UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

DANIEL T. COLEMAN	:	
	:	
v.	:	C.A. No. 08-034A
	:	
MICHAEL J. ASTRUE,	:	
Commissioner of the Social Security	:	
Administration	:	

MEMORANDUM AND ORDER

This matter is before the Court for judicial review of a final decision of the Commissioner of the Social Security Administration ("Commissioner") denying Supplemental Security Income ("SSI") benefits and Disability Insurance Benefits ("DIB") under the Social Security Act ("Act"), 42 U.S.C. § 405(g). Plaintiff filed his Complaint on January 24, 2008 seeking to reverse the decision of the Commissioner. On August 11, 2008, Plaintiff filed a Motion to Reverse the Decision of the Commissioner. (Document No. 9). On September 11, 2008, the Commissioner filed a Motion for an Order Affirming the Decision of the Commissioner. (Document No. 10).

With the consent of the parties, this case has been referred to me for all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Based upon my review of the record and the legal memoranda filed by the parties, I find that there is substantial evidence in the record to support the Commissioner's decision and findings that Plaintiff is not disabled within the meaning of the Act. Consequently, I order that the Commissioner's Motion for an Order Affirming the Decision of the Commissioner

(Document No. 10) be GRANTED and Plaintiff's Motion to Reverse the Decision of the Commissioner (Document No. 9) be DENIED.

I. PROCEDURAL HISTORY

Plaintiff filed applications for DIB and SSI on March 22, 2005 (Tr. 92-94) alleging disability as of May 31, 2002. Plaintiff's date last insured for DIB is December 31, 2004. (Tr. 13, 95). The application was denied initially (Tr. 82-87) and on reconsideration. (Tr. 75-80). Plaintiff filed a request for an administrative hearing. (Tr. 74). On December 15, 2006, a hearing was held before Administrative Law Judge Martha H. Bower (the "ALJ") at which Plaintiff, represented by counsel, and a vocational expert ("VE") appeared and testified. (Tr. 38-71).

On December 22, 2006, the ALJ issued a decision finding that Plaintiff was not disabled. (Tr. 10-24). The Appeals Council denied Plaintiff's request for review on December 5, 2007. (Tr. 6-8). A timely appeal was then filed with this Court.

II. THE PARTIES' POSITIONS

Plaintiff argues that the ALJ's findings regarding Plaintiff's mental impairments were not supported by substantial evidence. Plaintiff also contends that the ALJ erred by failing to obtain medical expert testimony at the hearing to assist in determining the date of onset of his disability.

The Commissioner disputes Plaintiff's claims and asserts that the ALJ properly evaluated Plaintiff's mental impairments and properly found no severe mental impairment prior to December 31, 2004. The Commissioner also asserts that there is substantial evidence which supports the ALJ's assessment of Plaintiff's mental RFC.

III. THE STANDARD OF REVIEW

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – i.e., the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health and Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

Where the Commissioner's decision is supported by substantial evidence, the court must affirm, even if the court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health and Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991). The court must view the evidence as a whole, taking into account evidence favorable as well as unfavorable to the decision. Frustaglia v. Sec'y of Health and Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied).

The court must reverse the ALJ's decision on plenary review, however, if the ALJ applies incorrect law, or if the ALJ fails to provide the court with sufficient reasoning to determine that he or she properly applied the law. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145 (11th Cir. 1991). Remand is unnecessary where all of the essential evidence was before the Appeals Council when it denied review, and the evidence establishes without any doubt that the claimant was disabled. Seavey

v. Barnhart, 276 F.3d 1, 11 (1st Cir. 2001) citing, Mowery v. Heckler, 771 F.2d 966, 973 (6th Cir. 1985).

The court may remand a case to the Commissioner for a rehearing under sentence four of 42 U.S.C. § 405(g); under sentence six of 42 U.S.C. § 405(g); or under both sentences. Seavey, 276 F.3d at 8. To remand under sentence four, the court must either find that the Commissioner's decision is not supported by substantial evidence, or that the Commissioner incorrectly applied the law relevant to the disability claim. Id.; accord Brenem v. Harris, 621 F.2d 688, 690 (5th Cir. 1980) (remand appropriate where record was insufficient to affirm, but also was insufficient for district court to find claimant disabled).

