeals Council.

SSR 83-14

Program Policy Statement

TITLES II AND XVI: CAPABILITY TO DO OTHER WORK--THEMEDICAL-VOCATIONAL RULES AS A FRAMEWORK FOR EVALUATING A COMBINATION OF EXERTIONAL AND NONEXERTIONAL IMPAIRMENTS
SSR 83-14

(PPS-105)
1983

PURPOSE: To clarify how the table rules in Appendix 2, Subpart P, Regulations No. 4, provide a framework for decisions concerning persons who have both a severe exertional impairment and a nonexertional limitation or restriction.

PERTINENT HISTORY: No table rule applies to direct a conclusion of "Disabled" or "Not disabled" where an individual has a nonexertional limitation or restriction imposed by a medically determinable impairment. In these situations, the table rules are used, in conjunction with the definitions and discussions provided in the text of the regulations, as a framework for decisionmaking.

This Program Policy Statement (PPS) clarifies the distinction between exertional and nonexertional limitations and explains how the latter affect performance of work activities. The PPS also explains how to evaluate the vocational effects of nonexertional impairments within the context of the exertionally based table rules where claimants or beneficiaries also have severe exertional

impairments that limit them to sedentary, light, or medium work.

See the cross-reference section at the end of this PPS for related PPS's, the first one of which contains a glossary of terms used.

POLICY STATEMENT: The term "exertional" has the same meaning in the regulations as it has in the United States Department of Labor's publication, the *Dictionary of Occupational Titles* (DOT). In the DOT supplement, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (SCO), occupations are classified as sedentary, light, medium, heavy, and very heavy according to the degree of primary strength requirements of the occupations. These consist of three work positions (standing, walking, and sitting) and four worker movements of objects (lifting, carrying, pushing, and pulling).

Any functional or environmental job requirement which is not exertional is "nonexertional." In the disability programs, a nonexertional impairment is one which is medically determinable and causes a nonexertional limitation of function or an environmental restriction. Nonexertional impairments may or may not significantly narrow the range of work a person can do. In the SCO, where specific occupations have critical demands for certain physical activities, they are rated for climbing or balancing; stooping, kneeling, crouching or crawling; reaching, handling, fingering, or feeling; talking or hearing; and seeing. Occupations are also rated for certain environmental conditions (e.g., high humidity or excessive dust). With respect to job complexity, occupations are rated by the training time required for average performance. Further, the

occupational code numbers assigned to jobs reflect different levels of complexity in dealing with data, people, and objects. Narrative occupational descriptions in the DOT explain what is generally done in the job.

Effects of Nonexertional Impairments

Maintaining body equilibrium; using the fingers and finger tips to work with small objects; using the eyes and ears to see and hear; and using the vocal apparatus to speak are considered nonexertional activities. Limitations of these functions can affect the capacity to perform certain jobs at all levels of physical exertion. An entire range of jobs can be severely compromised. For example, section 201.00(h) of Appendix 2 calls attention to the fact that bilateral manual dexterity is necessary for the performance of substantially all unskilled sedentary occupations.

Mental activities are also nonexertional. Jobs at various levels of complexity require mental functions such as intellectual competence and ability to function in terms of behavior, affect, thought, memory, orientation and contact with reality. Exposure to particular work stresses may not be medically sustainable for some persons with mental impairments, as would be the case with some persons who have physical impairments (e.g., certain cardiovascular or gastrointestinal disorders). Depending on the nature and extent of a person's mental impairment which does not meet or equal the criteria in the Listing of Impairments, relatively broad or narrow types of work may be precluded (e.g., dealing with a variety of abstract and concrete variables with nonverbal symbolism--a highly skilled level of work--or dealing frequently with members of the public--a particular type of work at any level of complexity). Although mental impairments as such as considered to be

nonexertional, some conditions (e.g., depression or a conversion reaction) may also affect a person's exertional capacity.

Working conditions (environmental demands) which a person may not be able to tolerate as a result of an impairment include exposure to extremes of heat or cold, humidity, noise, vibration, hazards, fumes, dust, and toxic conditions. Physical limitation of function may be linked with an environmental restriction (e.g., a respiratory impairment may diminish exertional capacity as well as restrict a person to types of work not requiring exposure to excessive dust or fumes). In other cases, functional ability may not be impaired by an environmental restriction (e.g., a person may be able to do anything so long as he or she is not near dangerous moving machinery, on unprotected elevations, or in contact with certain substances to which he or she is allergic).

