MONTALVO v. BARNHART

239 F. Supp.2d 130 (2003) | Cited 0 times | D. Massachusetts | January 16, 2003

MEMORANDUM AND ORDER WITH REGARD TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS and DEFENDANT'S MOTION TO AFFIRM THE DECISION OF THE COMMISSIONER (Docket Nos. 10 and 11)

This is an action for judicial review of a final decision by theCommissioner of the Social Security Administration ("Commissioner"). See42 U.S.C. § 405(g). Pedro Montalvo ("Plaintiff") alleges that theCommissioner's decision denying him Supplemental Security Income ("SSI")disability benefits — which is memorialized in a January 22, 1999decision by an administrative law judge — is flawed by variouserrors of law. Plaintiff, via a motion for judgment on the pleadings, hasmoved to reverse or, in the alternative, to remand the decision, and theCommissioner, in turn, has moved to affirm.

The parties have consented to the jurisdiction of this court pursuantto 28 U.S.C. § 636(c) and Fed.R.Civ.P. 73(b). For the reasons setforth below, the court will deny the Commissioner's motion and will allowPlaintiff's motion to the extent it seeks a remand.

I. STANDARD OF REVIEW

The Commissioner's factual findings in making her disabilitydetermination are conclusive so long as they are grounded in substantialevidence. See 42 U.S.C. § 405(g) and 1383(c)(3). Substantial evidenceis "such relevant evidence as a reasonable mind might accept as adequateto support a conclusion." Richardson v. Perales, 402 U.S. 389, 401(1971). It is "more than a mere scintilla." Id. Thus, even if theadministrative record could support multiple conclusions, a court mustuphold the Commissioner's findings "if a reasonable mind, reviewing theevidence in the record as a whole, could accept it as adequate to support[her] conclusion." Irlanda Ortiz v. Sec'y of Health & Human Servs.,955 F.2d 765, 769 (1st Cir. 1991) (citation and internal quotation marksomitted).

Even so, a denial of disability benefits need not be upheld if therehas been an error of fact or law in the evaluation of the particularclaim. See Manso-Pizarro v. Sec'y of Health & Human Servs., 76 F.3d 15,16 (1st Cir. 1996). In the end, the court maintains the power, inappropriate circumstances, "to enter . . . a judgment affirming,modifying, or reversing the [Commissioner's] decision" or to "remand[]the cause for a rehearing." 42 U.S.C. § 405(g).

II. BACKGROUND

Plaintiff was born on December 30, 1961, has a sixth grade educationand no relevant work history.

(Administrative Record ("A.R.") at 113,124, 149; Supplemental Transcript ("Supp. Tr.") at 6.) He was born inPuerto Rico and came to the United States at about age thirteen. (A.R. at202.) Since that time, and until 1996, Plaintiff was a heavy drug user(including intravenous cocaine and heroin) and he spent four years injail in the mid-1990s. (Id.) Plaintiff is literate in Spanish but doesnot understand English. (Supp. Tr. at 6.)

A. Medical History

Plaintiff claims a disability due to chronic hepatitis infection, acondition he claimsto have had since December 1, 1996. (See A.R. at30-31, 113.) He also claims to have a mental impairment. (See A.R. at21-22.)

1. Hepatitis

Plaintiff tested positive for Hepatitis C in April of 1997. (A.R. at196.) Thereafter, from January through March of 1998, he was treated forhepatitis at the emergency room and ambulatory clinic at St. BarnabasHospital (A.R. at 134-48.)

Dr. Michael Polak, an internist, examined Plaintiff in February of 1998and noted that he was not undergoing Interferon treatment or treatmentfor end-stage liver disease. (A.R. at 149-55.) The physical examinationshowed that Plaintiff was well-developed, well-nourished and in no acutedistress. (A.R. at 149.) He could ambulate without difficulty and hisgait was within normal limits. (Id.) Dr. Polak also observed thatPlaintiff's head, eyes, ears, nose, throat, neck and cardiovascularsystem were normal and that Plaintiff had no difficulty rising from achair or getting off the examination table. (A.R. at 149-50.) Dr. Polakdiagnosed a history of Hepatitis C exposure (with the extent ofunderlying liver disease unclear), alcohol abuse and multiple substanceabuse and concluded that Plaintiff was mildly impaired in relation tocarrying, lifting, pushing, pulling, walking and standing. (A.R. at150-51.)