Where the court cannot discern the basis for the Commissioner's decision, a sentence four remand may be appropriate to allow her to explain the basis for her decision. Freeman v. Barnhart, 274 F.3d 606, 609-610 (1st Cir. 2001). On remand under sentence four, the ALJ should review the case on a complete record, including any new material evidence. Diorio v. Heckler, 721 F.2d 726, 729 (11th Cir. 1983) (necessary for ALJ on remand to consider psychiatric report tendered to Appeals Council). After a sentence four remand, the court enters a final and appealable judgment immediately, and thus loses jurisdiction. Freeman, 274 F.3d at 610.

In contrast, sentence six of 42 U.S.C. § 405(g) provides:

> The court...may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding;

42 U.S.C. § 405(g). To remand under sentence six, the claimant must establish: (1) that there is new, non-cumulative evidence; (2) that the evidence is material, relevant and probative so that there is a reasonable possibility that it would change the administrative result; and (3) there is good cause for failure to submit the evidence at the administrative level. See Jackson v. Chater, 99 F.3d 1086, 1090-1092 (11th Cir. 1996).

A sentence six remand may be warranted, even in the absence of an error by the Commissioner, if new, material evidence becomes available to the claimant. Jackson, 99 F.3d at 1095. With a sentence six remand, the parties must return to the court after remand to file modified findings of fact. Id. The court retains jurisdiction pending remand, and does not enter a final judgment until after the completion of remand proceedings. Id.

IV. DISABILITY DETERMINATION

The law defines disability as the inability 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 twelve months. 42 U.S.C. §§ 416(I), 423(d)(1); 20 C.F.R. § 404.1505. The impairment must be severe, making the claimant unable to do her previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 404.1505-404.1511.

A. Treating Physicians

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there is good cause to do otherwise. See Rohrberg v. Apfel, 26 F.

Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. § 404.1527(d). If a treating physician's opinion on the nature and severity of a claimant's impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is not inconsistent with the other substantial evidence in the record, the ALJ must give it controlling weight. 20 C.F.R. § 404.1527(d)(2). The ALJ may discount a treating physician's opinion or report regarding an inability to work if it is unsupported by objective medical evidence or is wholly conclusory. See Keating v. Sec'y of Health and Human Servs., 848 F.2d 271, 275-276 (1st Cir. 1988).

Where a treating physician has merely made conclusory statements, the ALJ may afford them such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's impairments. See Wheeler v. Heckler, 784 F.2d 1073, 1075 (11th Cir. 1986). When a treating physician's opinion does not warrant controlling weight, the ALJ must nevertheless weigh the medical opinion based on the (1) length of the treatment relationship and the frequency of examination; (2) nature and extent of the treatment relationship; (3) medical evidence supporting the opinion; (4) consistency with the record as a whole; (5) specialization in the medical conditions at issue; and (6) other factors which tend to support or contradict the opinion. 20 C.F.R § 404.1527(d). However, a treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See 20 C.F.R. § 404.1527(d)(2).

The ALJ is required to review all of the medical findings and other evidence that support a medical source's statement that a claimant is disabled. However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. 20 C.F.R. § 404.1527(e). The ALJ is not required to give any special significance

to the status of a physician as treating or non-treating in weighing an opinion on whether the claimant meets a listed impairment, a claimant's RFC (see 20 C.F.R. §§ 404.1545 and 404.1546), or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. § 404.1527(e). See also Dudley v. Sec'y of Health and Human Servs., 816 F.2d 792, 794 (1st Cir. 1987).

B. Developing the Record

The ALJ has a duty to fully and fairly develop the record. Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991). The Commissioner also has a duty to notify a claimant of the statutory right to retained counsel at the social security hearing, and to solicit a knowing and voluntary waiver of that right if counsel is not retained. See 42 U.S.C. § 406; Evangelista v. Sec'y of Health and Human Servs., 826 F.2d 136, 142 (1st Cir. 1987). The obligation to fully and fairly develop the record exists if a claimant has waived the right to retained counsel, and even if the claimant is represented by counsel. Id. However, where an unrepresented claimant has not waived the right to retained counsel, the ALJ's obligation to develop a full and fair record rises to a special duty. See Heggarty, 947 F.2d at 997, citing Currier v. Sec'y of Health Educ. and Welfare, 612 F.2d 594, 598 (1st Cir. 1980).