After it has been decided that an impaired person can meet the primary strength requirements of sedentary, light, or medium work--sitting, standing, walking, lifting, carrying, pushing, and pulling--a further decision may be required as to how much of this potential occupational base remains, considering certain nonexertional limitations which the person may also have. For example, at all exertional levels, a person must have certain use of the arms and head to grasp, hold, turn, raise, and lower objects. Most sedentary jobs require good use of the hands and fingers. In jobs performed in a seated position which require the operation of pedals or treadles, a person must have the use of his or her legs and feet. Relatively few jobs in the national economy require ascending or descending ladders and scaffolding. Two types of bending must be done frequently (from one-third to two-thirds of the time) in most medium,

heavy, and very heavy jobs because of the positions of objects to be lifted, the amounts of weights to be moved, and the required repetitions. They are stooping (bending the body downward and forward by bending the spine at the waist) and crouching (bending the body downward and forward by bending both the legs and spine). However, to perform substantially all of the exertional requirements of most sedentary and light jobs, a person would not need to crouch and would need to stoop only occasionally (from very little up to one-third of the time, depending on the particular job).

For additional discussions of nonexertional impairments, see SSR 83-13, PPS-104, Capability to Do Other Work--The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments.

Evaluating the Claim

Section 200.00(e)(2) of Appendix 2 provides that, "where an individual has an impairment or combination of impairments resulting in both strength limitations and nonexertional limitations, the rules in this subpart are considered in determining first whether a finding of disabled may be possible based on the strength limitations alone and, if not, the rule(s) reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations. Also, in these combinations of nonexertional and exertional limitations which cannot be wholly determined under the rules in this Appendix 2, full consideration must be given to all of the relevant facts in the case in accordance with the

definitions and discussions of each factor in the appropriate sections of the regulations, which will provide insight into the adjudicative weight to be accorded each factor."

Disabled Based on Strength Limitations Alone

Where a person's residual functional capacity (RFC), age, education, and work experience coincide with the criteria of an exertionally based rule in Table No. 1, 2, or 3--and that rule directs a conclusion of "Disabled"--there is no need to consider the additional effects of a nonexertional impairment since consideration of it would add nothing to the fact of disability. A written determination or decision supporting a conclusion must specify the rule in Appendix 2 which directs such conclusion. It must also reflect consideration of the individual steps of the sequential evaluation process specified in sections 404.1520 and 416.920 of the regulations. There must also be findings of fact based on the evidence in the individual claim which leads to the conclusion that the individual is not exertionally capable of doing work different from past work, considering the medical and vocational factors. (See SSR 83-11, PPS-102, Capability to Do Other Work--The Exertionally Based Medical-Vocational Rules Met.)

The Exertionally Based Rules as a Framework for Evaluating Additional Impairments of a Nonexertional Nature

Where a person cannot be found disabled based on strength limitations alone, the rule(s) which corresponds to the person's vocational profile and maximum sustained exertional work capability (Table No. 1, 2, or 3) will be the starting point to evaluate what the person can still do functionally. The rules will also be used to determine how

the totality of limitations or restrictions reduces the occupational base of administratively noticed unskilled sedentary, light, or medium jobs.

A particular additional exertional or nonexertional limitation may have very little effect on the range of work remaining that an individual can perform. The person, therefore, comes very close to meeting a table rule which directs a conclusion of "Not disabled." On the other hand, an additional exertional or nonexertional limitation may substantially reduce a range of work to the extent that an individual is very close to meeting a table rule which directs a conclusion of "Disabled."

Use of a vocational resource may be helpful in the evaluation of whatappear to be "obvious" types of cases. In more complex situations, the assistance of a vocational resource may be necessary. The publications listed in sections 404.1566 and 416.966 of the regulations will be sufficient for relatively simple issues. In more complex cases, a person or persons with specialized knowledge would be helpful. State agencies may use personnel termed vocational consultants or specialists, or they may purchase the services of vocational evaluation workshops. Vocational experts may testify for this purpose at the hearing and Appeals Council levels. In this PPS, the term vocational specialist (VS) describes all vocational resource personnel.

Examples of Evaluation Involving Combinations of Exertional and Nonexertional Limitations

1. *Sedentary exertion combined with a nonexertional impairment*. Example 1 of section 201.00(h) in Appendix 2 illustrates a limitation to unskilled sedentary work with an additional loss of bilateral manual dexterity that is

significant and, thus, warrants a conclusion of "Disabled." (The bulk of unskilled sedentary jobs requires bilateral manual dexterity.) An example of nonexertional impairment which ordinarily has an insignificant effect on a person's ability to work is an allergy to ragweed pollen. Many individuals who have this allergy experience no more discomfort during the ragweed season than someone who has a common cold. However, others are more affected by the condition. Assuming that an individual has a severe impairment of the low back which limits that person to sedentary work, and that the assessment of RFC also restricts him or her from workplaces which involve exposure to ragweed pollen, the implications for adjustment to sedentary work are relatively clear. Ragweed grows outdoors and its pollen is carried in the air, but the overwhelming majority of sedentary jobs are performed indoors. Therefore, with the possible exclusion of some outdoor sedentary occupations which would require exposure to ragweed pollen, the unskilled sedentary occupational base is not significantly compromised. The decisionmaker may need the assistance of a VS in determining the significance of the remaining occupational base of unskilled sedentary work in more difficult cases.