On May 8, 1998, Dr. C. Levit of the New York State DisabilityDetermination Service ("DDS") reviewed Plaintiff's file for theCommissioner. (A.R. at 188-95.) Dr. Levit advised that, due to thehepatitis, Plaintiff would be limited to frequent lifting over ten poundsand only occasional lifting of over twenty pounds. (A.R. at 189.)

As a result of Plaintiff's request, an administrative law judgeobtained other medical records. (Supp. Tr. at 2, 7.) They show thatPlaintiff began treating with Dr. Ronald Loescher in June of 1998. (A.R.at 202-04.) Plaintiff was not taking medication for liver disease at thetime, but testing confirmed Hepatitis B and C for which a healthy diet,regular exercise and abstinence from drugs and alcohol were recommended.(A.R. at 206, 208.) A liver biopsy in October of 1998 was positive formoderate chronic active viral hepatitis with cirrhosis. (A.R. at 200.)Interferon treatment was being considered in December of 1998. (A.R. at211.)

2. Mental Impairment

A neurological examination performed by Dr. Polak in February of 1998showed that Plaintiff was alert and oriented in all spheres. (A.R. at150-51.) On March 9, 1998, DDS determined that Plaintiff need not bereferred for a psychological examination because the physical examinationshowed that no psychiatric problems were evident or alleged. (A.R. at166.) Dr. Loescher's notes of October 5, 1998, indicate that Plaintiffcomplained about his weight and that he was fatigued, nervous anddepressed. (A.R. at 208.) Plaintiff wondered if he should see acounselor. (Id.) Dr. Loescher explained, however, that the symptomsdescribed were quite common with chronic illness and advised Plaintiffthat he eat healthy foods and avoid alcohol, drugs and smoking. (Id.)

B. Procedural History

On December 8, 1997, in the midst of these medical benchmarks,Plaintiff filed an application for SSI disability benefits. (A.R. at113-14.) After his claim was denied on March 13, 1998, Plaintiffrequested reconsideration but was again denied on May 21, 1998. (A.R. at90-97.) Proceeding pro se, Plaintiff requested a hearing before anadministrative law judge("ALJ"). (A.R. at 98.) The hearing was held onOctober 13, 1998, at which time a Spanish interpreter was provided.(Supp. Tr. at 1, 5.) The ALJ denied Plaintiff's claim in a decision datedJanuary 22, 1999. (A.R. at 32-45.) On March 9, 1999, Plaintiff requestedreview of the decision by the Appeals Council. (A.R. at 30-31.)

On December 16, 1999, Plaintiff retained his present lawyer. (Complaint¶ 5.) On January 14, 2000, with the assistance of counsel, Plaintifffiled a new claim for SSI benefits, but did not withdraw the request forreview then pending in the Appeals Council. (A.R. at 23-26.) His newclaim was approved on or about February 23, 2000, apparently on the basisof mental illness, the Commissioner finding as well that Plaintiff wasincapable of managing his finances and needed a representative payee.(See A.R. at 14-29.) Plaintiff's file with respect to this newly approvedclaim was forwarded to the Appeals Council. (See id.)

On January 30, 2002, the Appeals Council denied Plaintiff's request forreview. (A.R. at 5-6.) Plaintiff then filed this action which, inessence, seeks SSI benefits for the period of time between his first,unsuccessful, application and his second, successful one. In due course,the parties submitted the cross motions presently before the court.

III. DISCUSSION

An individual is entitled to SSI benefits if, among other things, he isneedy and disabled. See 42 U.S.C. § 1381a and 1382c(a)(3).Plaintiff's financial need is not challenged. The question here iswhether Plaintiff suffers from a disability.

A. DISABILITY STANDARD AND THE ALJ'S DECISION

The Social Security Act (the "Act") defines disability, in part, as theinability "to engage in any substantial gainful activity by reason of anymedically determinable physical or mental impairment which can beexpected to result in death or has lasted or can be expected to last fora continuous period of not less than twelve months."42 U.S.C. § 1382c(a)(3)(A). An individual is considered disabledunder the Act "only if his physical or mental impairment or impairmentsare of such severity that he is not only unable to do his previous workbut cannot, considering his age, education, and work experience, engagein any other kind of substantial gainful work which exists in thenational economy." 42 U.S.C. § 1382c(a)(3)(B). See generally Bowenv. Yuckert, 482 U.S. 137, 146-49 (1987).

