ADMINISTRATIVE LAW JUDGE

▸ Administrative Notice

Galarza v. Sec'y HHS, No. 93-1703, 19 F.3d 7 (Table) (1st Cir. 1994). **Unpublished.** ALJ may take administrative notice of the DOT and rely on the DOT's job descriptions which reflected a general absence of environmental concerns in the relevant job categories. VE testimony about environmental conditions not needed.

Gray v. Heckler, 760 F.2d 369 (1st Cir. 1985). Approves administrative notice of occupational reference materials for information regarding various types of work. Court notes that the 4th circuit has held that the Secretary may rely on general categories in the Supplement to the DOT as presumptively applicable to the claimant's past work.

▸ Bias

Hebert v. Sec'y HHS, 758 F.2d 804 (1st Cir. 1985). Making an error of law does not constitute bias.

▸ Credibility Determinations

Shaw v. Sec'y HHS, No. 93-2173, 25 F.3d 1037 (Table) (1st Cir. 1994). The credibility determination by the ALJ, who observed the claimant, evaluated her demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference.

Dupuis v. Sec'y HHS, 869 F.2d 622 (1st Cir. 1989). An ALJ's credibility determinations are owed "considerable deference."

Frustaglia v. Sec'y HHS, 829 F.2d 192 (1st Cir. 1987). The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings, although more express findings regarding pain and credibility would have been preferable.

DaRosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). ALJ improperly discounted Claimant's testimony concerning his pain and physical limitations because the extent of pain alleged was not corroborated by objective medical evidence. ALJ must make specific findings as to the relevant evidence he considered in determining to disbelieve the appellant.

▸ Duty to Consult Medical Advisor

Colon v. Chater, No. 98-1245, 187 F.3d 681 (Table) (1st Cir. 1998). **Unpublished**. No duty to contact MA where record contained several medical opinions, including those of treating and consulting, non-examining doctors, on claimant's functional capacity.

May v. Comm'r of Soc. Sec., No. 97-1367, 125 F.3d 841 (Table)(1st Cir. 1997). **Unpublished**. Where evidence is ambiguous as to when claimant's mental impairment became severe, SSR 83-20 requires ALJ to consult a medical advisor. Case remanded.

Manso-Pizarro v. Sec'y HHS, 76 F.3d 15 (1st Cir. 1996). Illegibility of non-trivial parts of medical record, combined with identifiable diagnoses and symptoms indicating more than a mild impairment, alerted ALJ to need for expert guidance regarding the extent of the claimant's RFC to perform her past employment. Case remanded.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Court declines to lay down an iron-clad rule that an ALJ is powerless to piece together the relevant medical facts from the findings and opinions of multiple physicians. Report of consulting physician retained by claimant is not new and material evidence where it is based on same medical evidence considered by ALJ, but the consulting physician organized it differently and reached a different conclusion.

▸ Duty to Develop the Record

See also "**Duty Toward Unrepresented Claimants**" below.

Nguyen V. Chater, 172 F.3d 31 (1st Cir. 1999). The fact that claimant stated "I drive" on initial application form does not contradict his alleged inability to remain seated. ALJ never inquired into extent of claimant's ability to drive or driving activity subsequent to application.

Faria v. Comm'r of Soc. Sec., 187 F.3d 621 (Table) (1st Cir. 1998). **Unpublished.** Court refuses to remand for ALJ's failure to secure medical treatment notes or ask further questions where claimant has not shown how he was prejudiced by ALJ's shortcomings.

Colon v. Chater, No. 98-1245, 187 F.3d 681 (Table) (1st Cir. 1998). **Unpublished**. ALJ only required to recontact treating doctor where unable to ascertain from the records the basis for the doctor's opinion as to the claimant's disability.

Niemi v. Shalala, No. 95-1743, 81 F.3d 147 (Table)(1st Cir. 1996). **Unpublished.** SSA "must make investigation that is not wholly inadequate under the circumstances," meaning that SSA must attempt "without undue effort" to fill evidentiary gaps (e.g., by ordering "easily obtained" medical reports).

Manso-Pizano v. Sec'y HHS, 76 F.3d 15 (1996). ALJ is entitled to credit claimant's own description of her former job duties and functional limitations but has some burden independently to develop the record.

Garcia-Martinez v. Comm'r of Soc. Sec., No. 95-1791, 82 F.3d 403 (Table) (1st Cir. 1996). **Unpublished.** Where claimant never referred to emotional symptoms or described how his mental condition affected his ability to work, ALJ had no duty to further develop the record regarding the existence of a mental impairment.

Nieves v. Sec'y HHS, No. 94-1887, 45 F.3d 423 (Table) (1st Cir. 1995). **Unpublished.** Factors that increase SSA's duty to develop the record are claimant being unrepresented and the presentation of a claim which itself seems on its face to be substantial.

Heggarty v. Sec'y HHS, 947 F.2d 990 (1st Cir. 1991). Because Social Security proceedings are non-adversarial in nature, the ALJ had a duty to develop an adequate record from which a reasonable conclusion could be drawn. ALJ's responsibility increases where claimant is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence necessary to a reasoned evaluation of the claim, and where it is within the power of the ALJ, without undue effort, to see that the gaps are somewhat filled. Case remanded.

Santiago v. Sec'y HHS, 944 F.2d 1 (1st Cir. 1991). Where the testimony and evidence did not go far enough to raise a "meaningful issue" in regard to how claimant's impairments affected her ability to work, the ALJ had no duty to further develop the record by obtaining RFC assessments.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). The Secretary bears a responsibility for adequate development of the record in these cases. This responsibility increases when the applicant is bereft of counsel.

Carrillo Marin v. Sec'y HHS, 758 F.2d 14 (1st Cir. 1985). While claimant bears the burden of proof on the issue of disability, the Secretary nonetheless retains a certain obligation to develop an adequate record from which a reasonable conclusion can be drawn.

DeBlois v. HHS, 686 F.2d 76 (1st Cir. 1982). Because of plaintiff's readily apparent mental disorder and fact that the ALJ noticed the possibility that the disorder might be related to an event occurring prior to the date last insured., ALJ had duty to develop the record of the etiology of the illness, its course, and its severity.

Figueroa v. Sec'y HHS, 585 F.2d 551 (1st Cir.1978). ALJ has duty to develop evidence of side effects of seizure medication where claimant alleged side effects disabled him from working.

Thompson v. Califano, 556 F.2d 616 (1st Cir. 1977). ALJ under no duty to go to "inordinate lengths to develop a claimant's case."

Miranda v. Sec'y HEW, 514 F.2d 996 (1st Cir. 1975). ALJ must make an investigation that is not wholly inadequate under the circumstances.

▸ Duty to Evaluate the Evidence and Make Findings

Harris v. Apfel, 215 F.3d 1311 (Table)(1st Cir. 2000). **Unpublished.** Remand where ALJ did not adequately explain what evidence supported his mental and physical RFC determinations.

Nguyen v. Chater, 172 F.3d 31(1st Cir. 1999). ALJ's findings not conclusive when derived by ignoring evidence, misapplying the law, or judging matters entrusted to experts. ALJ must explicate grounds for finding that treating physician's opinion is not credible.

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). ALJ must make subjective, individualized inquiry into nature of and what triggers claimant's nonexertional limitations. ALJ erred by failing to make findings as to claimant's ability to perform basic mental work-related activities.

DaRosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). ALJ must make specific findings as to the relevant evidence he considered in determining that claimant is not credible.

Suarez v. Heckler, 740 F.2d 1 (1st Cir. 1984). The ALJ is not required to evaluate in writing every piece of testimony and evidence submitted. The ALJ's indication that he considered "the entire record" is sufficient.

▸ Duty Toward Unrepresented Claimants

See also "**Duty to Develop the Record**" above.

Faria v. Comm'r of Soc. Sec., 187 F.3d 621(Table) (1st Cir. 1998). **Unpublished.** When a claimant is represented, the ALJ should ordinarily be entitled to rely on claimant's counsel to structure and present the claimant's case in a way that claimant's claims are adequately explored.

Nieves v. Sec'y HHS, No. 94-1887, 45 F.3d 423 (Table) (1st Cir. 1995). **Unpublished.** Factors that increase SSA's duty to develop the record are claimant being unrepresented and the presentation of a claim which itself seems on its face to be substantial.

Vasquez-Vargas v. Sec'y HHS, 838 F.2d 6 (1st Cir. 1988). ALJ adequately developed record for pro se claimant.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Self-representation by claimant at hearing, without more, is not a ground for remand. Remand for lack of representation "is necessitated only where there is a showing of unfairness, prejudice or procedural hurdles insurmountable by laymen." Where the claimant was able to present his case adequately and the ALJ met his burden to develop the record, remand is not warranted.

Suarez v. Sec'y HHS, 755 F.2d 1 (1st Cir. 1985), *cert. denied* 474 U.S. 844, 88 L.Ed.2d 109, 106 S.Ct. 133 (1985); rehearing denied 474 U.S. 1097, 88 L.Ed.2d 911, 106 S.Ct. 872 (1986). Inadequacy of representation, noted by court, doesn't warrant reversal of non-disability decision, but court suggests claimant get a new lawyer and attempt reopening.

DeBlois v. HHS, 686 F.2d 76 (1st Cir. 1982). Fairness dictates that when a claimant obviously suffering from a severe mental disorder appears at a social security proceeding without counsel, the ALJ undertake to protect his interests at the hearing. ALJ's failure to develop evidence is good cause for remand.

Currier v. Sec'y HHS, 612 F.2d 594 (1st Cir. 1980). Due to non-adversarial nature of proceedings, SSA's responsibility to develop the evidence increases where claimant is unrepresented, where the claim seems on its face to be substantial, where there are gaps in the evidence needed for a reasoned evaluation of the claim, and where it is in the power of the ALJ, without undue effort, to see that the gaps are somewhat filled.

Toledo v. Sec'y HEW, 435 F.2d 1297 (1st Cir. 1971). Fact that claimant was not supplied with counsel at government expense did not prejudice his claim, since the record, which shows that the examiner was exceptionally solicitous and helpful, and that the claimant was fairly treated, does not suggest that having counsel would have resulted in the presentation of a better case.

▸ Error - Ignoring Uncontroverted Medical Evidence

Ramos v. Barnhart, No. 02-1687, 2003 WL 1411959 (1st Cir. 3/21/03). **Unpublished**. By concluding that claimant did not have a somatoform disorder, the ALJ was substituting his own lay opinion for the uncontroverted medical evidence.

Brunel v. Comm'r of Soc. Sec., 248 F.3d 1126 (Table) (1st Cir. 2000). **Unpublished.** ALJ ignored, without explanation, part of treating physician's RFC opinion, that indicated claimant's capacity for sedentary work was significantly compromised.

Nguyen V. Chater, 172 F.3d 31(1st Cir. 1999). ALJ's findings not conclusive when derived by ignoring evidence, misapplying the law, or judging matters entrusted to experts. The ALJ was not at liberty to ignore medical evidence or substitute his own views for uncontroverted medical opinion.

Garay v. Sec'y HHS, No. 94-1515, 46 F.3d 1114 (Table)(1st Cir. 1995). **Unpublished.** It was error for ALJ to ignore uncontroverted evidence of claimant's mental impairment in hypothetical question to VE where the medical evidence and the ALJ's own decision support a finding of mental limitations. Case remanded.