2. *Light exertion combined with a nonexertional impairment*. The major difference between sedentary and light work is that most light jobs-- particularly those at the unskilled level of complexity--require a person to be standing or walking most of the workday. Another important difference is that the frequent lifting or carrying of objects weighing up to 10 pounds (which is required for the full range of light work) implies that the worker is able to do occasional bending of the stooping type; i.e., for no more than one-third of the workday to bend the body downward and forward by bending the spine at the waist.

Unlike unskilled sedentary work, many unskilled light jobs do not entail fine use of the fingers. Rather, they require gross use of the hands to grasp, hold, and turn objects. Any limitation on these functional abilities must be considered very carefully to determine its impact on the size of the remaining occupational base of a person who is otherwise found functionally capable of light work.

Where a person has a visual impairment which is not of Listing severity but causes the person to be a hazard to self and others--usually a constriction of visual fields rather than a loss of acuity--the manifestations of tripping over boxes while walking, inability to detect approaching persons or objects, difficulty in walking up and down stairs, etc., will indicate to the decisionmaker that the remaining occupational base is significantly diminished for light work (and medium work as well).

On the other hand, there are nonexertional limitations or restrictions which have very little or no effect on the unskilled light occupational base. Examples are inability to ascend or descend scaffolding, poles, and ropes; inability to crawl on hands and knees; and inability to use the finger tips to sense the temperature or texture of an object. Environmental restrictions, such as the need to avoid exposure to feathers, would also not significantly affect the potential unskilled light occupational base.

Where nonexertional limitations or restrictions within the light work category are between the examples above, a decisionmaker will often require the assistance of a VS.

3. *Medium exertion combined with a nonexertional impairment*. Most medium jobs, like most light jobs, require the worker to stand or walk most of the time. Also, as in light work, most unskilled medium jobs require gross use of the hands to grasp, hold, and turn objects rather than use of the fingers for fine movements of small objects.

Medium work is distinct from the less strenuous levels in the activities needed to accomplish the considerable lifting and carrying involved for the full range of medium work. A maximum of 50 pounds may be lifted at a time, with frequent lifting or carrying of objects weighing up to 25 pounds. (Frequent in this context means from one-third to two-thirds of the workday.) Consequently, to perform the full range of medium work as defined, a person must be able to do both frequent stooping and frequent crouching--bending both the back and the legs--in order to move objects from one level to another or to move the objects near foot level. While individual occupations classified as medium work vary in exertional demands from just above the light work requirements to the full range of medium work, any limitation of these functional abilities must be considered very carefully to determine its impact on the size of the remaining occupational base of a person who is otherwise found capable of medium work.

In jobs at the medium level of exertion, there is more likelihood than in light work that such factors as the ability to ascend or descend ladders and scaffolding, kneel, and crawl will be a part of the work requirement. However, limitations of these activities would not significantly affect the occupational base.

As in light work, inability to use the finger tips to sense the temperature or texture of an object is an example of a nonexertional limitation which would have very little effect on the potential unskilled medium occupational base. The need to avoid environments which contain objects or substances commonly known not to exist in most workplaces would be an obvious example of a restriction which does not significantly affect the medium occupational base.

Where nonexertional limitations or restrictions within the medium work category are between the examples above, a

decisionmaker will often require the assistance of a VS.

The Disability Determination or Decision Based on a Combination of Exertional and Nonexertional Impairments

The usual requirements apply for a clear, persuasive, orderly rationale, reflecting the sequential evaluation process. There must be findings of fact and recitation of the evidence which supports each finding (see SSR 82-56, PPS-81, The Sequential Evaluation Process). Whenever a vocational resource is used and an individual is found to be not disabled, the determination or decision will include (1) citations of examples of occupations/jobs the person can do functionally and vocationally and (2) a statement of the incidence of such work in the region in which the individual resides or in several regions of the country.

In reaching judgments as to the sufficiency of the remaining exertional job base (approximately 2,500 unskilled medium, light, and sedentary occupations, approximately 1,600 unskilled light and sedentary occupations, and approximately 200 unskilled sedentary occupations), there are three possible situations to consider:

1. Where it is clear that the additional limitation or restriction has very little effect on the exertional occupational base, the conclusion directed by the appropriate rule in Tables No. 1, 2, or 3 would not be affected.
2. Where it is clear that additional limitations or restrictions have significantly eroded the exertional job base set by the exertional limitations alone, the remaining portion of the job base will guide the decision.
3. Where the adjudicator does not have a clear understanding of the effects of additional limitations on the job base, the services of a VS will be necessary.