C. Medical Tests and Examinations

The ALJ is required to order additional medical tests and exams only when a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled. 20 C.F.R. § 416.917; see also Conley v. Bowen, 781 F.2d 143, 146 (8th Cir. 1986). In fulfilling his duty to conduct a full and fair inquiry, the ALJ is not

required to order a consultative examination unless the record establishes that such an examination is necessary to enable the ALJ to render an informed decision. Carrillo Marin v. Sec'y of Health and Human Servs., 758 F.2d 14, 17 (1st Cir. 1985).

D. The Five-step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. §§ 404.1520, 416.920. First, if a claimant is working at a substantial gainful activity, she is not disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any impairment or combination of impairments which significantly limit her physical or mental ability to do basic work activities, then she does not have a severe impairment and is not disabled. 20 C.F.R. § 404.1520(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, she is disabled. 20 C.F.R. § 404.1520(d). Fourth, if a claimant's impairments do not prevent her from doing past relevant work, she is not disabled. 20 C.F.R. § 404.1520(e). Fifth, if a claimant's impairments (considering her RFC, age, education and past work) prevent her from doing other work that exists in the national economy, then she is disabled. 20 C.F.R. § 404.1520(f). Significantly, the claimant bears the burden of proof at steps one through four, but the Commissioner bears the burden at step five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five-step process applies to both SSDI and SSI claims).

In determining whether a claimant's physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant's impairments, and must consider any medically severe combination of impairments throughout the disability

determination process. 42 U.S.C. § 423(d)(2)(B). Accordingly, the ALJ must make specific and well-articulated findings as to the effect of a combination of impairments when determining whether an individual is disabled. Davis v. Shalala, 985 F.2d 528, 534 (11th Cir. 1993).

The claimant bears the ultimate burden of proving the existence of a disability as defined by the Social Security Act. Seavey, 276 F.3d at 5. The claimant must prove disability on or before the last day of her insured status for the purposes of disability benefits. Deblois v. Sec'y of Health and Human Servs., 686 F.2d 76 (1st Cir. 1982), 42 U.S.C. §§ 416(I)(3), 423(a), (c). If a claimant becomes disabled after she has lost insured status, her claim for disability benefits must be denied despite her disability. Id.

E. Other Work

Once the ALJ finds that a claimant cannot return to her prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the national economy. Seavey, 276 F.3d at 5. In determining whether the Commissioner has met this burden, the ALJ must develop a full record regarding the vocational opportunities available to a claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989). This burden may sometimes be met through exclusive reliance on the Medical-Vocational Guidelines (the "grids"). Seavey, 276 F.3d at 5. Exclusive reliance on the "grids" is appropriate where the claimant suffers primarily from an exertional impairment, without significant non-exertional factors. Id.; see also Heckler v. Campbell, 461 U.S. 458, 103 S. Ct. 1952, 76 L.Ed.2d 66 (1983) (exclusive reliance on the grids is appropriate in cases involving only exertional impairments, impairments which place limits on an individual's ability to meet job strength requirements).

Exclusive reliance is not appropriate when a claimant is unable to perform a full range of work at a given residual functional level or when a claimant has a non-exertional impairment that significantly limits basic work skills. Nguyen, 172 F.3d at 36. In almost all of such cases, the Commissioner's burden can be met only through the use of a vocational expert. Heggarty, 947 F.2d at 996. It is only when the claimant can clearly do unlimited types of work at a given residual functional level that it is unnecessary to call a vocational expert to establish whether the claimant can perform work which exists in the national economy. See Ferguson v. Schweiker, 641 F.2d 243, 248 (5th Cir. 1981). In any event, the ALJ must make a specific finding as to whether the non-exertional limitations are severe enough to preclude a wide range of employment at the given work capacity level indicated by the exertional limitations.

