STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – AUGUST 31, 2012)

HERBERT D. HOLMES	:	
	:	
VS.	:	**C.A. No.: PC/10-5455**
	:	
RHODE ISLAND DEPARTMENT OF HUMAN SERVICES	:	

DECISION

K. RODGERS, J. Herbert D. Holmes (Holmes or Appellant) appeals from the August 20, 2010 decision of a Hearing Officer of the Rhode Island Department of Human Services (DHS) denying his application for medical assistance. The Appellant argues that the Hearing Officer erred by failing to allocate the appropriate weight to his treating and consulting physicians' opinions, failing to apply the appropriate legal standards, failing to assess his symptoms in accordance with federal law, and failing to make sufficient findings of fact in support of its decision. DHS counters that the Hearing Officer's decision that Appellant was not disabled was made upon proper application of the law, proper exercise of her legal authority, and is supported by the evidence. Jurisdiction is pursuant to G.L. 1956 § 42-35-15. For the reasons set forth below, the decision is hereby remanded for further proceedings before DHS.

I
Facts and Travel

Holmes is a forty-five year-old male who has worked as a laborer and furniture mover in the past. (Ex. 7.)[1] He was last employed in 2000. (Ex. 7.) In January 2010, Holmes completed

[1] Citations herein are to the exhibits contained in the complete administrative records before DHS filed with this Court on or about October 14, 2010. The transcript of the July 15, 2010 hearing is also included in the administrative record as Exhibit 17, but will be referred to herein as "Tr. ___."

a DHS application for determination of his eligibility for Medical Assistance for disability coverage. With his application, Holmes submitted an AP-70 Information for Determination of Disability form in which he asserted an inability to work because of depression, arthritis pain in both knees, neuropathy in his feet and blurred vision resulting from uncontrolled diabetes, hearing loss resulting from a bullet lodged behind his left ear, and heart disease which has resulted in shortness of breath and a stent in his heart. (Ex. 7.) Holmes reported that he cannot lift heavy objects or stand for long periods of time. (Ex. 7.) His application reveals that he can get around without help and that the only household activities he cannot perform alone is cooking because, as he explains, he does not know how to prepare food that is appropriate for his diabetic condition. (Ex. 7.) His application also shows that he shops once a month, visits doctors, relatives and friends, and can ride on the bus, all without assistance. (Ex. 7.)

Along with his application, Holmes submitted a MA-63 Physician Examination Report, which was completed by Holmes' treating physician, Magdi Salmon, M.D. (Dr. Salmon), a physician associated with St. Joseph Hospital's Adult Primary Clinic. (Ex. 6.) In that report, Dr. Salmon indicated several conditions for which he has examined or treated Holmes since 2008, including uncontrolled type II diabetes, depression, knee pain, thyromegaly, and thyroid nodule. (Ex. 6.) He further indicated that Holmes had been hospitalized for coronary artery disease in June 2007 when he received a stent in his heart. (Ex. 6.) Dr. Salmon concluded that during the course of an eight-hour workday, Holmes could walk and stand less than two hours, sit less than four hours and occasionally reach and bend, but would be unable to lift or carry up to five pounds. (Ex. 6 at 3.) Dr. Salmon also found that Holmes is markedly limited in the following mental functions: maintaining attention and concentration; interacting appropriately with co-

workers and supervisors; and responding to changes in work routine or environment. (Ex. 6 at 3.)

Dr. Salmon's opinions in the Physician Examination Report were based upon medical records dating from May 30, 2008 to November 16, 2009, which were included with Holmes' application. These records contained copies of Dr. Salmon's notes from Holmes' office visits from March 26, 2009 to November 2, 2009. In his notes for the March 26, 2009 visit, Dr. Salmon explained several abnormalities pertaining to type II diabetes, depression, coronary artery disease, a thyroidal condition, and knee pain. (Ex. 8.) The March 26, 2009 notes also document Dr. Salmon's recommendation that Holmes see an orthopedic doctor and take Vicodin for his knee pain, as well as that Holmes continue his compliance with medication for diabetes, hypertension, and depression. (Ex. 8.) At the September 18, 2009 visit, Dr. Salmon recorded the same abnormalities and adjusted Holmes' medication for depression, diabetes, hyperlipidemia, coronary artery disease, and knee pain. (Ex. 8.) At that time, Dr. Salmon also noted that Holmes was still smoking and had not seen an orthopedic doctor, but that his weight was down fifty-three pounds from the March 2009 visit to 214 pounds. (Ex. 8.) In the November 2, 2009 notes, Dr. Salmon again recorded abnormalities pertaining to type II diabetes, depression, knee pain, a thyroid nodule, hypertension, and hyperlipidemia, with continued medication. (Ex. 8.) Significantly, Dr. Salmon again noted that Holmes was still smoking, had not complied with his orders to see an orthopedic doctor for his knee pain, and had failed to keep an appointment for an examination of his thyroid. (Ex. 8.)