SSR 85-15

Program Policy Statement

1 TITLES II AND XVI: CAPABILITY TO DO OTHER WORK--THEMEDICAL-VOCATIONAL RULES AS A FRAMEWORK FOR EVALUATING SOLELY NONEXERTIONAL IMPAIRMENTS
SSR 85-15

(PPS-119)
1985

This supersedes Program Policy Statement No. 116 (SSR 85-7) with the same title (which superseded Program Policy Statement No. 104 (SSR 83-13) and is in accord with an order of the U.S. District Court for the District of Minnesota.

PURPOSE: The original purpose of SSR 83-13 was to clarify how the regulations and the exertionally based numbered decisional rules in Appendix 2, Subpart P, Regulations No. 4, provide a framework for decisions concerning persons who have only a nonexertional limitation(s) of function or an environmental restriction(s). The purpose of this revision to SSR 83-13 and SSR 85-7 is to emphasize, in the sections relating to mental impairments: (1) that the potential job base for mentally ill claimants without adverse vocational factors is not necessarily large even for individuals who have no other impairments, unless their remaining mental capacities are sufficient to meet the intellectual and emotional demands of at least unskilled, competitive, remunerative work on a sustained basis; and (2) that a finding of disability can be appropriate for an individual who has a severe mental impairment which does not meet or equal the Listing of Impairments, even where he or she does not have adversities in age, education, or work

experience.

PERTINENT HISTORY: If a person has a severe medically determinable impairment which, though not meeting or equaling the criteria in the Listing of Impairments, prevents the person from doing past relevant work, it must be determined whether the person can do other work. This involves consideration of the person's RFC and the vocational factors of age, education, and work experience.

The Medical-Vocational Guidelines (Regulations No. 4, Subpart P, Appendix 2) discuss the relative adjudicative weights which are assigned to a person's age, education, and work experience. Three tables in Appendix 2 illustrate the interaction of these vocational factors with his or her RFC. RFC is expressed in terms of sedentary, light, and medium work exertion. The table rules reflect the potential occupational base of unskilled jobs for individuals who have severe impairments which limit their exertional capacities: approximately 2,500 medium, light, and sedentary occupations; 1,600 light and sedentary occupations; and 200 sedentary occupations--each occupation representing numerous jobs in the national economy. (See the text and glossary in SSR 83-10, PPS-101, Determining Capability to Do Other Work--the Medical-Vocational Rules of Appendix 2.) Where individuals also have nonexertional limitations of function or environmental restrictions, the table rules provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs within these exertional ranges that would be contraindicated by the additional limitations or restrictions. However, where a person has solely a nonexertional impairment(s), the table rules do not direct conclusions of disabled or not disabled. Conclusions must, instead, be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for

specific case situations in Appendix 2.

This PPS clarifies policies applicable in cases involving the evaluation of solely nonexertional impairments.

POLICY STATEMENT: Given that no medically determinable impairment limits exertion, the RFC reflecting the severity of the particular nonexertional impairment(s) with its limiting effects on the broad world of work is the first issue. The individual's relative advantages or adversities in terms of age, education, and work experience is the second. Section 204.00 of Appendix 2 provides an example of one type of nonexertional impairment-environmental restrictions--and states that environmental restrictions ordinarily would not significantly affect the range of work existing in the national economy for individuals with the physical capability for heavy work (or very heavy work); i.e., with no medically determinable impairment which limits exertion. However, numerous environmental restrictions might lead to a different conclusion, as might one or more severe losses of nonexertional functional capacities. The medical and vocational factors of the individual case determine whether exclusion of particular occupations or kinds of work so reduces the person's vocational opportunity that a work adjustment could not be made.

Nonexertional Impairments Contrasted With Exertional Impairments

The term “exertional” has the same meaning in the regulations as it has in the U.S. Department of Labor's classifications of occupations by strength levels. (See SSR 83-10, PPS-101, Determining Capability to Do Other Work--The Medical-Vocational Rules of Appendix 2.) Any job requirement which is not exertional is considered to be nonexertional. A nonexertional impairment is one which is