1. Pain

"Pain can constitute a significant non-exertional impairment." Nguyen, 172 F.3d at 36. Congress has determined that a claimant will not be considered disabled unless he furnishes medical and other evidence (e.g., medical signs and laboratory findings) showing the existence of a medical impairment which could reasonably be expected to produce the pain or symptoms alleged. 42 U.S.C. § 423(d)(5)(A). The ALJ must consider all of a claimant's statements about his symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence. 20 C.F.R. § 404.1528. In determining whether the medical signs and laboratory findings show medical impairments which reasonably could be expected to produce the pain alleged, the ALJ must apply the First Circuit's six-part pain analysis and consider the following factors:

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

Avery v. Sec'y of Health and Human Servs., 797 F.2d 19, 29 (1st Cir. 1986). An individual's statement as to pain is not, by itself, conclusive of disability. 42 U.S.C. § 423(d)(5)(A).

2. Credibility

Where an ALJ decides not to credit a claimant's testimony about pain, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. Rohrberg, 26 F. Supp. 2d at 309. A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence in the record. See Frustaglia, 829 F.2d at 195. The failure to articulate the reasons for discrediting subjective pain testimony requires that the testimony be accepted as true. See DaRosa v. Sec'y of Health and Human Servs., 803 F.2d 24 (1st Cir. 1986).

A lack of a sufficiently explicit credibility finding becomes a ground for remand when credibility is critical to the outcome of the case. See Smallwood v. Schweiker, 681 F.2d 1349, 1352 (11th Cir. 1982). If proof of disability is based on subjective evidence and a credibility determination is, therefore, critical to the decision, "the ALJ must either explicitly discredit such

testimony or the implication must be so clear as to amount to a specific credibility finding." Foote v. Chater, 67 F.3d 1553, 1562 (11th Cir. 1995) (quoting Tieniber v. Heckler, 720 F.2d 1251, 1255 (11th Cir. 1983)).

V. APPLICATION AND ANALYSIS

Plaintiff was forty-four years old at the time of the ALJ hearing. (Tr. 92). He has an eighth-grade education with past relevant work as a plasterer for approximately twenty years until he was "let go" on May 31, 2002. (Tr. 42, 95, 98, 125). Plaintiff alleged disability due to depression, personality disorder and various physical ailments related to his neck, back and right shoulder. (Tr.18).

Plaintiff was seen by Dr. Stephen DiZio, a DDS Psychiatrist, for a consultative psychiatric evaluation on April 5, 2005. (Tr. 124-127). Plaintiff described a longstanding history of chronic low mood with intermittent episodes of more severe depression. (Tr. 124). Plaintiff had been psychiatrically hospitalized following a suicide attempt at age twenty-five, but had not had any follow-up care. Id. Plaintiff described his depressive episodes as being characterized by marked social withdrawal and isolation, suicidal thoughts, poor sleep, low appetite, weight loss, low energy and distractability. Id. He stated his current episode had begun about a year ago but had become more intense in the past month due to his mother's illness. Id. Plaintiff felt that there was "no hope for anything." Id. He was not undergoing any mental health treatment at the time. Id. Plaintiff reported that he had lost his last job as a plasterer partly due to low energy, shoulder pain and impaired concentration related to his depression. (Tr. 125). Plaintiff reported that he had almost no daily activities of any kind and did nothing

but watch television. Id. He described himself as increasingly withdrawn and isolated. Id. He got along well with his siblings and his mother, and had visitation every other weekend with his eight-year-old daughter. (Tr. 126).

On mental status examination, Plaintiff spoke at a normal rate, and his thoughts were well-organized with no evidence of thought disorder or psychotic thought content. Id. His affect was of sadness, and his thought content was focused on feelings of depression and helplessness. Id. Plaintiff was alert and oriented with no deficits in cognition or memory evident. Id. Dr. DiZio diagnosed chronic depression with superimposed episodes of major depression and alcohol abuse in partial remission. Id. Dr. DiZio indicated that Plaintiff "could probably benefit from a comprehensive intervention with antidepressant medication, supportive psychotherapy and a particular focus on achieving and maintaining sobriety." Id. He assessed moderately severe limitations in Plaintiff's ability to make occupational adjustments, carry out instructions and respond appropriately to customary work pressures. (Tr. 127). He further noted severe impairment of social adjustments and daily activities. Id.