The remaining records included in the application were the results of various tests conducted by the Radiology Department at St. Joseph's Hospital. See Ex. 8. The results of a May 30, 2009 MRI indicated that Holmes had degenerative changes in his knees and some joint

effusion, but that his ligaments were intact. (Ex. 8.) However, while the examination of his left knee disclosed no conclusive evidence of meniscus or ligament tears, examination of Holmes' right knee revealed degenerative arthritis and suggested a tear in the medial meniscus. (Ex. 8.) Next, an x-ray examination conducted on the same day revealed the presence of bullet fragments in Holmes' skull, behind his left ear. (Ex. 8.) A blood test also revealed that Holmes had an abnormal cholesterol reading indicating a high overall cholesterol level. (Ex. 8.) Lastly, according to the results of Holmes' thyroid ultrasound on November 16, 2009, a solid 1.3 centimeter nodule was found in his thyroid gland; however, the doctor who conducted the test indicated that the sample taken thereof was insufficient for a biopsy diagnosis. (Ex. 8.)

After reviewing the above submissions, on April 15, 2010, the DHS Medical Assistant Review Team (MART) determined that Holmes was not disabled because he did not meet the disability criteria of Title XIX of the Medical Assistance guidelines. (Exs. 3, 5.) Thereafter, on May 13, 2010, Holmes requested an administrative hearing before the DHS Hearing Officer, which was conducted on July 15, 2010. (Exs. 1, 2.)

Holmes testified at the hearing regarding the treatment he received for his various conditions. He explained that he went to see an orthopedic doctor at Rhode Island Hospital for his knees, but wasn't examined because "they didn't accept the medical: the GPA insurance," and he also noted that he had difficulty gaining access to the facility. (Tr. at 10.) He also explained that he was receiving treatment for his alleged opiate abuse from Doctor Chang at Cranston East Medical Center and was taking suboxone to treat that addiction. (Tr. at 11.) In addition to suboxone, Holmes testified that he was taking medications for high cholesterol, high blood pressure, and "two types of insulin four times a day" for his diabetes. (Tr. at 17-18.) With regard to his pain and symptoms, Holmes explained that his significant weight loss was not due

to his diet, but rather to his thyroid condition. (Tr. at 11.) Further, he stated that he has anxiety attacks, difficulty concentrating, knee pain, and, as a result of his diabetes, vision problems and neuropathy in his feet. (Tr. at 11, 13, 19-21.)

Holmes supplemented his oral testimony at the hearing with documentary evidence of his conditions. First was a report regarding a psychiatric evaluation conducted by board-certified psychiatrist Thamara Davis, M.D. (Dr. Davis), which evaluation was conducted at the request of an attorney. (Ex. 9.) Dr. Davis evaluated Holmes just once on June 12, 2009, several months before Holmes submitted his disability application to DHS. (Ex. 7.) Dr. Davis' report refers to the following sources as having been considered in her evaluation: Trinitas Hospital records from 2005; Rhode Island Hospital records from 2007; St. Joseph's Hospital records from 2008; and Rhode Island Hospital records from 2009. Of these records relied upon by Dr. Davis, only the Rhode Island Hospital records from 2007 were made part of the administrative record, see Ex. 10, and only one reference appears therein related to depression and anxiety generally; and, a referral to psychiatry at Holmes' request as of November 8, 2007. Dr. Davis' report is largely based on Holmes' self-reporting of his problems with depression, memory loss, feelings of helplessness, a lack of motivation and energy, an inability to concentrate, anxiety, past drug addition, and thoughts of suicide. (Ex. 9.) Dr. Davis concluded that Holmes' impairment meets the criteria for affective disorders and for anxiety-related disorders. (Ex. 9.)

To further explain her conclusions, Dr. Davis completed a questionnaire which characterized Holmes' ability to function as "marked" in the following areas: restrictions on activities of daily living (ADL); difficulties in maintaining social functioning; and difficulties in maintaining concentration, persistence or pace. (Ex. 9.) She also found that the degree of impairment with respect to Holmes' ability to follow instructions, respond appropriately to

supervisors and co-workers, and respond to customary work pressures was moderately severe. (Ex. 9.) Dr. Davis further concluded that the degree of deterioration in his personal habits was severe. (Ex. 9.)

Holmes also submitted Rhode Island Hospital records from 2007 and additional St. Joseph's Hospital records from 2009. See Exs. 10, 11. These records included the results of an ultrasound of Holmes' thyroid taken on July 17, 2008, which indicated the presence of the thyroid nodule to which the previous ultrasound and doctor's reports referred. See Ex. 12.

In the Administrative Hearing Decision dated August 20, 2010, the DHS Hearing Officer confirmed the MART's rejection of Holmes' disability application. Utilizing the requisite five-step test for disability determinations, the Hearing Officer found that he was not disabled. (Ex. 16 at 15.) In the course of her written analysis, the Hearing Officer summarized her conclusions at each step of the test. At the first step, the Hearing Officer summarily determined that the evidence in Holmes' application and oral testimony showed that he had a work history as a furniture mover, but that he had not worked since 2000. (Ex. 16 at 10.) Proceeding to the second step, she noted that the evidence shows diagnoses of uncontrolled diabetes, coronary artery disease along with hypertension and hyperlipidemia, degenerative arthritis of the knees, and major depressive disorder. (Ex. 16 at 11.) Although she found that Holmes "is able to get around without help, and can use his arms for basic grasping and handling[,]" and that his claims of vision and hearing loss are unsupported by medical testing, the Hearing Officer concluded that the combination of the reported abnormalities is severe. Id.