In determining disability, the Commissioner follows a familiarfive-step protocol. The First Circuit has described the mandatorysequential inquiry as follows:

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

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

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

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

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

Goodermote v. Sec'y of Health & Human Servs., 690 F.2d 5, 6-7 (1stCir. 1982).

In the instant case, the ALJ found as follows with respect to thesefive questions: that Plaintiff had never engaged in substantial gainfulactivity (question one); that Plaintiff's "Hepatitis C" and "substanceaddiction disorder" were "severe" impairments, although not severe enoughto be listed in Appendix 1 (questions two and three); that Plaintiff hasno history of past relevant work (question four); and that Plaintiff wasable to perform certain "medium" work in the national economy (questionfive). (A.R. at 41-42.) As a result, the ALJ concluded that Plaintiffdoes not suffer from a "disability."

B. ANALYSIS OF PLAINTIFF'S CHALLENGE

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Plaintiff challenges the decision denying him benefits in essentiallythree ways. First, Plaintiff asserts that the ALJ failed to adequatelydevelop the record with respect to his claim of mental impairment.Second, Plaintiff asserts that the Appeals Council, faced with the factthat his second application for SSI had been approved based on a mentalimpairment, failed to vacate the ALJ's decision and order a new hearingto establish its onset date. Third, Plaintiff claims that he did not makean informed waiver of his right to legal representation and, therefore,was denied due process.

The first two arguments can be addressed and set aside with relativespeed. The third argument, however, contains within its boundaries thereason upon which the court will order a remand, namely, the ALJ'sfailure to fulfill his heightened duty to Plaintiff as a pro seclaimant.

1. Development of the Record with Respect to Mental Illness

Plaintiff first contends that the ALJ abrogated his duty to developPlaintiff's claim of mental impairment. Unfortunately for Plaintiff, therecord before the ALJ contained no specific claim of mental impairmentand made little, if any, reference to Plaintiff's mental anxiety. To besure, when Plaintiff requested reconsideration of the initial denial ofhis SSI application, he mentioned that, in addition to his physicalproblems, he felt "anxious and depressed." (A.R. at 94; see also id. at127 ("Reconsideration Disability Report" in which Plaintiff stated, "Isuffer from anxiety and depression").) Nonetheless, it is clear that,even with this somewhat offhand reference to anxiety, the record beforethe ALJ presented a claim of physical, not mental, disability based onPlaintiff's chronic hepatitis. Indeed, at the hearing before the ALJ,Plaintiff himself made no mention of a mental impairment affecting eitherhis ability to work or engage in the daily activities of living and thereis no other evidence that he had an "obvious" mental impairment. CompareDeblois v. Sec'y of Health and & Human Servs., 686 F.2d 76, 81 (1stCir. 1982).

In short, the court rejects Plaintiff's initial argument that hismental impairment was so obvious that, based on that fact alone, the ALJhad a duty to more fully develop the record. In the court's estimation,the ALJ could appropriately assume that Plaintiff was pursuing a claimbased only on a physical impairment.

2. Appeals Council's Actions

Plaintiff next asserts that the Appeals Council abused its discretionin notvacating the ALJ's decision and remanding Plaintiff's case forrehearing. In essence, Plaintiff argues that, after the Appeals Councilreceived documentation of the approval of his second claim for SSIbenefits based on a mental disability, the issue was no longer whether hewas disabled, but when he became disabled, i.e., the onset date.

Under applicable regulations, the Appeals Council may grant a requestfor review in circumstances where: (1) there appears to be an abuse ofdiscretion by the administrative law judge; (2) there is an

error oflaw; (3) the administrative law judge's action, findings, or conclusionsare not supported by substantial evidence; or (4) there is a broad policyor procedural issue which may affect the general public interest.20 C.F.R. § 416.1470 (2002). While additional material evidence maybe submitted to the Appeals Council, a claimant requesting review musthave good cause for not having presented such evidence to the ALJ. SeeRawls v. Apfel, 998 F. Supp. 70, 75 (D.Mass. 1998) (citations omitted).It is also "well established" that a discretionary decision by theAppeals Council is "reviewable to the extent that it rests on an explicitmistake of law or other egregious error." Mills v. Apfel, 244 F.3d 1, 5(1st Cir. 2001) (citing Services v. Dulles, 354 U.S. 363 (1957)), cert.denied, 112 S.Ct. 822 (2002).