Plaintiff's attorney sent him to Dr. Judith Lubiner, a Psychologist, for a psychological evaluation in support of his disability application on October 20 and 28, 2005. (Tr. 164-169). Plaintiff displayed flat affect, and his energy level was low. (Tr. 165). His rate of speech was slow, and his thought content was impoverished. Id. He learned a list of five words in two trials, but was unable to remember even one word after twenty-five minutes. Id. He indicated inability to perform the "serial sevens" subtraction task. Id. Plaintiff described his psychiatric symptoms as being angry or down, snapping at people, with low energy and self esteem and obsessive

symptoms such as counting things. Id. He stated that his anxiety had increased over the past year. Id. Plaintiff stated that in his last job, he had not gotten along well with either his supervisor or his crew. Id. He recounted a car accident in which he was knocked out, as well as another head injury. (Tr. 166).

Dr. Lubiner administered a series of diagnostic tests. Intelligence testing yielded a score in the low average range, in the nineteenth percentile. Id. Plaintiff displayed problems with memory functioning throughout the testing process. Id. Dr. Lubiner suggested that Plaintiff's cognitive deficits could be due to depression, his earlier experience of head trauma, or substance abuse, which he had denied. (Tr. 167). Of Plaintiff's personality, Dr. Lubiner stated that Plaintiff had limited psychological flexibility, used avoidance as his preferred coping style and was "extraordinarily isolated." (Tr. 167-168).

Dr. Lubiner diagnosed major depressive disorder, severe and schizoid personality disorder, and placed his GAF at 40, consistent with major impairment in several functional areas. (Tr. 168). She discussed his RFC, stating that his memory was "severely impaired" and that this would prevent him from remembering and carrying out instructions. Id. Dr. Lubiner believed that his "poor interpersonal adjustment" would create problems with supervisors and tensions with coworkers. (Tr. 169). She predicted severe problems in dealing with customary work pressures, given Plaintiff's irritability and critical attitude toward authority. Id. She further indicated that Plaintiff's concentration problems would severely impair his ability to maintain even simple and repetitive tasks. Id.

Dr. Lubiner also completed an RFC Questionnaire. (Tr. 162-163). In it, she indicated that Plaintiff had a severe impairment in responding to customary work pressures. (Tr. 162). She further assessed moderately severe impairments in relating to other people, understanding/ remembering/carrying out instructions, responding appropriately to supervision and to coworkers and performing complex tasks. (Tr. 162-163). She suggested moderate limitations in performing simple, repetitive or varied tasks. (Tr. 163). Dr. Lubiner indicated that she would expect the limitations she suggested to last for twelve or more months and that they had been present at the same level of severity since 2003. Id.

Dr. Michael R. Slavit, a DDS Psychologist, reviewed Plaintiff's updated records and completed a Psychiatric Review Technique form on May 6, 2005. (Tr. 130-143). Dr. Slavit noted that his assessment was from May 21, 2002 to December 31, 2004 "and current claim." (Tr. 130). Dr. Slavit assessed affective and substance addiction disorders, (Tr. 130, 133, 138), imposing a mild restriction in activities of daily living and moderate restrictions in maintaining social functioning and maintaining concentration, persistence and pace. (Tr. 140). Dr. Slavit also completed a mental RFC assessment, for the same period, in which he assessed moderate limitations in the areas of understanding, remembering and carrying out detailed instructions; maintaining attention and concentration for extended periods; performing activities punctually within a schedule; completing a normal workday and workweek without psychologically-based interruptions or unreasonable rest periods; interacting appropriately with the general public; responding appropriately to supervision and to workplace changes and setting realistic goals or making independent plans. (Tr. 144-145). Dr. Slavit elaborated in concluding comments,

stating that "there may be physical limitations, but based solely on psych factors claimant can sustain a typical 2-hr/8-hr routine at simple tasks." (Tr. 146). He additionally handwrote: "Note: there is no evidence for the 2002-04 claim." Id.