medically determinable and causes a nonexertional limitation of function or an environmental restriction. Nonexertional impairments may or may not affect a person's capacity to carry out the primary strength requirements of jobs, and they may or may not significantly narrow the range of work a person can do. Nonexertional limitations can affect the abilities to reach; to seize, hold, grasp, or turn an object (handle); to bend the legs alone (kneel); to bend the spine alone (stoop) or bend both the spine and legs (crouch). Fine movements of small objects, such as done in much sedentary work and in certain types of more demanding work (e.g., surgery), require use of the fingers to pick, pinch, etc. Impairments of vision, speech, and hearing are nonexertional. Mental impairments are generally considered to be nonexertional, but depressions and conversion disorders may limit exertion. Although some impairments may cause both exertional limitations and environmental restrictions (e.g., a respiratory impairment may limit a person to light work exertion as well as contraindicate exposure to excessive dust or fumes), other impairments may result in only environmental restrictions (e.g., skin allergies may only contraindicate contact with certain liquids). What is a nonexertional and extremely rare factor in one range of work (e.g., crawling in sedentary work) may become an important element in arduous work like coal mining.

Where a person's exertional capacity is compromised by a nonexertional impairment(s), see SSR 83-14, PPS-105, Capability to Do Other Work--The Medical-Vocational Rules as a Framework for Evaluating a Combination of Exertional and Nonexertional Impairments.

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SSR 00-4P

Policy Interpretation Ruling

POLICY INTERPRETATION RULING : TITLES II AND XVI: USE OF VOCATIONAL EXPERT AND VOCATIONAL SPECIALIST EVIDENCE, AND OTHER RELIABLE OCCUPATIONAL INFORMATION IN DISABILITY DECISIONS
SSR 00-4p

December 4, 2000

PURPOSE: This Ruling clarifies our standards for the use of vocational experts (VEs) who provide evidence at hearings before administrative law judges (ALJs), vocational specialists (VSs) who provide evidence to disability determination services (DDS) adjudicators, and other reliable sources of occupational information in the evaluation of disability claims. In particular, this ruling emphasizes that before relying on VE or VS evidence to support a disability determination or decision, our adjudicators must: Identify and obtain a reasonable explanation for any conflicts between occupational evidence provided by VEs or VSs and information in the Dictionary of Occupational Titles (DOT), including its companion publication, the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCO), published by the Department of Labor, and Explain in the determination or decision how any conflict that has been identified was resolved.

PERTINENT HISTORY:

To determine whether an individual applying for disability benefits (except for a child applying for Supplement Security Income) is disabled, we follow a 5-step sequential evaluation

process as follows:

1. Is the individual engaging in substantial gainful activity? If the individual is working and the work is substantial gainful activity, we find that he or she is not disabled.

2. Does the individual have an impairment or combination of impairments that is severe? If the individual does not have an impairment or combination of impairments that is severe, we will find that he or she is not disabled. If the individual has an impairment or combination of impairments that is severe, we proceed to step 3 of the sequence.

3. Does the individual's impairment(s) meet or equal the severity of an impairment listed in appendix 1 of subpart P of part 404 of our regulations? If so, we find that he or she is disabled. If not, we proceed to step 4 of the sequence.

4. Does the individual's impairment(s) prevent him or her from doing his or her past relevant work (PRW), considering his or her residual functional capacity (RFC)? If not, we find that he or she is not disabled. If so, we proceed to step 5 of the sequence.

5. Does the individual's impairment(s) prevent him or her from performing other work that exists in the national economy, considering his or her RFC together with the "vocational factors" of age, education, and work experience? If so, we find that the individual is disabled. If not, we find that he or she is not disabled.

The regulations at 20 CFR 404.1566(d) and 416.966(d) provide that we will take administrative notice of "reliable job information" available from various publications, including the DOT. In addition, as provided in 20 CFR 404.1566(e) and 416.966(e), we use VEs and VSs as sources of occupational evidence in certain cases. Questions have arisen about how we ensure that conflicts between occupational evidence provided by a VE or a VS and information in the DOT (including its companion publication, the SCO) are resolved. Therefore, we

are issuing this ruling to clarify our standards for identifying and resolving such conflicts.

POLICY INTERPRETATION: Using Occupational Information at Steps 4 and 5

In making disability determinations, we rely primarily on the DOT (including its companion publication, the SCO) for information about the requirements of work in the national economy. We use these publications at steps 4 and 5 of the sequential evaluation process. We may also use VEs and VSs at these steps to resolve complex vocational issues.[FN1] We most often use VEs to provide evidence at a hearing before an ALJ. At the initial and reconsideration steps of the administrative review process, adjudicators in the DDSs may rely on VSs for additional guidance. See, for example, SSRs 82-41, 83-12, 83-14, and 85-15.

Resolving Conflicts in Occupational Information

Occupational evidence provided by a VE or VS generally should be consistent with the occupational information supplied by the DOT. When there is an apparent unresolved conflict between VE or VS evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about whether the claimant is disabled. At the hearings level, as part of the adjudicator's duty to fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such consistency.