At the third step of her analysis, the Hearing Officer compared the record of Holmes' impairments to the Social Security Administration's Listings of Impairments (SSI listings). 20 C.F.R. Pt. 404 subpt. P, app. 1. She concluded that Holmes did not satisfy the following listings:

(1) "Diabetes mellitus" because "the evidence [did] not establish that neuropathy has resulted in significant and persistent disorganization of motor function;" (2) "Ischemic heart disease" because "the evidence does not establish the occurrence of three separate ischemic episodes requiring revascularization;" (3) "Major dysfunction of a joint" because "the evidence does not demonstrate an extreme limitation to ability to ambulate;" and (4) "Affective disorders" because "the evidence regarding mental activities [was] predominantly based on self-report", the opinions of Dr. Salmon and Dr. Davis "do not provide support for restrictions that have reached a marked level relative to ADL, social functioning or cognitive functioning," and Dr. Davis "did not find any episode of decompensation of extended duration." (Ex. 16 at 12.) The Hearing Officer concluded that Holmes' impairments did not match those listed in the SSI listings, thereby necessitating further analysis of Holmes' application. Id.

At the fourth step, the Hearing Officer assessed Holmes' physical and mental residual functional capacity (RFC). (Ex. 16 at 14.) After considering several specific aspects of his ability to work, the Hearing Officer focused on the lack of medical testing to support the assertions of impairments and determined that Holmes "retains the physical ability to perform sedentary level exertional requirements with some postural and environmental restrictions; and the mental ability to perform simple, routine tasks that are not highly time pressured and do not require him to work closely with others." Id. The Hearing Officer concluded that Holmes' current RFC would preclude his ability to perform his past work as a furniture mover and proceeded to the final step in the evaluation process. Id.

In the last step of her analysis, the Hearing Officer noted the above-discussed impairments and diagnoses, as well as Holmes' age, education, past work history, and current RFC. (Ex. 16 at 15.) Ultimately, she determined that:

> "[b]ased on the appellant's age of 45 (younger individual), 12th grade education (high school or more), work history (very heavy, semi-skilled, not transferable), RFC (sedentary exertion with some postural and environmental restrictions), MRFC (simple, routine tasks, not involving complex instructions, time pressures, or working closely with others), and using vocational rule 201.21 as a guide along with consideration of non-exertional impairments; the factors direct a conclusion of 'not disabled'." (Ex. 16 at 15.)

From this finding that he is not disabled, Appellant filed a timely appeal to this Court.

II
Standard of Judicial Review

This Court's review of an administrative decision is guided by the provisions of § 42-35-15(g), as follows:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

In reviewing an agency decision, this Court is limited to an examination of the certified record in deciding whether the agency's decision is supported by substantial evidence. Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 684 (R.I. 1998). Substantial evidence has been defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." Newport Shipyard, Inc. v. Rhode Island Comm'n for Human Rights, 673 A.2d

457, 459 (R.I. 1996). This Court may not substitute its judgment for that of the agency on issues of fact or with regard to the credibility of witnesses where substantial evidence exists to support the agency's findings. See Barros, 710 A.2d at 684; Baker v. Dep't of Employment and Training Bd. of Review, 637 A.2d 360, 366 (R.I. 1994); Mercantum Farm Corp. v. Dutra, 572 A.2d 286, 288 (R.I. 1990). Only where "factual conclusions of administrative agencies . . . are totally devoid of competent evidentiary support in the record" may the Court reverse. Baker, 637 A.2d at 363 (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)). The hearing officer need not use particular phrases or formulations in the decision, nor is he or she required to cite to particular regulations or cases. Jamison v. Bowen, 814 F.2d 585, 588-89 (11th Cir. 1987).

Questions of law are not binding upon the court and are reviewed de novo. Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (R.I. 1977); Bunch v. Bd. of Review, R.I. Dep't of Employment & Training, 690 A.2d 335, 337 (R.I. 1997). It is inherent in the power of this Court to order a remand to the administrative agency to "correct deficiencies in the record and thus afford the litigants a meaningful review." Birchwood Realty, Inc. v. Grant, 627 A.2d 827, 834 (R.I. 1993) (quoting Lemoine v. Dep't of Mental Health, Retardation, & Hospitals, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974)).

III
Standards Governing Determination of Eligibility

DHS is an agency within the Executive Branch of state government and is responsible for the management of state- and federally-funded public financial assistance programs. G.L. 1956 §§ 42-12-1,-4. One such program that DHS administers is the Medical Assistance Program, which provides medical care benefits to individuals who meet any of the eligibility requirements set forth in G.L. 1956 § 40-8-3.