Dr. Slavit additionally completed a Rhode Island DDS Case Review Form on the same day. (Tr. 148). Dr. Slavit indicated that he was reviewing Plaintiff's case for the current period, for the period of twelve months after the alleged disability onset date of May 21, 2002 and through Plaintiff's date last insured for disability purposes, December 31, 2004. Id. He noted the absence of treatment sources and mental health sources. Id. Dr. Slavit diagnosed chronic dysthymia with superimposed episodes of major depressive disorder but checked off a box indicating that there was insufficient evidence to determine severity "for 02-04 claim." Id. With respect to the current period, Dr. Slavit checked off boxes indicating that Plaintiff's mental impairment was severe but did not meet or equal any Listing. Id.

A second DDS consultant psychologist, Dr. Joseph Litchman, reviewed Plaintiff's records and concurred with the conclusions Dr. Slavit reached in his Psychiatric Review Technique Form and mental RFC assessment on August 5, 2005. (Tr. 142, 146).

A. The ALJ Properly Evaluated Plaintiff's Mental Impairments

By decision dated December 22, 2006, the ALJ determined that Plaintiff had not established a disability and an eligibility for either DIB or SSI. For purposes of DIB, the ALJ decided the case adverse to Plaintiff at Step 2 finding that, for the relevant period (May 31, 2002 onset to December 31, 2004 date last insured), he did not have a medically determinable impairment or combination of impairments that significantly limited his ability to perform basic

work activities. (Tr. 15-17). For purposes of SSI (where date last insured is irrelevant), the ALJ decided the case adverse to Plaintiff at Step 5. (Tr. 22-23). As to mental impairments (the subject of Plaintiff's appeal), the ALJ found that Plaintiff's depression, personality disorder and substance abuse were "severe" impairments but not of Listing-level severity. (Tr. 17-18). The ALJ assessed an RFC for a limited range of medium work with nonexertional limitations regarding postural activities, concentration and social interaction. (Tr. 19-20). Based on this RFC and testimony from the VE, the ALJ concluded that Plaintiff was capable of making a successful adjustment to other unskilled work at the medium, light and sedentary level that exists in significant numbers in the economy. (Tr. 23).

Plaintiff takes issue with the ALJ's evaluation of his mental impairments for purposes of the DIB claim. The ALJ determined that the non-examining DDS psychologists (Dr. Slavit and Dr. Litchman) found "insufficient evidence of a severe mental impairment for the period 2002 to 2004." (Tr. 17). Plaintiff does not directly challenge the ALJ's conclusion as to the lack of sufficient evidence and fails to point out the existence of evidence substantiating the presence of a mental impairment prior to December 31, 2004. Rather, Plaintiff seeks to capitalize on some sloppiness in the forms.

For instance, Plaintiff contends that the ALJ misinterpreted Dr. Slavit's report. In particular, Plaintiff points out, accurately so, that Dr. Slavit did not check the box for "insufficient evidence" on the first page of his Psychiatric Review Technique Form. (Tr. 130). Thus, Plaintiff argues that the ALJ had no basis in the record for her conclusion that Dr. Slavit and Dr. Litchman found "insufficient evidence of a severe mental impairment for the period

2002 to 2004." (Tr. 17). Plaintiff is wrong, and the ALJ's statement has sufficient support in the record. The single page relied upon by Plaintiff (Tr. 130) cannot be interpreted in a vacuum. Dr. Slavit made clear elsewhere that he found insufficient evidence to determine severity prior to January 1, 2005. For example, Dr. Slavit added a note to the page on "Functional Capacity Assessment" which indicated that "there is no evidence for the 2002-04 claim." (Tr. 146). Plaintiff's counsel states that the statement is "illegible, at least to this writer." (Document No. 9 at p. 8). Although the handwriting is sloppy, it is legible to this writer. More significantly, however, Dr. Slavit made his conclusion absolutely clear on the DDS Case Review where he distinguished between the "current" or SSI claim and the "02-04" or DIB claim. (Tr. 148). As to the DIB claim, he did mark the box denoting "evidence insufficient to determine severity" and noted it was "for 02-04 claim." Id. Thus, Plaintiff's argument that the ALJ misinterpreted Dr. Slavit's opinions is unsupported.