Rose v. Shalala, 34 F.3d 13 (1st Cir. 1994). Given the uncontroverted evidence that the claimant suffered from CFS, blind reliance on a lack of objective findings is wholly inconsistent with the Secretary's policy as expressed in the POMS and in other pertinent policy statements.

Heggarty v. Sullivan, 947 F.2d 990 (1st Cir. 1991). An ALJ is not at liberty to substitute his own impression of an individual's health for uncontroverted medical opinion..

Rosado v. Sec'y HHS, 807 F.2d 292 (1st Cir. 1986). By disregarding the only residual functional capacity evaluation in the record, the ALJ in effect has substituted his own judgment for uncontroverted medical opinion. This was error.

Carillon Marin v. Sec'y HHS, 750 F. 2d 14 (1st Cir. 1985). ALJ is not at liberty to substitute his own impression of an individual's health for uncontroverted medical opinion.

Nieves v. Sec'y HHS, 775 F.2d 12, 14 (1st Cir.1985). ALJ not at liberty to discredit IQ scores where such test results are the only evidence on the point before the ALJ. Secretary is not at liberty to substitute her own opinion of an individual's health for uncontroverted medical evidence.

Suarez v. Sec'y HHS, 740 F.2d 1 (1st Cir.1984). The ALJ, although empowered to make credibility determinations and to resolve conflicting evidence, was not at liberty simply to ignore uncontroverted medical reports.

▸ Error - Interpreting Raw Medical Data

Nguyen V. Chater, 172 F.3d 31 (1st Cir. 1999). As a lay person, the ALJ is not qualified to interpret raw medical data in functional terms. Here, ALJ ignored uncontroverted treating physician opinion, interpreted medical test results, decided that treating doctor's opinion was inconsistent with test results, made a judgment about the appropriateness of claimant's medical treatment.

Rivera v. Comm'r of Soc. Sec., No. 98-1377, 181 F.3d 80 (Table)(1st Cir. 1998). **Unpublished.** ALJ lacks expertise to interpret raw medical data. Medical advisor is needed to interpret medical data in lay terms.

Manso-Pizano v. Sec'y HHS, 76 F.3d 15 (1st Cir. 1996). With a few exceptions, an ALJ, as a lay person, is not qualified to interpret raw data in a medical record. Where claimant sufficiently put her inability to perform her past work in issue, the ALJ must measure the claimant's capabilities, and ordinarily an expert's RFC evaluation is essential unless the extent of functional loss, and its effect on job performance, would be apparent even to a lay person.

Vasquez v. Sec'y HHS, 29 F.3d 619 (Table)(1st Cir. 1994). **Unpublished.** While ALJ is not qualified to interpret raw medical data in functional terms, he is not precluded from rendering common sense judgments about RFC based on medical findings where impairments in the record appear "relatively mild." Here, ALJ's common sense judgment was bolstered by testimony of MA.

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table) (1st Cir. 1994). **Unpublished.** As a general rule, an ALJ is not qulaified to assess RFC on the basis of bare medical findings. BUT, in this case the court finds substantial evidence to support the finding of a light RFC.

Perez v. Sec'y HHS, 958 F.2d 445 (1st Cir. 1991). ALJ is not qualified to interpret raw medical data in functional terms.

Heggarty v. Sec'y HHS, 947 F.2d 990 (1st. Cir. 1991). The ALJ may not substitute his own assessment of the claimant's health for uncontroverted medical opinion.

Gordils v. Sec'y HHS, 921 F.2d 327, 329 (1st Cir. 1990) .ALJ may make common sense judgments about functional capacity based on medical findings as long as he does not overstep the bounds of a lay person's competence and render a medical judgment.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Court declines to lay down an iron-clad rule that an ALJ is powerless to piece together the relevant medical facts from the findings and opinions of multiple physicians.

Rosado v. Sec'y HHS, 807 F.2d 292 (1st Cir. 1986). ALJ is not qualified to assess claimant's mental RFC from raw medical data in non-specific medical reports.

Nieves v. Sec'y HHS, 775 F.2d 12 (1st Cir. 1985). ALJ is not at liberty to substitute her own opinions of an individual's health for uncontroverted medical evidence. ALJ erred in discrediting IQ scores where such test results are the only evidence on the point before the ALJ. It was error for ALJ to conclude that IQ score of 63 must be invalid because claimant had a work history.

▸ Error - Misapplication of the Grid

See also "Grid" and "Vocational Expert" sections below.

Brunel v. Comm'r of Soc. Sec., No. 00-1142, 248 F.3d 1126 (Table) (1st Cir. 2000). **Unpublished.** ALJs advised to take vocational evidence when faced with claimant's with unusual needs to alternate sitting and standing.

Nguyen V. Chater, 172 F.3d 31(1st Cir. 1999). Because ALJ's finding that claimant could perform full range of sedentary work was not supported by the record, ALJ erred in using Grid to reach nondisability conclusion. Pain can constitute a significant nonexertional impairment which precludes naked application of the Grid and requires use of a vocational expert.

Rodriguez v. Sec'y HHS, No. 94-1858, 46 F.3d 1114 (Table)(1st Cir. 1995). **Unpublished.** ALJ erred in relying on the Sedentary grid rules to conclude that the claimant was not disabled where claimant can't perform the full range of sedentary work. But court upholds ALJ's finding of not disabled because claimant can perform sedentary and light work.

Heggarty v. Sec'y HHS, 947 F. 2d 990 (1st Cir. 1991) If occupational base is significantly limited by a nonexertional impairment, then the Secretary may not rely on the Grid to prove that there are other jobs available; usually a vocational expert is required.

Zayas v. Sec'y HHS, No. 83-1752 (3/27/84), 732 F.2d 40 (Table) (1st Cir. 1984). **Unpublished.** Remand where ALJ made factual errors in application of Grid.

Mullin, et al. v. Sec'y HHS, No. 83-1510 (1/31/84). **Unpublished (not on Westlaw). Available at DLC.** The ALJ is not qualified to make determination that claimant's depression does not significantly affect his RFC for sedentary work, where medical reports characterize the depression as moderate but there is no evidence, and no supporting findings, about the effect of the depression on claimant's ability to work. Error to rely on Grid where finding about sedentary RFC is unsupported.

Gagnon v. Sec'y HHS, 666 F.2d 662 (1st Cir.1981). ALJ erred in applying Grid and in failing to make findings as to whether or by how much claimant's work capability is further diminished by his nonexertional limitations.

▸ Finality of ALJ Decision

Sims v. Apfel, 530 U.S. 103, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000) Under 42 U.S.C. §405(g), claimants may only obtain judicial review after a final decision of the Commissioner after a hearing. If Appeals Council grants review, its decision is the final decision of the Commissioner. If the AC denies review, the ALJ's decision is the final decision of the Commissioner.

▸ Remand to Different ALJ

Mendoza v. Sec'y HHS, 655 F.2d 10(1st Cir. 1981). Court doubts the ability of any ALJ in these circumstances to proceed with the case unaffected by his earlier judgment and suggests it might be appropriate to have a different ALJ "take a completely fresh look" at case. ALJ's conclusion that

claimant failed to meet her burden of proof of child's paternity was unreasonable and not supported by substantial evidence.

Guzman Diaz v. Sec'y HEW, 613 F.2d 1194 (1st Cir. 1980). Court comments that ALJ's conclusion about schizophrenic claimant's mental RFC is incredible and that the evidence was not weighed in and sifted in a balanced and even-handed manner. ALJ had already heard case initially and on remand from district court.

- **Waiver of Issues Not Raised with ALJ (Issue Preclusion)**

Mills v. Apfel, 244 F.3d 1 (1st Cir. 2001), *cert. denied* 534 U.S. 1085, 122 S.Ct. 822, 151 L.Ed.2d 704 (1/7/2002). Issue (whether claimant's sporadic prior employment should have been considered at Step 4) is waived if it is not raised at the ALJ hearing, at least where the Appeals Council refuses to review the ALJ's decision and it becomes a final decision. However, failure to raise an issue at the Appeal Council does not bar Federal Court review of the issue provided it was raised with ALJ (see Sims v. Apfel, 530 U.S. 103; 120 S. Ct. 2080; 147 L. Ed. 2d 80 (2000)).

AMERICANS WITH DISABILITIES ACT

Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 996 (1999). No inherent conflict between receipt of Social Security Disability Insurance and employment discrimination claim under the Americans with Disabilities Act. Being "disabled" for SSDI purposes does not preclude proving essential element of ADA claim - that person, with or without reasonable accommodation, can perform the essential functions of a job. SSA does not take the possibility of reasonable accommodation into account when determining disability for SSDI purposes.

ANTI-ASSIGNMENT CLAUSE

Washington State Dept. of Social and Health Services, Et Al v. Guardianship Estate of Keffeler, No. 01-1420, 537 U.S. _____ (2003). No violation of anti-assignment provision of the Social Security Act (42 U.S.C. §407(a)) where State Dept. of Social and Health Services, acting as representative payee of children to whom it provides foster care, uses SSDI and SSI benefits to reimburse itself for cost of foster care. Dept.'s role as rep. payee and use of benefits to pay for foster care do not constitute "execution, levy, attachment, garnishment, or other legal process" under §407(a).

Splude v. Apfel, 165 F.3d 85 (1st Cir. 1999) Court will not recharacterize retroactive SSI as SSD in order to undo recoupment of state aid from retro SSI. Policies in favor of recoupment of state aid from SSI and recoupment of overpaid SSI from SSD are stronger than policy to protect SSD from assignments under §407(a) of the Social Security Act. Anomalous situation - where state aid is recouped if SSI retro is paid before SSD retro, but state aid is not recouped if SSD retro is paid first - does not render statutory scheme unconstitutional because it's rational.

Szlosek v. Sec'y HHS, 861 F.2d 13 (1st Cir. 1988). Title II benefits recouped for overpayment recovery can be counted as income when determining SSI payment levels. Counting withheld Title II amounts as income does not violate the availability principle. This was brought as a class action with a Massachusetts class certified.

Sckolnick v. Harlow, 820 F. 2d 13 (1st Cir. 1987). Order to pay bond is not an attachment or garnishment prohibited by the Anti-Assignment clause of the Social Security Act, 42 U.S.C. §407(a), (a person's entitlement to Social Security payments shall not "be subject to execution, levy, garnishment, or other legal process) where bond order does nothing to attach or garnish Social Security benefits.

Marengo v. First Massachusetts Bank, N.A., 152 F.Supp.2d 92 (D. Mass. 2001). SSI and SSDI benefits in bank account protected from offset by bank to recoup bank fees. Anti-assignment provision 42 U.S.C. §407(a), should be construed broadly. "Other legal process" encompasses extra-judicial remedies such as setoffs.

APPEALS COUNCIL

▸ Denial of Review

Ciccariello v. Apfel, 215 F.3d 1311(Table)(1st Cir. 2000). **Unpublished.** Appeals Council is not required to explain basis of decisions denying review.