Plaintiff has failed to establish either an explicit mistake of law orother egregious error on the part of the Appeals Council. As described,Plaintiff supplied the ALJ with no real claim or evidence that he wasunable to work because of a mental impairment. Therefore, the evidence ofmental impairment which Plaintiff later presented to the Appeals Councilcannot be said to have been "material" to the initial claim rejected bythe ALJ. Accordingly, the Appeals Council's decision to deny reviewcannot be deemed to have been erroneous, let alone "egregiously" so.

3. ALJ'S Heightened Duty Because Plaintiff Appeared Pro Se

As a final matter, Plaintiff argues that, as a pro se claimant, he wasdenied due process of law because he did not receive complete informationabout his rights. In particular, Plaintiff asserts, he did not make aninformed waiver of his right to legal representation. Although the courtdoes not completely agree with Plaintiff's assessment, it does believethat infirmities with the administrative hearing justify a remand.

Were the court to look simply at the formal process by which Plaintiffwas advised of his rights and, thereafter, waived legal representation,it would be hard pressed to conclude that he was denied the due processof law. As the Commissioner asserts, Plaintiff received notice in bothEnglish and Spanish of his right to representation, as well as a list ofpotential legal representatives. (A.R. at 99-104.) While the ALJ, at thehearing, did not physically hand Plaintiff a compilation of services orexplain contingency fee representation — as Plaintiff argues heshould have — Plaintiff was sent this information by mail. (A.R. at99.) Moreover, at the commencement of the hearing, Plaintiff stated thathe received the notices, understood his right to representation anddecided to proceed alone.[1] At bottom, therefore, the court isnot prepared to impose upon this and other administrative law judges thestringent requirements suggested by Plaintiff and utilized by courts insome other jurisdictions with respect to pro se litigants. See Thompsonv. Sullivan, 933 F.2d 581, 584 (7th Cir. 1991); Smith v. Schweiker,677 F.2d 826, 828-29 (11th Cir. 1982); Frank v. Chater, 924 F. Supp. 416,423-24 (E.D.N.Y. 1996).

Nonetheless, the court concludes, based on standards established by theFirst Circuit in Evangelista v. Sec'y of Health & Human Servs.,826 F.2d 136 (1st Cir. 1987), that the ALJ failed to adequately dischargehis heightened duty to this pro se claimant. While the ALJ may haveadequately informed

Plaintiff of his right to legal representation andwhile, as indicated, Plaintiff's mental impairment was not obvious, thereis no doubt that Plaintiff's hearing, as further described below, wasmarked by sufficient unfairness due to lack of counsel and that a remandis appropriate.

The First Circuit has "long recognized that social security proceedingsare not strictly adversarial." Evangelista, 826 F.2d at 142 (citation andinternal quotation marks omitted)). Accordingly, the court has "made fewbones about [its] insistence that the [Commissioner] bear aresponsibility for adequate development of the record . . . and thisresponsibility increases when the applicant is bereft of counsel." Id.(citations omitted). Of course, the absence of counsel, without"something extra," creates no basis for remand. Id. Still, a "remand forwant of representation `is necessitated . . . where there is a showing ofunfairness, prejudice or procedural hurdles insurmountable by laymen.'"Id. (quoting Teal v. Mathews, 425 F. Supp. 474, 480 (D.Md. 1976)).

Similar sentiments were recently echoed by the Supreme Court in Simsv. Apfel, 530 U.S. 103 (2000). "Social Security proceedings," the SupremeCourt stated, "are inquisitorial, rather than adversarial. It is theALJ's duty to investigate the facts and develop the arguments both forand against granting benefits." Id. at 110-11. See also Currier v. Sec'yof Health, Educ. & Welfare, 612 F.2d 594, 598 (1st Cir. 1980);Deblois, 686 F.2d at 81; Dillard v. Massanari, 190 F. Supp.2d 242, 246(D.Mass. 2002) (citing Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir.1991)).