The Medical Assistance Program derives from Title XIX of the Federal Social Security Act and provides benefits for disabled individuals. 42 U.S.C. § 1396 et. seq. "The purpose of the Medicaid program is to furnish medical assistance to disabled individuals who are without funding to meet the necessary medical costs." Social Security Act, § 1910, as amended, 42 U.S.C. § 1396. Title XIX requires states to establish a plan to be approved by the United States Department of Health and Human Services in order for the state to qualify for federal funding. 42 U.S.C. § 1396 et seq.; §§ 40-8-1(c), 40-8-5. Thus, DHS is bound by the guidelines of the Supplemental Security Income (SSI) program as established by the federal government. See 42 U.S.C. § 1396, et seq.; Social Security Act § 1902(R)(2)(a); Tierney v. Dep't of Human Services, 793 A.2d 210, 211 (R.I. 2002).

Under federal law, "an individual shall be considered to be disabled . . . if he is unable to engage in 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. § 1382c(a)(3). In a hearing for disability benefits, DHS officers must consider "all relevant evidence," which includes not only objective evidence, but also medical history and subjective evidence, such as the applicant's own statements regarding daily activities, pain, and extent of limitations. 20 C.F.R. §§ 416.924(a), 416.912(b), 416.929(d)(1). When determining whether an individual is disabled, DHS is required to analyze the claimant's condition using a five-step sequential evaluation method set forth and fully explained in 20 C.F.R. § 416.920. That analysis is as follows:

> 1. Is the claimant engaged in substantial gainful activity? If so, the claimant is not disabled; if not, proceed to step two.
> 2. Is the impairment severe? If not, the claimant is not disabled; if so, proceed to step three.

> 3. If the impairment(s) is (are) severe, does it meet or equal an impairment listed in the SSI regulations, 20 C.F.R. Pt. 404 subpt. P, app. 1? If so, the claimant is found to be disabled. If not, proceed to step four.
> 4. If it does not meet or equal SSI regulations, does the impairment prevent the claimant from doing past relevant work? If not, the claimant is not disabled; if so, proceed to step five.
> 5. Considering age, education, work experience and RFC, does the impairment(s) prevent the claimant from doing other work in the national economy? If so, the claimant is found to be disabled; if not, the claimant is not disabled. See 20 C.F.R. § 416.920(a)(4)(i)-(v).

The claimant bears the burden of proof as to the first four steps; however, if the fifth step is reached, the burden shifts to the agency to prove that the claimant can perform work other than his past work in the national economy. Pope v. Shalala, 998 F.2d 473, 477 (7th Cir. 1993); 20 C.F.R. § 416.920(a)(4)(i)-(v). If a disability is found, it must be expected to last twelve (12) continuous months or end in death. 20 C.F.R. § 416.909.

This sequential analysis requires that the medical severity of a claimant's impairment(s) be considered at both the second and third steps, and the claimant's RFC be considered at both steps four and five. See 20 C.F.R. § 416.920(a)(4)(ii)-(v). The consideration of medical opinion evidence to demonstrate the medical severity of a claimant's impairment(s) is governed by 20 C.F.R. § 416.927. The RFC and other considerations set forth in step five are evaluated in accordance with 20 C.F.R. § 416.945.

IV
Analysis

Holmes essentially challenges two aspects of the decision: the Hearing Officer's treatment of the medical opinions submitted by Dr. Salmon and Dr. Davis, and the RFC determination. With respect to the medical opinions, Appellant argues that the Hearing Officer failed to articulate and apply legal standards, or applied the incorrect legal standards, in

evaluating Dr. Salmon's and Dr. Davis' medical opinions, failed to give proper weight to Dr. Salmon's opinion as the treating physician, and rejected Dr. Davis' opinions altogether when such opinions were entitled to great weight. Appellant further contends that the Hearing Officer acted arbitrarily and capriciously and that her findings are not supported by substantial evidence in that she arbitrarily accepted and credited some parts of Dr. Salmon's and Dr. Davis' opinions while rejecting other aspects of the opinions without explanation. Finally with regard to the medical opinions, Appellant asserts that the Hearing Officer's finding at step three was based on legal error and was unsupported by substantial evidence wherein Holmes' severe and non-severe impairments were not considered in combination, as required by the federal regulations. 20 C.F.R. § 416.923.

With respect to the RFC determination, Appellant argues that the Hearing Officer's finding is arbitrary and capricious, unsupported by substantial evidence and based on error of law because the RFC determination was not based upon the specific assessment of medical professionals and did not contain a thorough discussion and analysis of objective and subjective evidence. Appellant maintains that the DHS failed to sustain its burden in the last step of the sequential analysis.

Each of these issues will be addressed seriatim.

A
Weight of Medical Opinions

In weighing a physician's opinion for disability determinations, federal regulations provide that treating source physicians' opinions are generally given greater weight. 20 C.F.R. § 416.927(c)(2). A treating physician's opinion is afforded controlling weight when the agency finds:

> "that a treating source's opinion on the issue(s) of the nature and severity of [a claimant's] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [a claimant's] case record." 20 C.F.R. § 416.927(c)(2).

If a treating physician's opinion fails to meet the two requirements to be afforded controlling weight, it does not necessarily follow that such opinion is automatically rejected. Rather, DHS is still required to consider a treating physician's opinion in light of the length, frequency, nature, area of medical specialization, and extent of the applicant's treatment relationship with the physician, whether the opinion is supported by medical evidence and/or is consistent with the record as a whole, and other factors brought to the agency's attention. 20 C.F.R. § 416.927(c)(2)-(6). As stated in Social Security Ruling (SSR) 96-2p:

> "Adjudicators must remember that a finding that a treating source medical opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the case record means only that the opinion is not entitled to 'controlling weight,' not that the opinion should be rejected. Treating source medical opinions are still entitled to deference and must still be weighted using all of the factors provided in 20 C.F.R. [] 416.927. In many cases, a treating source's medical opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight." SSR 96-2p.