▸ Judicial Review of Appeals Council Decisions

Sims v. Apfel, 530 U.S. 103, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000) There is no Appeals Council issue exhaustion requirement. Although seeking AC review of ALJ decision is generally required in order to exhaust administrative remedies and obtain judicial review, claimant does not waive judicial review of an issue by failing to present it to the Appeals Council (provided it was raised with ALJ).

Mills v. Apfel, 244 F.3d 1 (1st Cir. 2001), *cert. denied* 534 U.S. 1085, 122 S.Ct. 822, 151 L.Ed.2d 704 (1/7/2002). Determination by Appeals Council that new evidence is not material is reviewable by Federal Court under *Service v. Dulles*, 354 U.S. 363, 1 L.Ed.2d 1403, 77 S.Ct. 1152 (1957) standard - i.e., decision is reviewable to extent that it rests on an explicit mistake of law or other egregious error.

▸ Remand

Weeks v. SSA Comm'r, 230 F.3d 6 (1st Cir. 2000). An Appeals Council order remanding a case to the ALJ for further proceedings is not a final decision appealable to the federal courts.

▸ Review Authority and Scope

McCuin v. Sec'y HHS, 817 F. 2d 161 (1st Cir. 1987). Own motion reopening by Appeals Council limited to 60 days; reopening after 60 days allowed only on the motion of claimants. Court gives great deference to Agency's interpretation of its own regulations.

Berrios v. Sec'y HHS, 796 F.2d 574 (1st Cir. 1986). Appeals Council has jurisdiction to undertake plenary review, *sua sponte*, even where ALJ's decision is supported by substantial evidence.

Lopez-Cardona v. Sec'y HHS, 747 F.2d 1081 (1st Cir. 1984). 20 CFR §404.970, which lists four situations in which AC will review a case, is not an exhaustive list of all situations where Appeals Council may take review. Restrictive interpretation of AC's right to own motion review could interfere with administration of claims and monitoring of department.

Oldham v. Sec'y HHS, 718 F.2d 507 (1st Cir. 1983). Once Appeals Council takes jurisdiction of a case to review error of law, review can permissibly encompass the entire record.

▸ Review of ALJ's Findings

Dupuis v. Sec'y HHS, 869 F. 2d 622 (1st Cir. 1989). Where there is no credible medical evidence to support claim of pain, the Appeals Council does not have to defer to the ALJ's interpretation.

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (Not on Westlaw). Available at DLC**. Deference owed to ALJ's credibility determination, but Appeals Council can overturn ALJ credibility determination if not supported by substantial evidence. Remand.

Berrios v. Sec'y HHS, 796 F.2d 574 (1st Cir. 1986). Appeals Council, composed of lay persons, is not competent to interpret raw medical data. AC's conclusion, based on uninterpreted medical reports, that claimant could return to her past work was unfounded.

Lopez-Cardona v. Sec'y HHS, 747 F.2d 1081 (1st Cir. 1984). Court reverses where Appeals Council, on own motion review, finds no severe impairment but fails to state reasons for rejecting ALJ's credibility determination.

ATTORNEYS FEES

▸ Equal Access to Justice Act (EAJA) - General

Brunel v. Comm'r of Soc. Sec., No. 00-1142, 248 F.3d 1126 (Table) (1st Cir. 2000). **Unpublished.** Rejection of EAJA application for attorneys fees reviewed for abuse of discretion.

Lopes v. Sec'y HHS, 989 F.2d 484 (1st Cir. 1993); Attorney may seek recovery of fees under both EAJA and Social Security Act but must return the amount of the smaller fee to the claimant.

Sierra Club v. Sec'y of Army, 820 F.2d 513 (1st Cir. 1987). |
Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985). | Basic requirements of EAJA
Sierra Club v. Sec'y of Transportation, 779 F.2d 776 (1st Cir. 1985). |

Brewster v. Dukakis, 786 F.2d 16 (1st Cir. 1986). EAJA permits payment of attorney fees to public sector law office that provides services *pro bono*.

Crooker v. EPA, 763 F.2d 16 (1st Cir. 1985). EAJA does not authorize award of attorney's fees to *pro se* litigants.

▸ EAJA - Prevailing Party

Buckhannon v. W.VA Dept. of Health & Human Resources, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). Court holds that the catalyst theory is not a permissible basis for an award of attorneys fees under the Fair Housing Act and the ADA. Instead, to be a "prevailing party," a party must have secured a judgement on the merits or a court ordered consent decree. This decision will affect attorneys fees petitions the Equal Access to Justice Act, which uses prevailing party status in determining entitlement to attorneys fees.

Domegan v. Ponte, 972 F.2d 401 (1st Cir. 1992), *cert. granted and judgment vacated* 507 U.S. 956, 113 S.Ct. 1378, 122 L.Ed.2d 754 (1993). Prevailing party status is appropriate where claimant established a significant procedural due process deprivation and obtained an enforceable nominal damage award. Court applies de novo, rather than abuse of discretion, review to the district court's prevailing party determination. Court applied abuse of discretion review to the size of award.

Guglietti v. Sec'y HHS, 900 F.2d 397 (1st Cir. 1990). EAJA fees denied because Plaintiff did not meet definition of prevailing party. Plaintiff's success on remand pursuant to Reform Act of 1984 was not a litigatory success, nor was it a catalyst to the passage of legislation to the passage of legislation changing the standard. The Court rejected the "was going to win anyway" approach.

Labrie v. Sec'y HHS, 796 F.2d 779 (1st Cir. 1992). Absent an express indication to the contrary, a district court may retain jurisdiction pending a fourth sentence remand and thereafter render final judgment for EAJA purposes. Overruled by Shalala v. Schaefer, 509 U.S. 292, 113 S.Ct. 2625, 125 L.Ed. 239 (1993)(Once a district court remands a case pursuant to sentence four of §405(g), the same court may not retain jurisdiction over the case. Rather, the court must enter judgment so as to start the EAJA clock ticking).

▸ Social Security Act

Gisbrecht v. Barnhart, 535 U.S. 789, 122 S.Ct. 1817, 152 L.Ed.2d 996 (2002). Provision of Social Security Act limiting attorney fees to 25% of past-due benefits does not displace contingent-fee agreements that are within such statutory ceiling.

Lopes v. Sec'y HHS, 989 F.2d 484 (1st Cir. 1993); Attorney may seek recovery of fees under both EAJA and Social Security Act but must return the amount of the smaller fee to the claimant.

Ramos Colon v. Sec'y HHS, 850 F. 2d 24 (1st Cir. 1988). Although the statute allows for a 25% maximum, it will often be the case that a reasonable fee (for time in the judicial review) is a much smaller amount, even in the face of a contingency fee agreement. Determination is in the sound discretion of the District Court. NOTE: In this case the attorney was filing for additional fees for work at the judicial level.

Gardner v. Menendez, 373 F.2d 488 (1st Cir. 1967). Vacates a judgment by the district court awarding claimant's counsel fees for representation of the claimant before the administrative agency. Counsel can recover for services rendered before the administrative agency only from the Secretary.

CHILD'S BENEFITS

***See* Family/Dependents' Benefits Section below.**

CIVIL PROCEDURE

▸ Class Action

McCuin v. Sec'y HHS, 817 F. 2d 161 (1st Cir. 1987). Where only declaratory and injunctive relief sought, plaintiffs not required to identify class members once the existence of the class has been demonstrated. Courts have broad discretion to grant or deny class certification. Class certification issue remanded where plaintiff's lack of evidence supporting class certification was due to defendant's failure to respond to discovery requests.

Crosby v. SSA, 769 F.2d 576 (1st Cir. 1986). Suit for injunctive relief requiring SSA to adjudicate claims without further delay could not be litigated as a class action because delays could only be analyzed for reasonableness in context of individual cases.

Avery v. Sec'y HHS, 762 F.2d 158 (1st Cir. 1985). Where statute provides that "[t]he Secretary shall notify [an individual class member] by certified mail that he may request a review of" his disqualification, district court has authority to establish the content of the notice. Orders requiring SSA to issue specific notices and to follow certain procedures for determining class membership were like an injunction and were appealable on an interlocutory basis.

▸ Intervention

Caterino, et. al v. Barry, 922 F. 2d 37 (1st Cir. 1990) Explains the requirements for intervention as of right.

▸ Mandamus

In re Bushkin Associates, 864 F.2d 241 (1st Cir. 1989) To obtain a writ of mandamus, petitioner must show some special risk of irreparable harm and clear entitlement to the relief requested.

▸ Notice

Piscopo v. Sec'y HHS, 27 F.3d 554 (Table) (1st Cir. 1994). **Unpublished.** Pro se claimant's appeal not timely filed, and properly dismissed by district court for lack of subject matter jurisdiction, where claimant filed appeal more than 65 days from mailing of Appeals Council denial notice. The fact that the claimant only goes to her P.O. box every week or two and did not pick up the SSA notice until 2 weeks after the date on the notice does not rebut the presumption that the SSA notice was received within 5 days of mailing. Relevant time period is when letter was delived to the P.O. box, not when claimant picked it up.

▸ Summary Judgment

Torres v. Sec'y HHS, 845 F.2d 1136 (1st Cir. 1988). Court reviews grant of summary judgment *de novo*. In social security disability cases, summary judgment procedure is not an invitation to the claimant to contradict the contents of that record or to introduce new or additional evidence.

▸ Subpoena

Vasquez v. Sec'y HHS, 16 F.3d 401(Table)(1st Cir. 1994). **Unpublished.** No due process violation in ALJ's refusal to submit interrogatories to or subpoena reporting physician where physician did not give an RFC opinion, report was not adverse to claimant, claimant had opportunity to cross-examine the MA who had reviewed report, claimant did not object to the report at the hearing, and claimant did not ask the ALJ to subpoena the physician to the hearing. Court didn't decide issue of whether claimant has absolute right to subpoena reporting physician.

U.S. v. Comley, 890 F. 2d 539 (1st Cir. 1989). The district court must enforce an administrative agency subpoena if it is issued according to statutory procedures, for a purpose authorized by Congress, and the information sought is relevant to that purpose and adequately described. The role of a court in a subpoena enforcement proceeding is limited to inquiring whether these requirements are met. Affidavits of government officials sufficient to make out a prima facie case that these requirements are satisfied.

CONSTITUTIONAL CLAIMS

▸ Due Process

Boothby v. Comm'r of Soc. Sec., No. 97-1245, 132 F.3d 30 (Table)(1st Cir.1997). **Unpublished**. Where mental impairments prevent claimant from understanding and pursuing administrative remedies (in this case, appealing initial application) and claimant lacks representation, there is a colorable claim that the failure to reopen the initial application violated due process.

Niemi v. Shalala, No. 95-1743, 81 F.3d 147 (Table)(1st Cir. 1996). **Unpublished** Although a constitutional claim might be stated where Plaintiff can demonstrate that, because of mental incapacity, she had been unable to understand or pursue the appeal procedures, her symptoms of fatigue, depression, and a sense of powerlessness (from multiple sclerosis), uncorroborated by any medical evidence, do not make the requisite showing.

Gilbert v. Sullivan, No.93-2309, 48 F.3d 1211 (Table)(1st Cir. 1995). **Unpublished.** Denial notice that does not explain how to file an appeal or the consequences of failing to file an appeal and instead reapplying is constitutionally inadequate. Where the notice denying the application for benefits violates due process, the procedural bar to reopenings after 4 years is lifted. Due process claim based on inadequate notice of denial of benefits requires showing that claimant relied to her detriment on the inadequate notice. Here, *pro se* claimant made that showing because she reapplied and requested reopening instead of appealing denial.