The "something extra" needed for remand, as required by Evangelista,obviously varies from case to case. For example, in both Deblois andCurrier, the First Circuit opined that the Commissioner "has certainresponsibilities with regard to the development of the evidence" and thatthese responsibilities "increase" in a number of circumstances:"[(1)]where the appellant is unrepresented, [(2)] where the claim itselfseems on its face to be substantial, [(3)] where there are gaps in theevidence necessary to a reasoned evaluation of the claim, and [(4)] whereit is within the power of the [ALJ], withoutundue effort, to see thatthe gaps are somewhat filled." Deblois, 686 F.2d at 80 (observing thatthe responsibilities are "even greater when the claimant is obviouslymentally impaired"). Accord Currier, 612 F.2d at 598 (overturningadministrative law judge's reliance on "skimpy evidence" presented by"uncounselled and mentally impaired" claimant).

Relatedly, an administrative hearing should be long enough so as toadequately protect a claimant's due process rights. See Battles v.Shalala, 36 F.3d 43, 45 (8th Cir. 1994) (remanding claim where, interalia, the hearing lasted only ten minutes and was fully transcribed ineleven pages); Lashley v. Sec'y of Health & Human Servs.,708 F.2d 1048, 1052 (6th Cir. 1983) (administrative law judge did notfulfill his responsibilities where the hearing "lasted a mere 25minutes, and was fully transcribed in approximately 11 pages"); Meyer v.Schweiker, 549 F. Supp. 1242, (W.D.N.Y. 1982) (deeming twenty-threeminute hearing to be inadequate). See also Thompson v. Sullivan,987 F.2d 1482, 1492 (10th Cir. 1993) (noting that while a hearing'slength is not dispositive, it is a consideration). The claimant'seducational background, physical health and comfort with the Englishlanguage ought to be considered as well. See Battles, 36 F.3d at 45.

Here, a number of factors converged so as to make the administrativehearing a due process minefield: Plaintiff had a limited education,appeared pro se, needed a translator, testified to memory problems, hadill health and may have had mental infirmities — albeit ones thatwere not obvious at the time. Despite these problems, the hearinglasted, at most, twenty-two minutes, spanning a mere eleven transcriptpages.[2] Most problematically, the ALJ, in the court's estimation, wasinsufficiently forthcoming during the proceeding with respect to afundamental element of the case, Plaintiff's residual functionalcapacity, as to enable Plaintiff to present his position fairly andadequately.

In his post-hearing decision, the ALJ claims that he "called upon thevocational expert to name jobs [Plaintiff] is able to perform given hisparticular residual functional capacity." (A.R. at 41.) The ALJ's decisionthen describes the following: "The [vocational] expert . . . was asked totake into account [Plaintiff]'s age, educational background, andemployment history. The vocational expert testified that assuming[Plaintiff]'s specific work restrictions, he is capable of making avocational adjustment to perform the full range of work at the mediumlevel of exertion." (.Id)

Regrettably, the ALJ's description of the hearing and the vocationalexpert's role therein is simply not true. Nowhere did the ALJ ask thevocational expert to name jobs Plaintiff could do in the manner describedand at no time did the vocational expert testify that Plaintiff wascapable of performing the full range of work at the medium level ofexertion. Quite to the contrary, the ALJ indicated on the record that hedid not need to solicit the vocational expert's opinion with respect toany assessment of Plaintiff's ability to perform medium-level workbecause, as the ALJ himself claimed during the hearing, "there is in thefile an assessment that says that [Plaintiff] can perform the full rangeof medium-level work." (Supp. Tr. at 10.) Thus, it was the ALJ, not thevocational expert, who had concluded that Plaintiffcould performmedium-level work. Simply stated, the ALJ's description of the vocationalexpert's "testimony" is made up out of whole cloth.[3]

What the ALJ did ask the vocational expert was whether, "assuming thateverything Plaintiff said in his testimony is completely credible[,][a]re you aware of any unskilled occupations that he would be able toperform?" (Supp. Tr. at 10.) The vocational expert's answer to thatquestion was "no." (Id.) The ALJ continued his questioning:

Q. And that's because of his description of the pain that he experiences, the fatigue, need to take frequent rests, and so on, am I correct?