Although the hearing officer must always carefully consider medical opinions in making her determination, such opinions are "never entitled controlling weight or special significance" with regard to the ultimate issue of disability. SSR 96-5p; see also Reeves v. Barnhart, 263 F. Supp.2d 154, 162 (D.Mass. 2003) (citing Arroyo v. Sec'y of Health and Human Servs., 932 F.2d 82, 89 (1st Cir. 1991) (finding ALJ not required to accept conclusions of claimant's treating physicians on ultimate issue of disability)). Such a rule exists because "[g]iving controlling weight to such opinions would, in effect, confer upon the treating source the authority to make

the determination or decision about whether an individual is under a disability, and thus would be an abdication of the [hearing officer's] statutory responsibility to determine whether an individual is disabled." SSR 96-5p.

To the extent Holmes argues that the Hearing Officer must give controlling weight to Dr. Davis' express conclusions that his impairments satisfy the criteria of 12.04 (Affective disorders) and 12.06 (Anxiety-related disorders), the Court disagrees. Not only would basing satisfaction of these listings on Dr. Davis' opinion be an "abdication of the [Hearing Officer's] statutory responsibility" regarding the ultimate question of disability, but according to the federal regulations, only a treating physician's opinion may be given controlling weight. 20 C.F.R. § 416.927(d)(2). By comparison, Dr. Davis rendered a "consultative examination," see Ex. 16 at 7, and did not serve as Holmes' treating physician nor render any treatment to Holmes. Accordingly, the controlling weight set forth in 20 C.F.R. § 416.927(c)(2) is inapplicable to Dr. Davis' opinion and the Hearing Officer did not misapply federal standards in not affording this medical opinion controlling weight.

The Court also disagrees with Holmes' contention that the Hearing Officer failed to properly apply the factors set out in 20 C.F.R. § 416.927(c). Dr. Davis, as a consultative physician having met Holmes only once, was not a treating physician whose opinion was entitled to controlling weight. Further, with respect to Dr. Salmon, the Hearing Officer specifically found that Dr. Salmon supported his opinion in the MA-63 form by providing "some office notes, with diagnostic and laboratory findings related to the appellant's physical health," but thereafter found that "[t]here is no support in Dr. Salmon's records for any limitations to mental functioning." (Ex. 16 at 6.) There is substantial evidence in the record to uphold these two specific findings by the Hearing Officer. See, e.g., Exs. 8, 10, 11, 12. Moreover, the physical

ailments from which Holmes suffers are well-supported by medical testing and are not inconsistent with the other substantial evidence in the record. Id., see also 20 C.F.R. § 416.927(c)(2). It is Dr. Salmon's opinion concerning Holmes' mental functioning that is lacking in support in both medically acceptable clinical and diagnostic techniques and in other evidence in the record which correctly led the Hearing Officer to conclude that "no one physician is deserving of controlling weight." (Ex. 16 at 7.)

Section 416.927(c) of Title 20 of the Code of Federal Regulations provides that, "[r]egardless of source, we will evaluate every medical opinion we receive. . . . We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." 20 C.F.R. § 416.927(c). If a treating source's opinion is not given controlling weight, the weight given to such opinion is to be determined based on the factors set forth in 20 C.F.R. § 416.927(c)(3)-(6). The same factors are considered in determining the weight of a non-treating source's opinion, with the additional consideration that more weight is to be given to the opinion of a source who has actually examined the claimant, as opposed to a non-examining medical source. 20 C.F.R. § 416.927(c)(1), (c)(3)-(6). Those factors generally address whether an opinion is supported by medical signs and laboratory findings or sufficient explanation; whether the opinion is consistent with the record as a whole; whether the source issued an opinion related to his or her area of specialty; and any other factors which may tend to support or contradict the opinion. 20 C.F.R. § 416.927(c) (3)-(6).

The Decision expressly states that "[a]ll medical opinion evidence is evaluated in accordance with the factors set forth at 20 C.F.R. § 416.927." (Ex. 16 at 7.) In assessing the medical evidence with respect to Holmes' alleged mental impairments, the Hearing Officer concluded that "[t]here is no support in Dr. Salmon's records for any limitations to mental

functioning[,]" and that she "has not efficiently reported information about treatment compliance and effectiveness [regarding depression]." (Ex. 16 at 6, 8.) On this basis, the Hearing Officer rejected Dr. Salmon's opinions regarding Holmes' mental impairments, but never addressed that Dr. Salmon's findings concerning Holmes' mental impairments were consistent with Dr. Davis' findings. See 20 C.F.R. § 416.927(c)(4). Further, with respect to Dr. Salmon's findings concerning Holmes' limits of functional activities, see Ex. 6 at 3, the Hearing Officer found that "the record does not provide any justification for restrictions in ability to sit for two-hour blocks of time through the workday" and that there is "no evidence of damage affecting muscle or nerve that would impact the upper body strength required to lift 10 lbs frequently and 20 lbs[2] occasionally as required of light work." (Ex. 16 at 13.)