Vasquez v. Sec'y HHS, 16 F.3d 401 (Table)(1st Cir. 1994). **Unpublished.** No due process violation in ALJ's refusal to submit interrogatories to the physician or subpoena the physician to testify at hearing where physician did not give an RFC opinion, report was not adverse to claimant, medical advisor at hearing based testimony in part on report and claimant had opportunity to cross-examine the MA, claimant did not object to the introduction of the report into evidence at the hearing, and claimant did not ask the ALJ to subpoena the physician to the hearing.

▸ Equal Protection

Muldoon v. SSA, 229 F.3d 1133 (Table) (1stCir. 2000)cert. denied 2/20/01. **Unpublished** Prohibition on receipt of SSDI for persons confined pursuant to a felony conviction is constitutional.

Quintal v. Sec'y HHS, 42 F.3d 1384 (1st Cir. 1994). Rule barring Social Security benefits while confined due to a conviction and under a rehabilitation program does not violate equal protection.

Usher v. Schweiker, 666 F.2d 652 (1st Cir. 1981), appeal after remand, Usher v. Sec'y HHS, 721 F.2d 854 (1st Cir. 1983). Regulation requiring reduction of SSI benefits by difference between fair market value of apartment and lower rent charged by relative landlords did not violate equal protection. Not unconstitutional to treat differently SSI recipients renting from relatives at reduced cost and SSI recipients living in federally subsidized housing because different treatment is rationally related to legitimate legislative objective of making subsidized housing more attractive to supplemental security income recipients.

▸ Property Interest in Social Security Benefits

Splude v. Apfel, 165 F.3d 85 (1st Cir. 1999). Social Security benefits, like SSDI, have been regarded in some contexts as "property" for constitutional purposes. But, Windfall Offset Provision (42 U.S.C. § 1320a-6(a)) does not violate anti-assignment clause and is not unconstitutional because it's rational. Anomalous situation - where state aid is recouped if retroactive SSI is paid before retroactive SSDI, but state aid is not recouped if SSDretro is paid first - does not render statutory scheme unconstitutional.

CONTINUING DISABILITY REVIEWS

▸ Medical Improvement Standard

Rice v. Chater, 86 F.3d 1 (1st Cir. 1996). Whether claimant continues to meet a listing is not dispositive in determining medical improvement. ALJ erred in finding medical improving based on claimant no longer meeting listing. In order to show medical improvement, there must be a decrease in the medical severity of the impairment based on changes in the symptoms, signs and laboratory findings associated with the impairment. Claimant's failure to seek treatment is not evidence of medical improvement where claimant didn't seek treatment for 2.5 years prior to initial disability finding.

Avery v. Sec'y HHS, 762 F.2d 158 (1st Cir. 1985). Social Security Disability Benefits Reform Act of 1984 requires use of the "medical improvement" standard in continuing disability reviews.

Miranda v. Sec'y HEW, 514 F.2d 996 (1st Cir. 1975). Secretary can take into account medical evidence considered earlier (when disability was first established) in determining whether benefits should be terminated. Secretary may not terminate benefits without substantial evidence of medical improvement and ability to perform substantial gainful activity.

EVIDENCE

▸ Administrative Notice

Galarza v. Sec'y HHS, 19 F.3d 7(Table) (1st Cir. 1994). **Unpublished.** ALJ may take administrative notice of the Dictionary of Occupational Titles (DOT) and rely on the DOT's job descriptions which reflected a general absence of environmental concerns in the relevant job categories. Vocational Expert testimony about environmental conditions not needed.

Gray v. Heckler, 760 F.2d 369, 372 (1st Cir. 1985). Approves administrative notice of occupational reference materials for information regarding various types of work. Court notes that the 4th circuit has held that the Secretary may rely on general categories in the Supplement to the DOT as presumptively applicable to the claimant's past work.

Hernandez v. Weinberger, 493 F.2d 1120 (1st Cir. 1974). Step 5 burden is not met by ALJ taking administrative notice of the general availability of light and sedentary work in the national economy.

▸ Burden of Proof

- **Generally**

Miranda v. Secretary, 514 F.2d 996 (1st Cir. 1975). The rules respecting burden of proof and reasonable diligence in proceedings of this type "resist translation into absolutes, . . . because social security proceedings are not strictly adversarial."

- **Meeting or Equaling a Listing**

See also SEQUENTIAL EVALUATION section below.

Hernandez-Torres v. Sec'y HHS, 968 F.2d 1210 (Table) (!st Cir. 1992) **Unpublished**. Appellant bore the burden of proving that his condition met or equaled the level of severity required for presumptive disability status.

Goodermote v. Sec'y HHS, 690 F.2d 5 (1st Cir. 1982). Implying that claimant bears burden of proving three threshold steps.

- **Onset of Disability Prior to Expiration of Insured Status**

Garcia v. Sec'y HHS, 25 F.3d 1037 (Table)(1st Cir. 1994). **Unpublished**. Claimant must show that her disability existed prior to the expiration of her insured status. It is not enough for her to show that her impairment had its roots before her DLI, she must show that her impairments reached a disabling level of severity before her DLI.

Torres v. Sec'y HHS, 845 F.2d 1136 (1st Cir. 1988). Claimant had the burden to show that his disability existed prior to his date last insured.

Cruz Rivera v. Sec'y HHS, 818 F.2d 96 (1st Cir. 1986), *cert. denied,* 107 S.Ct. 903 (1987). Claimant is not entitled to disability benefits unless he can demonstrate that his disability existed prior to the expiration of his insured status.

Deblois v. Sec'y HHS, 686 F.2d 76 (1st Cir.1982). Claimant had burden of establishing by credible evidence that his mental impairment was of a disabling level of severity as of date last insured. It is not sufficient for him to establish that his mental impairment had its roots prior to that date.

- **Steps 4 and 5 of Sequential Evaluation**

Seavey v. Barnhart, 276 F.3d 1 (1st Cir. 2001). At Step 5, SSA bears burden to come forward with evidence showing that there are jobs the claimant can do despite limitations. Since SSA is not represented as a litigant, it is better to think of Step 5 not as a shifting of burdens, but as a rule that the claimant is not under any obligation to produce evidence at Step 5.

Freeman v. Barnhart, 274 F.3d 606 (1st Cir. 2001). If applicant has met her burdens of production and proof at Steps 1-4 of sequential evaluation, then SSA has burden at Step 5 of coming forward

with evidence of specific jobs in the national economy that the applicant can still perform. ALJ met burden at Step 5 to come forward with evidence by introducing testimony of vocational expert.

Bermudez v. Sec'y HHS, No. 96-2318, 129 F.3d 1252 (Table)(1st Cir. 1997). **Unpublished**. Rules regarding burden of proof in Social Security cases, which are not strictly adversarial, "resist translation into absolutes."

Alvarez v. Sec'y HHS, No. 95-1028, 62 F.3d 1411 (Table)(1st Cir. 1995). **Unpublished**. In order to meet burden of showing inability to perform past work, claimant must provide some minimal information about the activities that his past usual work required.

Garay v. Sec'y HHS, 46 F.3d 1114 (Table)(1st Cir. 1995). **Unpublished**. It is the claimant's burden to produce RFC evidence showing that she cannot return to her past work. Court notes that where claimant is represented, there is no justification for a departure from this rule.

Parrilla-Fuentes v. Sec'y HHS, No. 94-1269, 39 F.3d 1166 (Table)(1st Cir. 1994). **Unpublished**. The burden is on the claimant to offer affirmative evidence to show that a disorder "not always disabling per se" is sufficiently severe to cause disability in the particular case.

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table)(1st Cir. 1994). **Unpublished**. Claimant bears the initial burden of proving that his condition prevents him from performing his former type of work, not just that he cannot return to a particular job.

Shaw v. Sec'y HHS, No. 93-2173, 25 F.3d 1037 (Table)(1st Cir. 1994). **Unpublished**. Claimant bears burden of proving that her impairments prevented her from performing her former type of work.

Galarza v. Sec'y HHS, 19 F.3d 7 (Table)(1st Cir. 1994). **Unpublished**. Claimant bears the initial burden of proving that her condition prevents her from performing her former type of work, not just a particular job. This burden includes an obligation to present evidence relating to the particular demands of the job that the claimant alleges she cannot perform. Therefore, it was not error for the ALJ to find the claimant disabled at step 4 without the use of a VE to testify about the environmental conditions in her past work.

Santiago v. Sec'y HHS, 944 F.2d 1 (1st Cir. 1991). At Step 4, claimant is the primary source for vocational documentation. It's claimant's duty to describe her impairments so as to raise the point to the Commissioner how the impairments preclude the performance of her prior work.

Dudley v. Sec'y HHS, 816 F.2d 792 (1st Cir. 1987) Claimant's burden at Step 4 includes proving the particular demands of past work that she cannot perform.

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). Stress is a factor which must be considered on an individualized basis for performing a range of work at step 5. Vocational evidence that there are a significant number of jobs in the economy that would be "low stress" for the average worker falls short of the requirements of Ruling 85-15. ALJ must undertake subjective, individualized inquiry into what job attributes are likely to produce disabling stress in the claimant, and what, if any, jobs exist in the economy that do not possess these attributes.

Lugo v.Sec'y HHS, 794 F.2d 14 (1st Cir.1986). The claimant has the burden of showing disability serious enough to prevent him from working at his former jobs. The burden then shifts to the Secretary to show the existence of other jobs in the national economy that the claimant can nonetheless perform.

Gray v. Heckler, 760 F.2d 369(1st Cir. 1985). Claimant's burden to prove an inability to perform her former type of work. necessarily includes an obligation to produce evidence on that issue. Claimant must not only show that she cannot do her former job, she must demonstrate that she cannot return to her former type of work.

Goodermote v. Sec'y HHS, 690 F.2d 5 (1st Cir. 1982). Claimant has the burden of proving that he is disabled at Step 4, meaning that he must prove that his disability is serious enough to prevent him from working at his former jobs. At Step 5, however, the Secretary must show that there are other jobs in the economy that claimant can nonetheless perform.

Sherwin v.Sec'y HHS, 685 F.2d 1 (1st Cir. 1982). At Step 4, the claimant bears the burden of showing that he cannot return to his previous work. At Step 5, the burden shifts to the Secretary to show the existence of other jobs in the national economy that the claimant can nonetheless perform.

Vasquez v. Sec'y HHS, 683 F.2d 1 (1st Cir. 1982). The claimant has the burden of showing disability serious enough to prevent him from working at his former jobs. The burden then shifts to the Secretary to show the existence of other jobs in the national economy that the claimant can nonetheless perform.

Torres v. Sec'y HHS, 677 F.2d 167 (1st Cir. 1982). At Step 4, the claimant bears the burden of showing that he cannot return to his previous work. At Step 5, the burden shifts to the Secretary to show the existence of other jobs in the national economy that the claimant can nonetheless perform. Where the Medical-Vocational Guidelines require a finding of "not disabled," the ALJ need not name specific jobs that the claimant could perform.