Plaintiff also faults the ALJ for failing to apply the "special technique" mandated by 20 C.F.R. §§ 404.1520a(c)(3), 416.920a(c)(3). Pursuant to the technique, the ALJ must determine whether or not Plaintiff's impairments are "severe" by rating the functional limitation which results from the impairment(s) in four specific areas: "[a]ctivities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation." 20 C.F.R. § 416.920a(c)(3)-(4), (d). While the ALJ should normally follow a mandatory regulatory review procedure, several courts in this Circuit have found that the failure to explicitly follow the prescribed technique is "harmless error" if the record otherwise supports the ALJ's conclusion and a remand would not "change, alter or impact the result." See, e.g., Arruda v. Barnhart, 314

F. Supp. 2d 52, 79-81 (D. Mass. 2004). See also Querido v. Barnhart, 344 F. Supp. 2d 236, 250-254 (D. Mass. 2004). Because of efficiency concerns, this Court sees no benefit in a meaningless remand and agrees with and adopts the standard articulated above, which reviews whether remand would change, alter or impact the result. See Moore v. Barnhart, 405 F.3d 1208, 1214 (11th Cir. 2005) (failure to follow a required regulatory review process requires remand but only when the record contains a "colorable claim" of mental impairment).

Although the ALJ did not make specific findings under the special technique regarding the DIB claim, it is important to consider that Dr. Slavit found (and the ALJ accepted), as discussed above, that there was insufficient evidence to establish severity prior to January 1, 2005. (Tr. 17, 148). Thus, it necessarily follows that Dr. Slavit's opinion informed the ALJ that the record did not contain sufficient contemporaneous evidence to assess the B-criteria severity ratings for the 2002-2004 DIB claim. Thus, the ALJ's failure to conduct a fruitless inquiry cannot be deemed error on the unique facts of this case. The ALJ did, however, discuss the B-criteria as to Plaintiff's SSI claim and found no more than moderate restrictions in daily activities, social functioning and concentration, persistence and pace, and no episodes of decompensation of an extended duration. (Tr. 19). The ALJ, thus, included moderate limitations on concentration, persistence and social functioning in her RFC assessment regarding the SSI claim. (Tr. 20).

Plaintiff also takes issue with the ALJ's evaluation of his mental impairments for purposes of the SSI claim, i.e., the ALJ's mental RFC assessment for the period after expiration of insured status. He primarily argues that the ALJ erred by not favoring the opinions of Dr.

DiZio and Dr. Lubiner over those of Dr. Slavit and Dr. Litchman. Dr. DiZio examined Plaintiff on April 5, 2005 and diagnosed chronic dysthymia with superimposed episodes of major depression and alcohol abuse in partial remission. (Tr. 126). Dr. DiZio noted that Plaintiff was not receiving treatment but "could probably benefit" from it. Id. He opined that Plaintiff's current level of depressed mood would impose moderately severe limitations on carrying out instructions and responding appropriately to customary work pressures. (Tr. 127). He also opined that Plaintiff's personal and social adjustments were severely impaired. Id. Dr. Lubiner evaluated Plaintiff at his attorney's request in October 2005 and reached similar findings. (Ex. 10F).

The ALJ, citing 20 C.F.R. § 416.921 and SSR 96-6p, gave only minimal probative weight to the opinions of Dr. DiZio and Dr. Lubiner because their conclusions were inconsistent with the record as a whole, including Plaintiff's lack of mental health treatment. (Tr. 19). To the contrary, the ALJ gave significant probative weight to the opinions of Dr. Slavit and Dr. Litchman as being consistent with and supported by the record. Id. The ALJ also did not find Plaintiff's allegations as to his inability to work to be supported by the record or credible for the period prior to January 1, 2005. (Tr. 16). The ALJ based this credibility assessment in part on Plaintiff's lack of medical treatment. Id. Plaintiff argues that the ALJ erred in failing to consider Plaintiff's reasons for his lack of treatment as required by SSR 96-7p. Plaintiff's argument is again unsupported.