With respect to Dr. Davis' opinion, the Hearing Officer failed to address not only the consistency with the mental functioning portion of Dr. Salmon's opinion, but also Dr. Davis' area of specialization. 20 C.F.R. § 416.927(c)(4)-(5). More importantly, the Hearing Officer discounted Dr. Davis' opinion because she "does not have a treatment relationship with the appellant, and has not provided substantive information to support extreme conclusions," and concluded that Dr. Davis' "narrative contains very few observations of the psychiatrist, no supportive testing, and only the appellant's own descriptions relative to functioning." (Ex. 16 at 7-8.) The Hearing Officer also stated that, "it is not evident if Dr. Davis is familiar with the listings criteria or what her rationale was for such an extreme conclusion." (Ex. 16 at 8.)

In accordance with 20 C.F.R. § 416.929(a), in determining whether a claimant is disabled, the Hearing Officer is required to "consider all your symptoms, including pain, and the

[2] Notably, the Hearing Officer stated that Dr. Salmon "did not indicate a specific weight limit for lifting." (Ex. 16 at 13.) This conclusion is erroneous. Dr. Salmon's MA-63 form responds "No" adjacent to "Able to lift/carry up to 5 lbs" and the designated frequency options, either "occasionally" or "frequently," remain uncircled. (Ex. 6 at 3.) It is evident, then, that Dr. Salmon found Holmes incapable of carrying any amount of weight.

extent to which your symptoms can reasonably be accepted as consistent with the objective medical evidence, and other evidence." 20 C.F.R. § 416.929(a). "An individual's statements about the intensity and persistence of pain or other symptoms or about the effect the symptoms have on his or her ability to work may not be disregarded solely because they are not substantiated by objective medical evidence." SSR 96-7p. "It is not sufficient for the adjudicator to make a single, conclusory statement that 'the individual's allegations have been considered' or that 'the allegations are (or are not) credible.'" SSR 96-7p. Despite these warnings that an applicant's statements should not be disregarded, the Hearing Officer notes that Dr. Davis' report did not contain mental or psychiatric tests results or employ other diagnostic tools and then appears to discount her opinion because "much of the information is derived from his self-report of symptoms." (Ex. 16 at 7.) Furthermore, the Hearing Officer neglected to apply the required factors for evaluating of subjective reports of pain. 20 C.F.R. § 416.929(c)(3)(i)-(vii).

While the Hearing Officer is entitled to determine the weight to be accorded medical opinions pursuant to 20 C.F.R. § 416.927(c), it also stands to reason that, at some point, the amount of weight given should be explained and should be applied consistently. Here, the Hearing Officer provides reasons for not giving controlling weight to Dr. Salmon's opinion on mental functioning and for discounting the lifting and sitting portions of Dr. Salmon's opinion on Holmes' physical restrictions, but makes no mention of the weight to be accorded to the balance of Dr. Salmon's opinions. The Hearing Officer provides reasons for discounting Dr. Davis' opinion as not being supported by diagnostic testing and having been based on Holmes' self reporting. Notwithstanding, the Hearing Officer then proceeds to apply, in part, the same opinions she has rejected or discounted in reaching the conclusion that Holmes "retains the

physical ability to perform sedentary level exertional requirements with some postural and environmental restrictions; and the mental ability to perform simple, routine tasks that are not highly time pressured and do not require him to work closely with others." (Ex. 16 at 5, 14.) The Hearing Officer also concludes that "[h]e has medically determinable impairments including DM [diabetes mellitus], CAD [coronary artery disease], OA [osteoarthritis] and MDD [major depressive disorder]" and that such conditions are severe. (Ex. 16 at 5, 15.)

In reaching such conclusions, it appears that the Hearing Officer did not, in fact, reject or discount Dr. Salmon's opinions regarding Holmes' ability to walk or stand less than two hours, to reach and bend, and postural and environmental limitations due to his osteoarthritis, diabetes, hypertension and degenerative musculoskeletal conditions. (Ex. 16 at 13-14; cf. Ex. 6 at 3.) The Hearing Officer also appears to give some credence to Dr. Salmon's assessment of Holmes' mental functioning by adopting limitations in the activities in which Dr. Salmon states he is markedly limited. For instance, Dr. Salmon opined that Holmes' was markedly limited in his ability to maintain attention and concentration in order to complete tasks in a timely manner, to interact appropriately with co-workers and supervisors, and to respond to changes in work routine or environment. (Ex. 6 at 3.) By comparison, the Hearing Officer concluded that he should not be in a position that requires him to adhere to a highly-structured or time-pressured schedule, that he should not work closely with others, including the public and team work situations, and that he could do simple, repetitive tasks. (Ex. 16 at 14.) Indeed, the Hearing Officer's findings that Holmes retains certain abilities are all the abilities in which Dr. Salmon found Holmes to be just moderately limited: carry out simple instructions and routine tasks without time pressure and without extraordinary supervision, or having to work closely with others. (Ex. 16 at 14; cf. Ex. 6 at 3.)