Geoffroy v. Sec'y HHS, 663 F.2d 315 (1st Cir. 1981). Where a claimant presents a prima facie case of disability-i. e., that he can not engage in his previous type of employment-it is the Secretary's responsibility to establish that the claimant can engage in alternate employment and that such employment exists.

Pelletier v. Sec'y HEW, 525 F.2d 158 (1st Cir. 1975). At Step 4, the claimant bears the burden of showing that he cannot return to his previous work. At Step 5, the burden shifts to the Secretary to show the existence of other jobs in the national economy that the claimant can nonetheless perform.

Small v. Califano, 565 F.2d 797 (1st Cir. 1975). Once claimant makes a prima facie case by proving she cannot return to her prior work, the burden shifts to the Secretary to show that there is other work she can perform.

Lopez Lopez v. Sec'y HEW, 512 F.2d 1155 (1st Cir. 1975). The Secretary's burden at Step 5 extends only to showing that there are specific jobs in the national economy which the claimant is capable of

performing. Local hiring practices, employer preferences for physically whole workers, and the claimant's actual chances of being hired are irrelevant considerations.

Hernandez v. Weinberger, 493 F.2d 1120 (1st Cir. 1974). Pre-GRID case. Once it is determined that claimant cannot perform her past work, Secretary's burden of showing capacity to do other work is not met by taking administrative notice of the general availability of light and sedentary work in the national economy.

Reyes Robles v. Finch, 409 F.2d 84 (1st Cir. 1969). Only when claimant meets his burden to establish that he's unable to return to his former work is there a need for SSA to show that there's available work.

Torres v. Celebrezze, 349 F.2d 345 (1st Cir. 1965). The claimant has the initial burden of showing that he is unable to return to his former work, the burden is upon the government to offer evidence showing there is generally available employment of a kind for which the claimant is fit and qualified. The fact that the claimant has made no attempt to find other employment, if proven, may suffice to satisfy the government's burden.

▸ Claimant's Demeanor at Hearing

Perez v. Sec'y HHS, 958 F.2d 445 (1st Cir. 1991). ALJ's observation of disability benefits claimant's demeanor at hearing provided substantial evidence for conclusion that nonexertional impairments did not disable claimant, in light of paucity of medical evidence to suggest objective physical basis for disabling pain and vocational expert testimony that claimant could perform the jobs he identified even if she suffered a constant light pain.

Gordils v. Sec'y HHS, 921 F.2d 327 (1st Cir. 1990). Evidence regarding claimant's daily activities and demeanor at the hearing, plus doctor's findings of no consistent neurological deficit and no objective evidence of lumbo-sacral root syndrome, constitute substantial evidence to support the finding that claimant's pain, viewed as a non-exertional impairment, did not significantly impair claimant's ability to perform the full range of sedentary work.

Arce Crespo v. Sec'y HHS, 831 F. 2d 1 (1st Cir. 1987). Court does not question ALJ's finding that "[n]o physical, mental or intellectual limitations were observed during the oral hearing which could add credibility to claimant's subjective complaints" because questions of demeanor are correctly left for the Secretary.

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). Although the ALJ apparently relied upon claimant's even demeanor at the disability hearing as evidence of his ability generally to work at low-stress jobs, we consider a claimant's ability to visit doctors and describe his medical problems coherently as insufficient evidence of his ability to work.

Carillon Marin v. Sec'y HHS, 750 F.2d 12 (1st Cir. 1985). ALJ cannot rely on his impressions of claimant's demeanor at hearing in determining disability. Here, there was uncontroverted evidence of claimant's schizophrenia.

Lizotte v. Sec'y HHS, 654 F.2d 127 (1st Cir. 1981). At the hearing, claimant did not appear preoccupied with personal discomfort and his thoughts did not wander during the hearing. He answered questions alertly and his general appearance suggested no obvious abnormality." Again, questions of demeanor and credibility are correctly left for the Secretary.

▸ Conflicting Evidence

Keating v. Chater, 187 F.3d 622 (Table) (1st Cir. 1998). **Unpublished**. Conflicts in evidence are for the Commissioner, not the courts, to resolve.

Irlanda Ortiz, 955 F.2d 765 (1st Cir. 1991). Conflicts in evidence are for the Commissioner to resolve.

Rivera-Torres v. Sec'y HHS, 837 F. 2d 4 (1st Cir. 1988). Conflicts in evidence are for the Secretary to resolve.

Ortiz v. Sec'y of HHS, 819 F.2d 1(1st Cir. 1987). Conflicts in evidence are for the Commissioner, not the courts, to resolve.

Rodriquez Pagan v. Sec'y HHS, 819 F.2d 1 (1st Cir. 1987). It is up to the Secretary to resolve conflicts in the medical evidence (here picking and choosing between CE and treating physician).

Burgos Lopez v. Sec'y HHS, 747 F.2d 37 (1st Cir. 1984). Conflicts in the evidence are for the Secretary to resolve.

Gagen v. Schweiker, No. 83-1780 (5/4/84), 740 F.2d 952 (Table)(1st Cir. 1984). **Unpublished (not on Westlaw)**. **Available at DLC**. Case remanded to resolve discrepancy between DDS examiner, who concluded claimant had a severe impairment and could not return to former heavy work, and ALJ who found claimant could return to former work and gave no explanation for rejecting the examiner's opinion.

Tremblay v. Sec'y HHS, 676 F.2d 11 (1st Cir. 1982). Conflict between evidence provided by the medical advisor and the treating physician is for Secretary to resolve.

Torres v. Sec'y HHS, 668 F.2d 67 (1st Cir. 1981). It's within ALJ's province to decide how much weight to assign evidence and to resolve conflict in the evidence.

Rodriquez v. Sec'y HHS, 647 F.2d 218 (1st Cir. 1981). It is for the Secretary, not the court, to resolve conflicts in the evidence.

Gonzalez v. Richardson, 455 F.2d 953 (1st Cir. 1972). Resolution of conflicting evidence and weighing of evidence is solely within the province of the Secretary and the District Court is required to accept as conclusive the Secretary's determination, if supported by substantial evidence.

▸ Credibility

Shaw v. Sec'y HHS, No. 93-2173, 25 F.3d 1037 (Table) (1st Cir. 1994). **Unpublished**. The credibility determination by the ALJ, who observed the claimant, evaluated her demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference.

DaRosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). ALJ improperly discounted claimant's testimony concerning his pain and physical limitations because the extent of pain alleged was not corroborated by objective medical evidence. ALJ must make specific findings as to the relevant evidence he considered in determining to disbelieve the appellant.

Lopez-Cardona v. Sec'y HHS, 747 F.2d 1081 (1st Cir. 1984). An ALJ's decision to give or deny credit to a particular witness's testimony should not be reversed absent an adequate explanation of the grounds for the reviewing body's source of disagreement with the ALJ.

Thompson v. Califano, 556 F.2d 616 (1st Cir. 1977). Holding that Secretary is not at the mercy of every claimant's subjective assertions of pain applies equally well to subjective claims of dizziness. Claimant must show that her impairment is "medically determinable" and only in a rare case can she do this without medical evidence.

▸ Determinations by Other Agencies

Alvarez v. Sec'y HHS, No. 95-1028, 62 F.3d 1411 (Table) (1st Cir. 1995). **Unpublished**. Although disability determinations by other agencies may be considered by SSA, they are not binding.

Shaw v. Sec'y HHS, No. 93-2173, 25 F.3d 1037 (Table) (1st Cir. 1994). **Unpublished**. Court finds support for denial in Welfare Department medical report forms filled out by treating doctor.

▸ Hearsay

Hernandez v. Heckler, No. 83-1755, 740 F.2d 951 (Table)(1st Cir. 1984). **Unpublished**. No blanket role prohibiting hearsay testimony in administrative proceedings. Here, hearsay that claimant had gone bowling didn't color Medical Advisor's opinion so even if there was error, it was harmless.

▸ Inferences

Bermudez v. Sec'y HHS, No. 96-2318, 129 F.3d 1252 (Table)(1st Cir. 1997). Medical expert's testimony, coupled with the negative inference that arose from claimant's failure to seek any medical treatment for 21 years, and current assessments of appellant's medical condition, constitutes substantial evidence. ALJ's choice among competing inferences was reasonable.

Santos-Martinez v. Sec'y HHS, 54 F.3d 764 (Table) (1st Cir. 1995). **Unpublished.** Where the record permits diverse inferences, the Secretary's determination will be affirmed, so long as the inferences drawn are supported by the evidence.

Irlanda Ortiz, 955 F.2d 765 (1st Cir. 1991). Inference could be drawn that claimant would have secured more treatment if her pain had been as intense as alleged.

Lizotte v. Sec'y HHS, 654 F.2d 127 (1st Cir. 1981). In reviewing the record for substantial evidence, "issues of credibility and the drawing of permissible inference from evidentiary facts are the prime responsibility of the Secretary."

Guzman Dias v. Sec'y HEW, 613 F.2d 1194 (1st Cir. 1980). Disparity between claimant's symptoms and medication prescribed did not compel conclusion that doctor was inaccurate in describing severity of claimant's mental impairments, even though that inference could be drawn. Doctor was a general practitioner, not a psychiatrist.

Rodriguez v. Celebrezze, 349 F.2d 494 (1st Cir. 1965). Issues of credibility and drawing of permissible inferences from evidence are the prime responsibility of the Secretary.

▸ Lay Evidence

Suarez v. Sec'y HHS, 755 F.2d 1 (1st Cir. 1985,)*cert. denied* 474 U.S. 844, 88 L.Ed.2d 109, 106 S.Ct. 133 (1985); *rehearing denied* 474 U.S. 1097, 88 L.Ed.2d 911, 106 S.Ct. 872 (1986). Discusses value of lay evidence, including corroborative evidence from neighbors and other family members, school records and employment records, in proving claimant's disability began before age 22 and lasted continuously for nearly 40 years. Court notes that while lay evidence may lack the strength of medical reports, it must be considered and may be useful if it is consistent with past and present medical diagnoses.

▸ Medical Evidence

▸ Acceptable Medical Source

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table) (1st Cir. 1994). **Unpublished**. Disability opinion expressed by an acupuncturist was not entitled to the weight that might be accorded a physician, since the regulations (20 CFR 416.972(a)) do not recognize acupuncturists as acceptable medical sources.

▸ Consultive Examinations

Rodriguez v. Sec'y HHS, No. 94-1858, 46 F.3d 1114 (Table)(1st Cir. 1995). **Unpublished**. Consulting neurologist's mental status exam of claimant alone is not substantial evidence that claimant lacked a mental impairment.

Garcia v. Sec'y HHS, 25 F.3d 1037 (1st Cir. 1994)(Table). **Unpublished**. Advisory reports such as CE's are entitled to evidentiary weight which will vary with the circumstances, including the nature of the illness and the information provided by the expert.

Barrientos v. Sec'y HHS, 820 F.2d 1 (1st Cir. 1987). Consulting examiner's opinions carry no less weight than those of the treating physician.