Neither the DOT nor the VE or VS evidence automatically "trumps" when there is a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on the VE or VS testimony rather than on the DOT information.

Reasonable Explanations for Conflicts (or Apparent Conflicts) in Occupational Information

Reasonable explanations for such conflicts, which may provide a basis for relying on the evidence from the VE or VS, rather than the DOT information, include, but are not limited to the following:

> Evidence from VEs or VSs can include information not listed in the DOT. The DOT contains information about most, but not all, occupations. The DOT's occupational definitions are the result of comprehensive studies of how similar jobs are performed in different workplaces. The term "occupation," as used in the DOT, refers to the collective description of those jobs. Each occupation represents numerous jobs. Information about a particular job's requirements or about occupations not listed in the DOT may be available in other reliable publications, information obtained directly from employers, or from a VE's or VS's experience in job placement or career counseling.
>
> The DOT lists maximum requirements of occupations as generally performed, not the range of requirements of a particular job as it is performed in specific settings. A VE, VS, or other reliable source of occupational information may be able to provide more specific information about jobs or occupations than the DOT.

Evidence That Conflicts With SSA Policy

SSA adjudicators may not rely on evidence provided by a VE, VS, or other reliable source of occupational information if that evidence is based on underlying assumptions or definitions that are inconsistent with our regulatory policies or definitions. For example:

Exertional Level

We classify jobs as sedentary, light, medium, heavy and very heavy (20 CFR 404.1567 and 416.967). These terms have the same meaning as they have in the exertional classifications noted in the DOT.

Although there may be a reason for classifying the exertional demands of an occupation (as generally performed) differently than the DOT (e.g., based on other reliable occupational information), the regulatory definitions of exertional levels are controlling. For example, if all available evidence (including VE testimony) establishes that the exertional demands of an occupation meet the regulatory definition of "medium" work (20 CFR 404.1567 and 416.967), the adjudicator may not rely on VE testimony that the occupation is "light" work.

Skill Level

A skill is knowledge of a work activity that requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation that is above the unskilled level (requires more than 30 days to learn). (See SSR 82-41.) Skills are acquired in PRW and may also be learned in recent education that provides for direct entry into skilled work.

The DOT lists a specific vocational preparation (SVP) time for each described occupation. Using the skill level definitions in 20 CFR 404.1568 and 416.968, unskilled work corresponds to an SVP of 1-2; semi-skilled work corresponds to an SVP of 3-4; and skilled work corresponds to an SVP of 5-9 in the DOT.

Although there may be a reason for classifying an occupation's skill level differently than in the DOT, the regulatory definitions of skill levels are controlling. For example, VE or VS evidence may not be relied upon to

establish that unskilled work involves complex duties that take many months to learn, because that is inconsistent with the regulatory definition of unskilled work. See 20 CFR 404.1568 and 416.968.

Transferability of Skills

Evidence from a VE, VS, or other reliable source of occupational information cannot be inconsistent with SSA policy on transferability of skills. For example, an individual does not gain skills that could potentially transfer to other work by performing unskilled work. Likewise, an individual cannot transfer skills to unskilled work or to work involving a greater level of skill than the work from which the individual acquired those skills. See SSR 82-41.

The Responsibility To Ask About Conflicts

When a VE or VS provides evidence about the requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible conflict between that VE or VS evidence and information provided in the DOT. In these situations, the adjudicator will:

Ask the VE or VS if the evidence he or she has provided conflicts with information provided in the DOT; and
If the VE's or VS's evidence appears to conflict with the DOT, the adjudicator will obtain a reasonable explanation for the apparent conflict.

Explaining the Resolution

When vocational evidence provided by a VE or VS is not consistent with information in the DOT, the adjudicator must resolve this conflict before relying on the VE or VS evidence to support a determination or decision that the individual is or is not disabled. The adjudicator will explain in the determination or decision how he or she resolved the conflict. The adjudicator must explain the resolution of the conflict irrespective of how the conflict was identified.

Dictionary of Occupational Titles 209.567-014

2 Clerical and Sales Occupations

20 Stenography, Typing, Filing, and Related Occupations 209 Stenography, Typing, Filing, and Related Occupations, N.E.C. 209.567-014 ORDER CLERK, FOOD AND BEVERAGE Industry Designation: Hotel and Restaurant Industry

Takes food and beverage orders over telephone or intercom system and records order on ticket: Records order and time received on ticketto ensure prompt service, using time-stamping device.Suggests menu items,and substitutions for items not available, and answers questions regarding food or service. Distributes order tickets or calls out order to kitchen employees. May collect charge vouchers and cash for service and keep record of transactions. May be designated according to type of order handled as Telephone-Order Clerk, Drive-In (hotel & rest.); Telephone-Order Clerk, Room Service (hotel & rest.).