While Plaintiff is correct that the ALJ must consider his explanation for lack of treatment (SSR 96-7p, 82-59), the ALJ did so. Plaintiff testified that he did not obtain mental health

treatment or medication because he did not have "coverage." (Tr. 53). The ALJ questioned Plaintiff at length as to his eligibility for medical assistance and concluded that "he did not bother to recertify." (Tr. 16, 59-60). Plaintiff testified that he was not turned down for assistance but rather failed to go to a three-month recertification appointment. (Tr. 60). He indicated that he "couldn't make it" and "just said the heck with it." Id. Although Plaintiff testified that he did not "want to go there" because "it always seems like they don't like me, and they don't really want to give me this...[a]nd it is like I'm begging them for it," (Tr. 60-61), the ALJ considered this evidence and, as is her province, she concluded that Plaintiff did not provide a "good reason" for failing to pursue mental health treatment. See SSR 96-7p. In particular, the ALJ stated that "[d]espite his lack of medical treatment, the testimony of [Plaintiff] reflects that for a period he was on general public assistance and received food stamps for which he had to recertify every three months and which would have covered doctor visits and prescription drugs, but that he did not bother to recertify." (Tr. 16). The ALJ's conclusion is supported by the record and thus entitled to deference.

The bottom-line is that the ALJ was faced with conflicting medical opinions and it is her province to resolve such conflicts. See Rodriguez-Pagan v. Sec'y of HHS, 819 F.2d 1, 4 (1st Cir. 1987) ("it is the [ALJ's] province to resolve conflicts in the medical evidence"). Plaintiff has shown no legal error in the ALJ's evaluation of the medical evidence or RFC assessment. Thus, Plaintiff is effectively asking this Court to reweigh the medical evidence and resolve the evidentiary conflict in his favor. That is not this Court's role. Since the ALJ's reasons for

favoring the opinions of Dr. Slavit and Dr. Litchman over those of Dr. DiZio and Dr. Lubiner are supported by the record, they are entitled to deference.

B. The ALJ did not Err by Failing to Obtain Medical Expert Testimony

Plaintiff further argues that, pursuant to SSR 83-20, the ALJ should have obtained medical expert testimony at the hearing to assist in determining the date of onset of his disability. This argument also fails as "SSR 83-20 applies only when a claimant has been determined to be disabled." Dennett v. Astrue, No. 08-97-B-W, 2008 WL 4876851 at *5 (D. Me. Nov. 11, 2008). Such medical expert testimony as to onset date is generally necessary only where there has been a finding of disability, and thus the issue is not whether but when the claimant became disabled. See, e.g., Lisi v. Apfel, 111 F. Supp. 2d 103, 111 (D.R.I. 2000) (citing Key v. Callahan, 109 F.3d 270, 274 (6th Cir. 1997) (where substantial evidence existed that plaintiff was not disabled prior to his last insured date, ALJ's failure to use a medical advisor was not a basis for reversal or remand, even where the record arguably supported the conclusion that the plaintiff was presently disabled)). In particular, SSR 83-20 states as follows with respect to the significance of onset date:

> In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability. In many claims the onset date is critical; it may affect the period for which the individual can be paid and may even be determinative of whether the individual is entitled to or eligible for any benefits. In title II [DIB] worker claims, the amount of the benefit may be affected; in title XVI [SSI] claims, the amount of the benefit payable for the first month of eligibility may be prorated.

SSR 83-20. This language, cited by Plaintiff in support of his position, addresses entitlement and eligibility for benefits – a different question than the disability inquiry at issue here. Specifically,

in DIB cases such as this one where a claimant's insured status expired at some point in the past, a finding that the claimant was disabled at some point after that date may raise the need for medical expert testimony on the issue of onset date if the disability is attributable to a "slowly progressive impairment" and the medical evidence is unclear on that point. SSR 83-20. In such a case, while the claimant has been found disabled, he is not entitled to receive DIB unless it can be determined that the disability commenced prior to the expiration of his insured status. See 42 U.S.C. §§ 423(a)(l)(A), (E). Accordingly, because the ALJ concluded that there was insufficient evidence in the record to find a severe mental impairment prior to January 1, 2005, she did not err in failing to obtain expert testimony on the issue of disability onset date.

VI. CONCLUSION

For the reasons stated above, I order that the Commissioner's Motion for an Order Affirming the Decision of the Commissioner (Document No. 10) be GRANTED and Plaintiff's Motion to Reverse the Decision of the Commissioner (Document No. 9) be DENIED. Final judgment shall enter in favor of the Commissioner.

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
April 7, 2009