Rodriguez Pagan v. Sec'y HHS, 819 F.2d 1 (1st Cir. 1987). The ALJ may rely on the RFC from a consulting examiner even when that RFC conflicts with other evidence.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Court declines to lay down an iron-clad rule that an ALJ is powerless to piece together the relevant medical facts from the findings and opinions of multiple physicians. Report of consulting physician retained by claimant is not new and material evidence where it is based on same medical evidence considered by ALJ, but the consulting physician organized it differently and reached a different conclusion.

Carillon Marin v. Sec'y HHS, 750 F. 2d 14 (1st Cir. 1985). If Secretary is doubtful as to severity of claimant's mental disorder, appropriate course is to request a consultative evaluation, not to rely on the lay impressions of the ALJ.

Gray v. Heckler, 760 F.2d 369 (1st Cir. 1985). Opinions of consulting physicians concerning disability claimant's physical condition are entitled to weight.

Sitar v. Schweiker, 671 F.2d 19 (1st Cir. 1982). A treating physician's opinion may be rejected by the Secretary, who may accord greater weight to his own experts.

Perez v. Sec'y HEW, 622 F.2d 1 (1st Cir. 1980). One CE report can be substantial evidence of non-disability in face of multiple reports from treating physicians showing disability.

- **Failure to Seek or Follow Treatment**

Rivera v. Apfel, No. 00-1476, 248 F.3d 1127 (Table)(1st Cir. 2000). **Unpublished**. Three year gap in treatment supports nondisability decision.

Chester v. Callahan, 193 F.3d 10, 1999 (1st Cir. 1999). Medical records showing treatment limited to 10 months is evidence that impairment did not last the required 12 months.

Diaz v. Chater, No. 98-1425, 181 F.3d 79 (Table)(1st Cir. 1998). **Unpublished**. Claimant's failure to seek treatment undermines probative value of non-medical evidence of restricted activities.

Bermudez v. Sec'y HHS, No. 96-2318, 129 F.3d 1252 (Table) (1st Cir. 1997). **Unpublished**. ALJ may draw from claimant's failure to seek treatment for nearly 21 years a negative inference with respect to claimant's limitations.

Rice v. Chater, 86 F.3d 1 (1st Cir. 1996). Claimant's failure to seek treatment is not evidence of medical improvement where claimant didn't seek treatment for 2.5 years prior to initial disability finding.

Griswold v. Sec'y HHS, No. 94-2168, 57 F.3d 1061 (Table) (1st Cir. 1995). **Unpublished**. The failure to follow restorative treatment without good cause can lead to a finding of not disabled. Here, claimant took medication but failed to pursue therapy that was recommended to her. Evidence that claimant had appointment with counselor but failed to follow through shows that she was aware of the appropriateness of counseling.

Rodriguez v. Sec'y HHS, No. 94-1858, 46 F.3d 1114 (Table) (1st Cir. 1995). **Unpublished**. Implicit in a finding of disability is a determination that existing treatment alternatives would not restore a claimant's ability to work. Claimant did not offer good reason for failing to take advantage of the various pain remedies that were offered to her. Claimant said bad side effects, but medical records don't show reports of adverse side effects.

Irlanda Ortiz v. Sec'y HHS, 955 F.2d 765 (1st Cir. 1991). Gaps in the medical record that show a lack of treatment are "evidence" for purposes of the disability determination.

Tsarelka v. Sec'y HHS, 842 F.2d 529 (1st Cir. 1988). The failure to follow restorative treatment without good cause can lead to a finding of not disabled.

Bianchi v. Sec'y HHS, 764 F.2d 44 (1st Cir. 1985). If an impairment reasonably can be remedied by treatment, it cannot serve as a basis for a finding of disability.

Manfredonia v. Heckler, No. 83-1776, 740 F.2d 952 (Table) (1st Cir. 1984). **Unpublished (not on Westlaw)**. **Available at DLC**. Possibility of mental impairment causing failure to take medication where medical report states that non-compliance "may be inherent to suspicious paranoia."

Zavas v. Sec'y HHS, No. 83-1752, 732 F.2d 140 (Table)(1st Cir. 1984). **Unpublished (not on Westlaw)**. **Available at DLC**. No substantial evidence that hypertension not controlled because of claimant's failure to follow prescribed treatment.

Schena v. Sec'y HHS, 635 F.2d 15 (1st Cir. 1980). Claimant's decision not to have spinal surgery did not bar him from receiving SSDI benefits given surgery's uncertain and sometimes adverse consequences. Denial of social security disability benefits because of claimant's alleged willful refusal to follow "recommended" course of treatment erroneously disregarded language of regulation speaking in terms of willful failure to follow "prescribed" treatment. Assessment as to whether social security disability benefits claimant's refusal to undergo treatment is reasonable should be made in light of such variables as risks involved, likelihood of success, consequences of failure and availability of alternative treatment; and reasonable fear of painful or dangerous surgery may justify refusal of treatment.

Torres Gutierrez v. HEW, 572 F.2d 7 (1st Cir. 1978). Where claimant does not follow the prescribed medical advice which would remedy or reduce his impairments, such conduct is "arguably inconsistent with his complaints of pain."

Reyes Robles v. Finch, 409 F.2d 84 (1st Cir. 1969). Fact that claimant failed to seek medical treatment was arguably inconsistent with his complaint of pain and lent credence to suspicions that he may have been exaggerating.

- **Illegible Medical Records**

Nazario v. Comm'r of Soc. Sec., No. 97-1193, 129 F.3d 1252 (Table) (1st Cir. 1997) **Unpublished**. No need for remand where overall record was legible and adequately disclosed status of claimant's impairments.

Manso-Pizano v. Sec'y HHS, 76 F.3d 15 (1st Cir. 1996). ALJ has duty to decipher illegible medical records where illegible parts are nontrivial and there are identifiable diagnoses and symptoms indicating more than a mild impairment.

- **Medical Advisor**

Rivera v. Comm'r of Soc. Sec., No. 98-1377, 181 F.3d 80 (Table)(1st Cir. 1998). **Unpublished**. Medical advisor is needed to interpret medical data in lay terms. Ambiguous medical evidence shows diagnosis of carpal tunnel syndrome, but no opinion as to effect of impairment on ability to do work related activity.

Berrios Lopez v. Sec'y HHS, No. 91-1294, 951 F.2d 427 (1st. Cir. 1991). The testimony of a non-examining medical advisor can alone constitute substantial evidence depending upon the circumstances.

Torres v. Sec'y HHS, 870 F.2d 742 (1989). The issue of whether or not the testimony of a medical advisor who reviews the record and testifies at the hearing can alone constitute substantial evidence varies with the circumstances, including the nature of the illness and the information provided.

Tsarelka v. Sec'y HHS, 842 F.2d 529 (1st Cir. 1988). Medical expert's sworn statement that "if claimant has fibrositis" she is disabled, not sufficient to establish finding of disability where claimant was not undergoing any treatment and expert did not know if fibrositis would respond to therapy.

Figueroa-Rodriquez v. Sec'y HHS, 845 F.2d 370 (1st Cir. 1988). Substantial evidence did not support ALJ's finding of a non-severe mental impairment where medical advisor's uncontradicted assessment that claimant had moderate restrictions in activities of daily living.

Dudley v. Sec'y HHS, 816 F.2d 792 (1st Cir. 1987). ALJ allowed to rely on medical advisor's opinion in the face of contradictory findings.

Rosado v. Sec'y HHS, 807 F.2d 292 (1st Cir. 1986). Medical advisor needed to assess RFC before VE can competently testify re: vocational possibilities.

Tremblay v. Sec'y HHS, 676 F.2d 11 (1st Cir. 1982). Although views of medical advisor are not always by themselves substantial evidence when medical advisor does not examine claimant, this rule is of limited value in a case involving a condition alleged to have existed many years before, and where claimant's proof of disability is slight.

Rodriquez v. Sec'y HHS, 647 F.2d 218 (1st Cir. 1981). The weight to which opinions of medical advisors are entitled will vary with the circumstances, including the nature of the illness and the information provided the expert. Obviously, the fact that the experts have neither examined nor testified lessens the probative power of their reports.

Guzman Diaz v. Sec' HEW, 613 F.2d 1194 (1st Cir. 1980). Whether testimony of nonexamining physician can constitute substantial evidence "will doubtlessly vary with the circumstances."

Alvarado v. Weinberger, 511 F.2d 1046 (1st Cir. 1975). Certainly board certification has never been held a prerequisite to qualification as an expert medical witness. The medical opinion of specialists may be entitled to greater weight than that of general practitioners

- **Medical Evidence of Residual Functional Capacity**

Rivera-Torres v. Sec'y HHS, 837 F.2d 4 (1st Cir. 1998). An explanation of claimant's functional capacity from a doctor is needed. Without an RFC evaluation from a doctor, the ALJ cannot conclude that claimant's musculoskeletal problems would not prevent him from performing his past work. The ALJ, a lay factfinder, lacks sufficient expertise to conclude claimant has the ability to be on his feet all day, constantly bending and lifting 25 pound weights.

Davila Melendez v. Sec'y HHS, 923 F.2d 839 (Table)(1st Cir. 1990). **Unpublished**. RFC assessment forms are necessary in cases like this because the raw medical data contained in charts, examination notes and doctors' reports are generally unintelligible to a lay fact finder such as an ALJ, who is not qualified to translate the data into conclusions about the claimant's residual functional capacity.

Class Rosario v. Sec'y HHS, 915 F.2d 1556 (Table)(1st Cir. 1990). **Unpublished**. The reports in the record were limited to medical findings stated in medical terms that carry no readily discernible message about the physical capacities of the claimant. Because "the ALJ, a lay fact- finder, lack[ed] sufficient expertise" to interpret these labels, the medical reports did not provide "substantial evidence" for his conclusions about the claimant's residual functional capacity.

Lugo v. Sec'y HHS, 794 F.2d 14 (1st Cir.1986). Where no examining physician has provided "any medical findings concerning the impact of [claimant's] heart condition or his residual functional capacity... [n]either the Appeals Council nor this court is qualified to make this medical judgment about residual functional capacity based solely on bare medical findings as to claimant's heart condition." None of the physicians who examined claimant provided any medical findings concerning the impact of his heart condition on his residual functional capacity.

Rosado v. Sec'y HHS, 807 F.2d 292 (1st Cir. 1986). Bare medical findings are unintelligible to a lay person in terms of residual functional capacity. Medical advisor needed to assess RFC before vocational expert can competently testify re: vocational possibilities.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Medical information not only diagnosed claimant's impairments, but related the consequential physical limitations to specific residual functional capacities.

- **Medically Determinable Impairment**

Rose v. Shalala, 34 F.3d 13 (1st Cir. 1994). No need for objective medical findings. "At this point there is no 'dipstick' laboratory test for chronic fatigue syndrome;" the medical community instead uses an "operational" diagnostic procedure, so the disease is "not per se excluded from coverage because it cannot be conclusively diagnosed in a laboratory setting." The absence of definitive diagnostic tests makes it plain that the failure of some doctors to state conclusive diagnoses does not constitute substantial evidence to support a finding that the claimant did not suffer from CFS.

Dupuis v. Sec'y HHS, 869 F.2d 622 (1st Cir.1989). Complaints of pain need not be precisely corroborated by objective findings, but they must be consistent with medical findings.