GUIDE FOR OCCUPATIONAL EXPLORATION: 07.04.02

STRENGTH: Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work invoves sitting most of the time, but may

involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occsasionally and all other sedentary criteria are met.

Reasoning: Level 3 - Apply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations.

Math: Level 1 - Add and subtract two-digit numbers. Multiply and divide 10's and 100's by 2, 3, 4, 5. Perform the four basic arithmetic operations with coins as part of a dollar. Perform operations with units such as cup, pint, and quart; inch, foot, and yard; and ounce and pound.

Language: Level 2 - READING: Passive vocabulary of 5,000-6,000 words. Read at rate of 190-215 words per minute. Read adventure stories and comic books, looking up unfamiliar words in dictionary for meaning, spelling, and pronunciation. Read instructions for assembling model cars and airplanes.

WRITING: Write compound and complex sentences, using cursive style, proper end puncuation, and employing adjectives and adverbs.

SPEAKING: Speak clearly and distinctly with appropriate pauses and emphasis, correct puncuation, variations in word order, using present, perfect, and future tenses.

SPECIFIC VOCATIONAL PREPARATION: Level 2 - Anything beyond short demonstration up to and including 1month

Data: 5 - Copying

S - Significant

People: 6 - Speaking-Signalling

S - Significant

Things: 7 - Handling

N - Not Significant

Field 1: 231 - Verbal Recording-Record Keeping

Field 1: 890 - GENERAL BUSINESS, FINANCE, INSURANCE, AND REAL ESTATE SERVICES

Field 2: 903 - Meal Services, except Domestic (food, beverage, and catering)

General Learning Ability: Level 3 - Middle 1/3 of the Population

Medium Degree of Aptitude Ability

Verbal Aptitude: Level 3 - Middle 1/3 of the Population

Medium Degree of Aptitude Ability

Numerical Aptitude: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Spacial Aptitude: Level 5 - Bottom 10% of the

Population

Markedly Low Aptitude Ability

Form Perception: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Clerical Perception: Level 3 - Middle 1/3 of the Population

Medium Degree of Aptitude Ability

Motor Coordination: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Finger Dexterity: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Manual Dexterity: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Eye-Hand-Foot Coordination: Level 5 - Bottom 10% of the Population

Markedly Low Aptitude Ability

Color Discrimination: Level 5 - Bottom 10% of the

Population

Markedly Low Aptitude Ability

P: Dealing with PEOPLE

T: Attaining precise set limits, TOLERANCES, and standards

Climbing: Not Present - Activity or condition does not exist

Balancing: Not Present - Activity or condition does not exist

Stooping: Not Present - Activity or condition does not exist

Kneeling: Not Present - Activity or condition does not exist

Crouching: Not Present - Activity or condition does not exist

Crawling: Not Present - Activity or condition does not exist

Reaching: Frequently - Exists from 1/3 to 2/3 of the time

Handling: Frequently - Exists from 1/3 to 2/3 of the time

Fingering: Frequently - Exists from 1/3 to 2/3 of the time

Feeling: Not Present - Activity or condition does not exist

Talking: Frequently - Exists from 1/3 to 2/3 of the time

Hearing: Frequently - Exists from 1/3 to 2/3 of the time

Tasting/Smelling: Not Present - Activity or condition does not exist

Near Acuity: Frequently - Exists from 1/3 to 2/3 of the time

Far Acuity: Not Present - Activity or condition does not exist

Depth Perception: Not Present - Activity or condition does not exist

Accommodation: Not Present - Activity or condition does not exist Color Vision: Not Present - Activity or condition does not exist

Field of Vision: Not Present - Activity or condition does not exist

Exposure to Weather: Not Present - Activity or condition does not exist Extreme Cold: Not Present - Activity or condition does not exist

Extreme Heat: Not Present - Activity or condition does not exist

Wet and/or Humid: Not Present - Activity or condition does not exist

Noise Level: Level 2 - Quiet

Vibration: Not Present - Activity or condition does not exist

Atmospheric Cond.: Not Present - Activity or condition does not exist

Moving Mech. Parts: Not Present - Activity or condition does not exist

Electric Shock: Not Present - Activity or condition does not exist

High Exposed Places: Not Present - Activity or condition does not exist

Radiation: Not Present - Activity or condition does not exist

Explosives: Not Present - Activity or condition does not exist

Toxic Caustic Chem.: Not Present - Activity or condition does not exist

Other Env. Cond.: Not Present - Activity or condition does not exist

Dictionary of Occupational Titles 209.587-014

Occupational Group Arrangement

2 Clerical and Sales Occupations

20 Stenography, Typing, Filing, and Related Occupations
209 Stenography, Typing, Filing, and Related Occupations, N.E.C.

209.587-014 CREDIT-CARD CLERK Industry Designation: Retail Trade Industry

Issues credit cards to customers for use as identification when purchasing articles to be charged to their account. Assigns and records card identification number on customer's account. Keeps records of cards reported lost and issues replacement cards.