The Hearing Officer also appears to give some credence to Dr. Davis' opinion in finding that Holmes retains the ability to perform simple, routine tasks that are not highly time-pressured and do not require him to work closely with others. Dr. Davis summarizes that Holmes has concentration difficulties and memory impairment, that he is unable to follow instructions, and that he is socially avoidant. (Ex. 9 at 5.) Dr. Davis also characterizes the degree of limitations in the following pertinent functions as being "moderately severe" and not "severe": ability to relate to other people; understand, carry out and remember instructions; attention and concentration in work setting; respond appropriately to supervision, co-workers and work pressures; and perform simple, complex, repetitive and varied tasks. (Ex. 9 at 19-20.) Certainly some of these restrictions were factored into the Hearing Officer's conclusion, notwithstanding the Hearing Officer's rejection of Dr. Davis' opinion as having been based largely on the Appellant's self-reporting.

In sum, Appellant argues that the Hearing Officer acted arbitrarily and capriciously in accepting and crediting some parts of the doctors' opinions while rejecting others without explanation. The Court agrees in part. The Hearing Officer explained at various times why certain aspects of Dr. Salmon's opinion were rejected and why it wasn't entitled to controlling weight, as well as why Dr. Davis' opinion was rejected. What the Hearing Officer does not explain, though, is how and why certain portions of these opinions of these physicians did influence the Hearing Officer's conclusions as to Holmes' functional limitations. The Hearing Officer's conclusions are not based upon any other evidence in the record. Without an explanation as to why certain portions of the physicians' opinion influenced the Hearing Officer in one respect but were rejected or discounted in other respects, the Hearing Officer acted arbitrarily and capriciously. On remand, the Hearing Officer should further explain the weight

given to each medical opinion, the basis for that determination, and whether, to what extent, and why a different weight is applied to certain aspects of the medical opinions.

B
Failure to Consider Medical Equivalence and Combination of Impairments

According to step three in the five-step analysis, the Hearing Officer is required to determine whether Holmes' impairments matched those in 20 C.F.R. Pt. 404 subpt. P, app. 1. If his impairments do not meet the criteria of those in a particular SSI listing or listings, the Hearing Officer must consider whether they can "medically equal the criteria of a listing." 20 C.F.R. § 416.925. There are three ways that a claimant can satisfy the "medically equivalent" standard: (1) if one of more of the criteria in a listing of impairment is not exhibited, other findings relating to the impairment that are at least of equal medical significance to the required criteria will be considered; (2) an impairment that is not included in the SSI listings will be compared to the criteria for a closely analogous impairment that is included in the SSI listings; and (3) if there is a combination of impairments and not one meets all the listing criteria, the criteria of closely analogous listed impairments will be considered and the combination can be medically equivalent to listing impairments. 20 C.F.R. § 416.926(b)(1)-(3).

Even if any one of Holmes' impairments do not match an SSI listing or does not medically equal the criteria of the listing, the Hearing Officer is required to consider whether the combined effect of all of Holmes' impairments would be of sufficient severity, without regard to whether any such impairment, if considered separately, met an SSI listing. 20 C.F.R. § 416.923. If the Hearing Officer finds "a medically severe combination of impairments, the combined impact of the impairments will be considered throughout the disability determination process." Id.

The Hearing Officer's discussion of the individual listings at step three makes clear that she considered only those listings that directly correspond to those impairments which she labeled "severe" at step two. (Ex. 16 at 11.) As expressed in her step two analysis, the Hearing Officer considered diabetes, coronary artery disease, osteoarthritis, and major depressive disorder "severe for the purpose of the sequential evaluation." (Ex. 16 at 11; see also id. at 5.) She then noted that although Holmes' reported visual impairment and thyroid abnormalities "are non-severe conditions, [they] are considered in combination with severe conditions for the purpose of the sequential evaluation[.]" (Ex. 16 at 11.) The Hearing Officer reviewed four discrete listings: 9.08 (Diabetes mellitus); 4.04 (Ischemic heart disease); 1.02 (Major dysfunction of a joint); and 12.04 (Affective disorders). (Ex. 16 at 12; see also 20 C.F.R. Pt. 404 subpt. P, app. 1.) In rejecting each of the impairment listings offered by Dr. Davis, the Hearing Officer notes at least one element for each listing that was not satisfied. See Ex. 16 at 12. There is no discussion whatsoever of medical equivalence. For instance, there is no discussion or consideration of other findings that are at least of equal medical significance to the criteria that the Hearing Officer found Holmes did not exhibit. See 20 C.F.R. §416.926(b)(1). Moreover, there is no discussion or consideration of whether the combination of Holmes' impairments can be medically equivalent to listing impairments to render him disabled. 20 C.F.R. §§ 416.923, 416.926(b)(3). The Hearing Officer's determination at step three, then, is affected by error of law. The matter shall be remanded for the Hearing Officer to consider and analyze these issues in accordance 20 C.F.R. §§ 416.923, 416.925, and 416.926.