DaRosa v. Sec'y HHS, 803 F.2d 24 (1st Cir.1986). ALJ improperly discounted Claimant's testimony concerning his pain and physical limitations because the extent of pain alleged was not corroborated by objective medical evidence. ALJ must make specific findings as to evidence considered in determining credibility of pain testimony.

Avery v. Sec'y HHS, 797 F.2d 19 (1st Cir.1980). Complaints of pain need not be precisely corroborated by objective findings, but they must be consistent with medical findings.

Thompson v. Califano, 556 F.2d 616 (1st Cir. 1977). Holding that Secretary is not at the mercy of every claimant's subjective assertions of pain applies equally well to subjective claims of dizziness. Claimant must show that her impairment is "medically determinable" and only in a rare case can she do this without medical evidence.

Ramirez v. Sec'y HEW, 528 F.2d 902 (1st Cir. 1976). The claimant has the burden of showing an impairment that is medically determinable. In some rare instances (this case is not such an instance), a claimant can satisfy that burden without medical evidence.

Miranda v. Sec'y HEW, 514 F.2d 996 (1st Cir. 1975). Regulations did not require that impairment (sacrolumbar strain) be established by objective laboratory findings in order for claimant to be entitled to SSD benefits.

- **Obtained After Claim Filed**

Gonzalez Perez v. Sec'y HHS, 812 F.2d 747 (1st Cir. 1987). Error for ALJ to discount medical report because it was obtained after claim filed and on advice of counsel. It's common practice in Social Security cases to obtain further medical reports in support of claim. ALJ's decision to discredit medical reports must be based on something more substantive than simply the timing and impetus of medical reports obtained after filing of claim.

- **Non-Examining Physicians**

Stephens v. Barnhart, No. 02-1474, 11/5/2002, 50 Fed.Appx. 7, 2002 WL 31474176 (1st Cir. 2002). **Unpublished**. ALJ's reliance on conclusory findings by non-examining Disability Determination Services physicians, which were unsupported by analysis or written findings and made well in advance of RFC evaluation, did not justify his decision to discount examining physician RFC report that found claimant unable to perform medium work.

Budzko v. Comm'r of Soc. Sec., No. 99-1932, 229 F.3d 1133 (Table) (1st Cir. 2000). **Unpublished**. Non-examining, non-testifying physician's opinion on materiality given weight and constitutes substantial evidence because he reviewed most, if not all, of the medical evidence.

Nazario v. Comm'r of Soc. Sec., No. 97-1193, 129 F.3d 1252 (Table)(1st Cir. 1997). **Unpublished.** There is no absolute rule that the opinions of nonexaminng physicians cannot constitute substantial evidence.

Ojeda v. Sec'y HHS, 30 F.2d 126 (Table)(1st Cir. 1994). **Unpublished**. Weight that can properly be given to the conclusions of non-testifying, non-examining physicians will vary with the circumstances. Court acknowledges that in some cases, written reports by non-testifying, non-examining physicians cannot alone constitute substantial evidence, but here there's more evidence than just DDS docs.

Rose v. Shalala, 34 F.3d 13 (1st Cir. 1994). Opinion of non-treating non-examining doctor that fatigue did not cause significant functional limitations because there was no objective abnormality found to explain the fatigue is not entitled to any weight. The amount of weight given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert.

Berrios Lopez v. Sec'y HHS, No. 91-1294, 951 F.2d 427 (1st. Cir. 1991). Report of non-examining, non-testifying physician may, under some circumstances, act as substantial evidence to support a finding that a claimant is not disabled.

Gordils v. Sec'y HHS, 921 F.2d 327 (1st Cir. 1990) Whether or not a consultative report of a non-examining physician constitutes substantial evidence depends upon the circumstances of the case.

Rodriguez v. Sec'y HHS, 893 F.2d 401 (1st Cir.1989). the testimony of a non-examining medical advisor--to be distinguished from the non-testimonial written reports in the instant case--can alone constitute substantial evidence, depending on the circumstances.

Torres v. Sec'y HHS, 870 F.2d 742, 744 (1st Cir.1989). the testimony of a non-examining medical advisor--to be distinguished from the non-testimonial written reports in the instant case--can alone constitute substantial evidence, depending on the circumstances.

Gray v. Heckler, 760 F.2d 369 (1st Cir. 1985). Opinions of non-examining consulting physicians are entitled to weight.

Tremblay v. Sec'y HHS, 676 F.2d 11, 13 (1st Cir.1982). Tthe principle enunciated in Browne is by no means an absolute rule. Findings of a non-testifying, non-examining physician by themselves, may constitute substantial evidence, in the face of a treating physician's conclusory statement of disability.

Guzman Diaz v. Sec'y HEW, 613 F.2d 1194 (1st Cir. 1980). Testimony of a non-examining medical advisor--to be distinguished from the non-testimonial written reports in the instant case--can alone constitute substantial evidence, depending on the circumstances.

Browne v. Richardson, 468 F.2d 1003 (1st Cir. 1972). A written report submitted by a non-testifying, non-examining physician who merely reviewed the written medical evidence could not alone constitute substantial evidence to support the Secretary's conclusion. The report "lacks the assurance of reliability that comes on the one hand from first-hand observation and professional examination or, on the other, from first-hand testimony subject to claimant's cross-examination. It is hearsay based on hearsay.

- **Retrospective Medical Opinion**

Faria v. Comm'r of Soc. Sec., 187 F.3d 621(Table)(1st Cir. 1998). **Unpublished.** Retrospective medical opinions are usually insufficient to establish disability absent corroboration of claimant's condition during insured period by lay witnesses, such as family members.

May v. Comm'r of Soc. Sec., No. 97-1367, 125 F.3d 841 (Table) (1st Cir. 1997). **Unpublished.** Retrospective opinion of a treating source is entitled to "significant weight." Neither the absence of medical treatment records from the relevant period nor the retrospective nature of the opinion justified the ALJ's finding that the treating source's report was too speculative a basis for establishing a severe impairment. Remanded.

Suarez v. Sec'y HHS, 755 F.2d 1 (1st Cir. 1985,)cert. denied 474 U.S. 844, 88 L.Ed.2d 109, 106 S.Ct. 133 (1985); rehearing denied 474 U.S. 1097, 88 L.Ed.2d 911, 106 S.Ct. 872 (1986). Discusses ways of proving that claimant's disability started before age 22 and existed continuously for nearly 40 years.

Deblois Sec'y HHS, 686 F.2d 76 (1st Cir. 1982). Neither absence of treatment records from relevant time period and retrospective nature of treating doctor's opinion justify ALJ's finding that treating source's report was too speculative a basis for establishing a severe impairment. (remanding for ALJ to obtain retrospective opinions regarding claimant's mental condition in relevant period).

- **Treating Physician**

Dias v. Apfel, No. 01-1191, 10/11/2001, 21 Fed.Appx. 14, 2001 WL 1263673 (1st Cir. 2001). **Unpublished**. Determinations as to whether claimant's impairment met listing and whether claimant was disabled were reserved solely to Commissioner, and treating physician's opinions on these issues were not binding on Commissioner.

Brunel v. Comm'r of Soc. Sec., 248 F.3d 1126 (Table) (1st Cir. 2000). **Unpublished.** ALJ ignored, without explanation, part of treating physician's RFC opinion, that indicated Claimant's capacity for sedentary work was significantly compromised, contrary to SSR 96-2p.

Brown v. Apfel, 230 F.3d 1347 (Table) (1st Cir. 2000). **Unpublished**. Controlling weight not given to treating physician's opinion that claimant is "psychologically incapacitated for work" because that issue and issue of whether claimant meets a listing are reserved for the Commissioner.

Troisi v. Apfel, 229 F.3d 1133 (Table) (1st Cir. 2000). **Unpublished**. Treating psychologist's opinion re: claimant's ability to return to full-time work not given controlling weight because it is inconsistent with other substantial evidence, including evidence from other treating sources.

Nguyen V. Chater, 172 F.3d 31(1st Cir. 1999). Here, ALJ determined that claimant was capable of sedentary work ignoring uncontroverted treating physician opinion and deciding that treating doctor's opinion was inconsistent with test results and that course of treatment was incommensurate with purported ailment. The ALJ was not at liberty to ignore medical evidence or substitute his own views for uncontroverted medical opinion.

Skodras v. Callahan, No. 98-1677, 181 F.3d 80 (Table) (1st Cir. 1999). **Unpublished**. In dicta, court states that treating doctor's opinion that claimant might be better off working implicitly assumes that claimant was well enough to tolerate work.

Garcia-Martinez v. Comm'r of Soc. Sec., No. 95-1791, 82 F.3d 403 (Table)(1st Cir. 1996). **Unpublished**. Where there is medical evidence conflicting with treating doctor's opinion, ALJ did not err in not giving controlling weight to treating doc's opinion.

Barker v. Comm'r Of Soc. Sec., 97 F.3d 1445 (Table)(1st Cir. 1996). **Unpublished.** ALJ properly rejected treating doctor's report where doctor did not examine patient, wrote report at patient's request, and report was conclusory and devoid of objective medical findings.

Rodriguez v. Sec'y HHS, No. 94-1858, 46 F.3d 1114 (Table)(1st Cir. 1995). **Unpublished**. ALJ not required to credit treating psychiatrist's report which is conclusory and brief and does not identify objective findings to support his conclusion. Claimant did not meet her burden to provide specific

medical evidence of her alleged mental impairment and its effect on her functional capacity for work.

Vasquez v. Sec'y HHS, No. 94-1793, 45 F.3d 424 (Table) (1st Cir. 1995). **Unpublished**. Not obvious that doctor who did not see claimant until after initial benefit determination and who only saw claimant twice is a treating source.

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table) (1st Cir. 1994). **Unpublished.** A treating physician's opinion may be rejected by the Secretary, who may accord greater weight to his own experts.

Shaw v. Sec'y HHS, No. 93-2173, 25 F.3d 1037 (Table) (1st Cir. 1994). **Unpublished**. Controlling weight may be accorded to a treating doctor's opinion as to the nature and severity of the impairments where the opinion is not inconsistent with substantial evidence in the case, but nontreating, nonexamining sources may override treating doctor opinions, provided there is support for the result in the record.

Gentle v. Shalala, 21 F.3d 419 (Table) (1st Cir. 1994). **Unpublished**. Court finds substantial evidence in treating doctor's statements about therapeutic value of work. Court interpreted doctor's statements to mean that doctor found claimant capable of returning to work and that failure to work would be psychologically harmful to claimant.

Keating v. Sec'y HHS. 84 F.2d 271 (1st Cir.1988). A treating physician's conclusions regarding total disability may be rejected by the Secretary especially when contradictory medical advisor evidence appears in the record.

Barrientos v. Sec'y HHS, 820 F.2d 1 (1st Cir. 1987). Treating physicians' opinions carry no greater weight than those of Consultive Examners'.

Rodriguez Pagan v. Sec'y HHS, 819 F.2d 1 (1st Cir. 1987). The court sees no basis on which to question the Secretary's decision not to credit the medical findings of two treating physicians. The opinions of treating physicians "are not entitled to greater weight merely because they were [from] treating physicians ..."

Dudley v. Sec'y HHS, 816 F.2d 792 (1st Cir. 1987). Treating physician's opinion not to be accorded greater weight.