GUIDE FOR OCCUPATIONAL EXPLORATION: 07.05.03

STRENGTH: Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work invoves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occsasionally and all other sedentary criteria are met.

Reasoning: Level 3 - Apply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations.

Math: Level 1 - Add and subtract two-digit numbers. Multiply and divide 10's and 100's by 2, 3, 4, 5. Perform the four basic arithmetic operations with coins as part of a dollar. Perform operations with units such as cup, pint, and quart; inch, foot, and yard; and ounce and pound.

Language: Level 3 - READING: Read a variety of novels, magazines, atlases, and encyclopedias. Read safety rules, instructions in the use and maintenance of shop tools and equipment, and methods and procedures in mechanical drawing and layout work.

WRITING: Write reports and essays with proper format, puncuation, spelling, and grammar, using all parts of speech.

SPEAKING: Speak before an audience with poise, voice control, and confidence, using correct English and a well-modulated voice.

SPECIFIC VOCATIONAL PREPARATION: Level 3 - Over 1 month up to and including 3 months

Data: 5 - Copying

S - Significant

People: 8 - Taking Instructions-Helping

N - Not Significant

Things: 7 - Handling

N - Not Significant

Field 1: 231 - Verbal Recording-Record Keeping

Field 1: 891 - Clerical Services, except Bookkeeping (stenographic, secretarial, typing, filing, duplicating, etc.)

General Learning Ability: Level 3 - Middle 1/3 of the Population

Medium Degree of Aptitude Ability

Verbal Aptitude: Level 3 - Middle 1/3 of the Population

Medium Degree of Aptitude Ability

Numerical Aptitude: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Spacial Aptitude: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Form Perception: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Clerical Perception: Level 3 - Middle 1/3 of the

Population

Medium Degree of Aptitude Ability

Motor Coordination: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Finger Dexterity: Level 3 - Middle 1/3 of the Population

Medium Degree of Aptitude Ability

Manual Dexterity: Level 4 - Lowest 1/3 Excluding Bottom 10%

Low Degree of Aptitude Ability

Eye-Hand-Foot Coordination: Level 5 - Bottom 10% of the Population

Markedly Low Aptitude Ability

Color Discrimination: Level 5 - Bottom 10% of the Population

Markedly Low Aptitude Ability

R: Performing REPETITIVE or short-cycle work

Climbing: Not Present - Activity or condition does not exist

Balancing: Not Present - Activity or condition does not

exist

Stooping: Not Present - Activity or condition does not exist

Kneeling: Not Present - Activity or condition does not exist

Crouching: Not Present - Activity or condition does not exist

Crawling: Not Present - Activity or condition does not exist

Reaching: Frequently - Exists from 1/3 to 2/3 of the time

Handling: Frequently - Exists from 1/3 to 2/3 of the time

Fingering: Frequently - Exists from 1/3 to 2/3 of the time

Feeling: Not Present - Activity or condition does not exist

Talking: Not Present - Activity or condition does not exist

Hearing: Not Present - Activity or condition does not exist

Tasting/Smelling: Not Present - Activity or condition does not exist

Near Acuity: Not Present - Activity or condition does not exist

Far Acuity: Not Present - Activity or condition does not exist

Depth Perception: Not Present - Activity or condition does not exist

Accommodation: Not Present - Activity or condition does not exist

Color Vision: Not Present - Activity or condition does not exist

Field of Vision: Not Present - Activity or condition does not exist

Exposure to Weather: Not Present - Activity or condition does not exist Extreme Cold: Not Present - Activity or condition does not exist Extreme Heat: Not Present - Activity or condition does not exist Wet and/or Humid: Not Present - Activity or condition does not exist

Noise Level: Level 3 - Moderate

Vibration: Not Present - Activity or condition does not exist

Atmospheric Cond.: Not Present - Activity or condition does not exist

Moving Mech. Parts: Not Present - Activity or condition does not exist

Electric Shock: Not Present - Activity or condition does not exist

High Exposed Places: Not Present - Activity or condition does not exist

Radiation: Not Present - Activity or condition does not exist

Explosives: Not Present - Activity or condition does not exist

Toxic Caustic Chem.: Not Present - Activity or condition does not exist

Other Env. Cond.: Not Present - Activity or condition does not exist