C
Residual Functional Capacity

Holmes argues that the Hearing Officer erred as a matter of law in finding that he is capable of performing sedentary work. Specifically, he asserts that he does not have the RFC

necessary to engage in sedentary work because, as his medical records indicate, he can only sit for four hours rather than the six hours mandated by the regulations. In addition, Holmes asserts that the Hearing Officer impermissibly substituted her own judgment for the opinions of the doctors and failed to consider all of his symptoms in defining the scope of his RFC. Conversely, DHS states that the Hearing Officer's decision should be affirmed because her finding was appropriately based on the evidence as a whole.

At step five, the Hearing Officer must determine whether the claimant can do any work in the national economy considering his RFC, age, education, and work experience.[3] See 20 C.F.R. § 416.920(a)(4). This inquiry requires a determination of the claimant's RFC because it reveals "the most [one] can still do despite [one's] limitations." 20 C.F.R. §§ 416.945(a)(1), 416.945(a)(5)(ii). The RFC assessment requires a "function by function analysis" and is to be based on all of the evidence in the record, including evidence of additional impairments which are not considered "severe," including pain. 20 C.F.R. §§ 416.945(a)(2), 416.929; SSR 96-8p. DHS "bears the burden of demonstrating the claimant's capacity to perform each of the RFC elements . . . and must proffer specific medical evidence in support of such demonstration." Sobolewski v. Apfel, 985 F. Supp. 300, 309-10 (E.D.N.Y. 1997) (citing Gray v. Chater, 903 F. Supp. 293, 300 (N.D.N.Y. 1995); Koseck v. Sec'y of Health and Human Servs., 865 F. Supp. 1000, 1013 (W.D.N.Y. 1994)). The decision that a claimant can return to work "must be based on more than conclusory statements." Pfitzner v. Apfel, 169 F.3d 566, 568 (8th Cir. 1999).

As with the disability determination at step three, the issue of a claimant's RFC is not a medical issue but an administrative finding. SSR 96-5p. Accordingly, the adjudicator must carefully consider the medical opinions in the record in determining a claimant's RFC; however,

[3] The RFC analysis took place at step four of the Hearing Officer's Decision and concludes that Holmes can no longer perform his past relevant work. While Holmes does not challenge this finding, he challenges the RFC determination because of its impact at step five.

such opinions are "never entitled controlling weight or special significance" with regard to the ultimate determination. Id.; see also Reeves v. Barnhart, 263 F. Supp.2d 154, 162 (D. Mass. 2003) (citing Arroyo v. Sec'y of Health and Human Servs., 932 F.2d 82, 89 (1st Cir. 1991)). As a lay person, the adjudicator is not qualified to interpret raw medical data in functional terms without medical opinion supporting the determination. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (citing Manso-Pizarro v. Sec'y of Health and Human Servs., 76 F.3d 15 (1st Cir. 1996)). As noted, in weighing physicians' opinions for disability determinations, 20 C.F.R. 404.1527(c)(2) provides that treating source physicians' opinions are generally given more weight.

Depending on the claimant's RFC, he or she will be classified as able to perform either "sedentary" work, "light" work, "medium" work, "heavy" work, "very heavy" work, or no work at all. In order to fit into any one of the various categories, one must be able to perform the full range of work, from an exertional standpoint, in that category. See SSR 83-10. In this case, at step five the Hearing Officer was required to show substantial evidence of Holmes' ability to perform "sedentary work." Sedentary work is defined by 20 C.F.R. § 416.967(a):

> "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met."

Dr. Salmon concluded that each day Holmes can walk and stand less than two hours, sit less than four out of eight hours, and can occasionally reach and bend, but is unable to lift or carry up to 5 lbs. (Ex. 6 at 3.) The Hearing Officer rejected those conclusions and found that there was "no evidence of damage affecting muscle or nerve [sic] that would impact the upper

body strength required to lift 10 lbs. frequently and 20 lbs. occasionally as required of light work" and that "the record does not provide any justification for restrictions in ability to sit for two-hour blocks of time throughout a workday." (Ex. 16 at 13.)

As discussed supra, Section IV A, the Hearing Officer arbitrarily relied upon portions of Dr. Salmon's and Dr. Davis' opinions and rejected other portions. Without an explanation as to how, why, and to what extent portions of these opinions were accepted, rejected, or discounted, it appears that the Hearing Officer merely substituted her opinion for that of the physicians in finding that Holmes can perform sedentary work. Under these circumstances, DHS cannot sustain its burden at step five. As the Hearing Officer's conclusion that Holmes can perform sedentary work is affected by her arbitrary reliance upon and rejection of the medical opinions, the determination at step five must also be remanded for further proceedings. Should the Hearing Officer reach step five of the analysis on remand, the burden obviously remains with the DHS to prove by substantial evidence that Holmes is capable of performing work in the national economy.

V
Conclusion

After a review of the entire record, this Court finds that the Hearing Officer arbitrarily and capriciously assessed the medical opinions and committed error in failing to consider the medical equivalency of and/or combination of the Appellant's impairments as required by law. Finally, this Court holds that DHS failed to sustain its burden at step five of the sequential evaluation process. Accordingly, the DHS Decision is vacated and the case is remanded to DHS for further proceedings consistent with this Decision. Counsel for the Appellant shall submit an appropriate Judgment for entry.