A. Yes, the way the pain incapacitates him, as he says, his activities of daily living.

(Id.) That, in sum and substance, was the testimony of the vocationalexpert. And, it was this testimony, it appears, that the ALJ later deemed"[un]necessary to consider in further detail." (A.R. at 41.)

Perhaps, the ALJ was confused about the testimony he was considering.There is a hearing transcript

included in the administrative record whichconcerns a completely different claimant. (See A.R. at 46-83.)Alternatively, perhaps, the ALJ was using boilerplate language when hedrafted his decision. Whatever the case, it appears that the ALJ took anadversarial posture during the most critical part of the hearing. Thereis no way that Plaintiff could have understood at the time that the ALJwas not going to rely on the vocational expert's testimony —which, after all, was favorable to Plaintiff — but would ignorethat testimony because he had concluded, without a hint of notice toPlaintiff, that Plaintiff's testimony was not credible. For the ALJ tothen ask Plaintiff whether he wished to cross-examine the vocationalexpert, (Supp. Tr. at 10-11), was a useless exercise. Plaintiff, a pro seclaimant, would have no reason to cross examine an expert who had justtestified that he would not be able to engage in any unskilled work.

In a way, this case is not unlike Bluvband v. Heckler, 730 F.2d 886(2nd Cir. 1984). There, the court held that where "the claimant ishandicapped by lack of counsel, ill health, and inability to speakEnglish well," the ALJ must "scrupulously and conscientiously probeinto, inquire of, and explore for all the relevant facts . . . and thereviewing court has a duty to make a searching investigation of therecord to make certain that the claimant's rights have been protected."Id. at 892 (citations and internal quotation marks omitted). Putbluntly, an administrative law judge may not engage in gamesmanship witha pro se claimant or treat him as an adversary. See id. (citationsomitted).

In short, the administrative hearing at issue here was marked by thekind of unfairness and insurmountable hurdles contemplated by the FirstCircuit. See Evangelista, 826 F.2d at 142; Ramirez v. Sec'y of Health,Educ. & Welfare, 528 F.2d 902, 903 (1st Cir. 1976) (observing thatright to counsel voluntarily waived may furnish grounds for disturbingdenial of benefits where claimant was "misled" or the hearing was"unfair"). A remand is necessary so these inequities may be remedied.

IV. CONCLUSION

For the reasons stated, the Commissioner's motion is DENIED andPlaintiff's motion is ALLOWED, but only to the extent it seeks remand.

IT IS SO ORDERED.

1. The hearing began with the following colloquy:

ALJ: All right. Mr. Montalvo, I'm Judge Mackay, and I [sic] been assigned to review the decision made by the Social Security Administration denying your application. I'll emphasize that I am independent of the Social Security Administration. The fact that they made the decision they did does not influence my decision. Prior to the hearing, I reviewed the written evidence. I will take that into account, along with testimony I receive (INAUDIBLE). After the hearing is over, I will make my decision, put it in writing, and send a copy to you. Now, the notices that you received explained you have the right to be represented at this hearing. Do you understand that right?

CLMT: Yes.

ALJ: And since you are here without representation, I take it you have decided to proceed without it, am I correct in that?

CLMT: Yes.

ALJ: All right. That is perfectly within your right, and as we're going forward, if there is any question you have, please stop me and let me know. I'll be happy to explain precisely what's going on.

(Supp. Tr. at 1-2.)

2. The twenty-two minute estimate may be generous insofar as it comesfrom the ALJ's own calculation. (See Supp. Tr. at 1, 11.) By contrast,the stenographer certified that the hearing was only twelve minuteslong. (See id.)

3. Even the ALJ's conclusion that Plaintiff could perform "medium"work is suspect. To be sure, the administrative record includes aresidual functional capacity assessment dated March 11, 1998, whichstates that Plaintiff could occasionally lift fifty pounds and frequentlylift or carry twenty-five pounds. (A.R. at 168.) See20 C.F.R. § 404.1567(c) (2002) (stating that "[m]edium work involveslifting no more than 50 pounds at a time with frequent lifting orcarrying of objects weighing up to 25 pounds"). But another suchassessment, Dr. Levit's May 8, 1998 analysis, states that Plaintiff couldonly occasionally lift twenty pounds and frequently lift or carry tenpounds (A.R. at 189), i.e., he could only perform "light" work, see 20C.F.R, § 404.1567(b) (2002).