Gonzalez-Avala v. Sec'y HHS, 807 F.2d 255 (1st Cir. 1986). Treating physician's opinion not binding on Secretary.

Gray v. Heckler, 760 F.2d 369 (1st Cir. 1985). Physician's conclusory statements about claimant's disability not binding on Secretary.

Sitar v. Schweiker, 671 F.2d 19 (1st Cir. 1982). Treating physician's diagnosis is not necessarily entitled to more weight than CEs.

Currier v. HEW, 612 F.2d 594 (!st Cir. 1980). A doctor's conclusory reflections as to claimant's employability, unaccompanied by any formal opinion and diagnoses, do not constitute substantial evidence.

▸ New and Material Evidence

see **"Judical Review," "Remand**" sections below.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Evidence is new if it is non-cumulative and has not been previously presented to the ALJ. Evidence is material if its inclusion in the record is necessary to develop the facts of the case fully and to afford the claimant a fair hearing. Determining whether evidence is material also requires a showing of prejudice; a showing that if the ALJ had considered the proposed evidence, his decision might reasonably have been different.

▸ Subpoena

Vasquez v. Sec'y HHS, 16 F.3d 401(Table)(1st Cir. 1994). **Unpublished**. No due process violation in ALJ's refusal to submit interrogatories to the physician or subpoena the physician to testify at hearing where physician did not give an RFC opinion, report was not adverse to claimant, medical advisor at hearing based testimony in part on report and claimant had opportunity to cross-examine the MA, claimant did not object to the introduction of the report into evidence at the hearing, and claimant did not ask the ALJ to subpoena the physician to the hearing (although she had asked the ALJ to submit interrogatories to the physician, and the ALJ refused). Court didn't decide issue of whether claimant has absolute right to subpoena reporting physician.

▸ Substantial Evidence Standard

May v. Comm'r of Soc. Sec., No. 97-1367, 125 F.3d 841 (Table) (1st Cir. 1997). **Unpublished.** "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Shaw v. Sec'y HHS, No. 93-2173, 25 F.3d 1037 (Table) (1st Cir. 1994). **Unpublished**. Even though record may support more than one conclusion, the court must uphold the Secretary "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion."

Devlin v. Sec'y HHS, 981 F.2d 1245 (Table)(1st Cir. 1992). **Unpublished**. Although the record may support more than one conclusion, the court will uphold the Secretary if "a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion."

Irlanda Ortiz v. Sec'y HHS, 955 F.2d 765 (1st Cir. 1991). Court will review ALJ decisions to determine if they are supported by substantial evidence. Court must uphold the Secretary's findings if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion.

Slessinger v. Sec'y HHS, 835 F.2d 937 (1st Cir. 1987). Even in the presence of substantial evidence, the Court may review conclusions of law.

Rodriguez v. Sec'y HHS, 647 F.2d 218, 222 (1st Cir. 1981). Court must uphold the Secretary's findings if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion.

Miranda v. Sec'y HEW, 514 F.2d 996 (1st Cir. 1975). Substantial evidence means evidence that "a reasonable mind might accept as adequate to support a conclusion."

Gonzalez v. Richardson, 455 F.2d 953 (1st Cir. 1972). Court must accept Secretary's findings of facts as conclusive if they are supported by substantial evidence. Court cannot re-weigh evidence.

Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971). Substantial evidence is "such relevant evidence as a reasonable mind might accept in support of a conclusion."

▸ Unemployment Benefits

Perez v. Sec'y HEW, 622 F.2d 1 (1st Cir. 1980). Despite reservations, court does not find that a claimant's decision to hold himself out as able to work for the purpose of receiving unemployment benefits may never be considered on the issue of disability. Where there was medical and vocational evidence supporting the denial of benefits and claimant's receipt of unemployment benefits does not appear to have been the decisive factor in the denial of benefits, court affirms denial.

▸ Vocational Evidence

***see also* "Vocational Expert" and Grid sections below.**

Galarza v. Sec'y HHS, 19 F.3d 7(Table) (1st Cir. 1994). **Unpublished.** ALJ may take administrative notice of the Dictionary of Occupational Titles (DOT) and rely on the DOT's job descriptions which reflected a general absence of environmental concerns in the relevant job categories. Vocational Expert testimony about environmental conditions not needed.

Edwards v. Sec'y HHS, No. 94-1345, 34 F.3d 1065 (Table) (1st Cir. 1994). **Unpublished**. Where VE testifies to availability of jobs, using general job titles not DOT numbers, claimant cannot prove that the VE misrepresented the exertional requirements of the jobs by comparing some DOT listings with the jobs she assumed the VE referred to in his testimony. Without DOT #s from the VE, it is impossible to verify whether the VE's testimony contradicts the DOT listings. Here, claimant was represented at the hearing by an experienced attorney who did not ask the VE for DOT numbers, did not object to the VE's testimony, and did not raise the issue of VE mistake until the motion for reconsideration of the district court's decision.

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). Vocational evidence that there are a significant number of jobs in the economy that would be "low stress" for the average worker falls short of the requirements of Ruling 85-15. ALJ must undertake subjective, individualized inquiry into what job attributes are likely to produce disabling stress in the claimant, and what, if any, jobs exist in the economy that do not possess these attributes.

Gray v. Heckler, 760 F.2d 369, 372 (1st Cir. 1985). Approves administrative notice of occupational reference materials for information regarding various types of work. Court notes that the 4th circuit has held that the Secretary may rely on general categories in the Supplement to the DOT as presumptively applicable to the claimant's past work.

Hernandez v. Weinberger, 493 F.2d 1120 (1st Cir. 1974). Step 5 burden is not met by ALJ taking administrative notice of the general availability of light and sedentary work in the national economy.

▸ Weight of Evidence

Torres v. Sec'y HHS, 668 F.2d 67 (1st Cir. 1981). It's within ALJ's province to decide how much weight to assign evidence and to resolve conflict in the evidence.

Miranda v. Sec'y HEW, 514 F.2d 996 (1st Cir. 1975). District Court usurped the Secretary's exclusive right to determine the weight of evidence and had applied a more-exacting standard than the substantial evidence test.

Gonzalez v. Richardson, 455 F.2d 953 (1st Cir. 1972). District Court erred by reweighing the evidence. The resolution of conflicting evidence is solely within the province of the Secretary and the District Court is required to accept as conclusive the Secretary's determination, if supported by substantial evidence.

FAMILY/DEPENDENTS' BENEFITS - TITLE II

▸ Dependent Child's SSDI

Parisi v. Shirley S. Chater Comm. of Soc. Sec., 69 F.3d 614 (1st Cir. 1995). Dependent child's benefits should not have been reduced when spouse of wage earner became "entitled" but not "paid" benefits on the wage earner's account. Calculation of family maximum only includes benefits on worker's record that are payable.

▸ Disabled Adult Child's SSDI

Suarez v. Sec'y HHS, 755 F.2d 1 (1st Cir. 1985), cert. denied 474 U.S. 844, 88 L.Ed.2d 109, 106 S.Ct. 133 (1985); rehearing denied 474 U.S. 1097, 88 L.Ed.2d 911, 106 S.Ct. 872 (1986). Eligibility for Disabled Adult Child's benefits requires that disability started before age 22 and continued until benefits are sought.

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (not on Westlaw). Available at DLC**. Eligibility for Disabled Adult Child benefits requires that disability began before age 22 and continued until 6 months prior to application for benefits.

▸ Divorced Spouse

Slessinger v. Sec'y HHS, 835 F. 2d 937 (1st Cir. 1987). State, not federal law of divorce governs validity of claim.

▸ Family Maximum Cap

Parisi v. Chater, 69 F.3d 614 (1st Cir. 1995). In calculating benefits of dependent child of disabled worker , family maximum cap does not reduce child's benefits by amount of spousal benefits to which worker's wife is entitled but which were never payable. Calculation of family maximum only includes benefits on worker's record that are payable.

▸ Paternity

Becker v. Sec'y HHS 895 F.2d 34 (1st Cir. 1990). State intestacy laws determine paternity for Social Security purposes.

Mendoza v. Sec'y HHS, 655 F.2d 10 (1st Cir. 1981). Failure of putative father to claim paternity directly in the two weeks available to him prior to his death from lung cancer is not proof of nonpaternity of illegitimate minor child seeking child's insurance benefits. Secretary has considerable latitude to determine the type and extent of evidence needed to establish paternity so long as such standards are reasonable. Discretion does not include the right to act arbitrarily or without criteria.

▸ Widow(er)'s Benefits

Cassas v. Sec'y HHS, 893 F.2d 454 (1st Cir. 1990). Regulations provide that in order to receive widow(er)s benefits, impairments must meet or equal a listing, and that age, education and work experience are not to be considered in disability determination. Court holds that residual functional capacity cannot be ignored in considering medical equivalence to a listing in widow(er)s cases.

Garcia v. Sec'y HHS, 760 F.2d 4 (1st Cir. 1985). Unmarried 2nd wife is not entitled to benefits as a "deemed" widow where wage earner did not divorce his first wife.

Ayuso-Morales v. Sec'y HHS, 677 F.2d 146 (1st Cir. 1982). Widow did not qualify for widow's Social Security benefits where she cohabitated for 20-years with her future husband in jurisdiction not recognizing "common law marriages" and married husband less than nine months before his death. Widow's status, under Puerto Rican law, as "concubine" for purpose of disposition of intestate property did not qualify her as "widow" entitled to receive Social Security benefits.

Rodriquez v. Sec'y HHS, 647 F.2d 218 (1st Cir. 1981). Disability finding for widow's benefits requires meeting or medical equivalence to a listed impairment.

GRID (MEDICAL-VOCATIONAL GUIDELINES)

▸ Applicability, Generally

Nguyen V. Chater, 172 F.3d 31 (1st Cir. 1999). Pain can constitute a significant nonexertional impairment which precludes naked application of the Grid and requires use of a vocational expert.

Vasquez v. Sec'y HHS, No. 94-1793, 45 F.3d 424 (1st Cir. 1995). ALJ did not err in relying on Grid where substantial evidence supported ALJ's conclusion that pain did not impair claimant's ability to perform light work.

Gonzalez-Alemen v. Sec'y HHS, No. 95-2168, 86 F.3d 1146 (Table)(1st Cir. 1996). **Unpublished**. ALJ's determination of nondisability at Step 5, based upon the Grid, does not meet substantial evidence standard where RFC indicates that claimant can never climb and is limited in his ability to be around moving machinery but ALJ does not mention these restrictions at all in her decision. Court can't determine whether the claimant's non-exertional limitations are sufficiently minimal to permit the ALJ to rely on the Grid or whether vocational evidence was required. Remand.

Ojeda v. Sec'y HHS, 30 F.3d 126 (Table) (1st Cir.1994). **Unpublished**. The Grid is based on a claimant's exertional capacity and can only be applied when claimant's nonexertional limitations do not significantly impair claimant's ability to perform at a given exertional level.

Rose v. Shalala, 34 F.3d 13 (1st Cir. 1994). The Grid is based on a claimant's exertional capacity and can only be applied when claimant's nonexertional limitations do not significantly impair claimant's ability to perform at a given exertional level.

Gonzalez-Garcia v. Sec'y HHS, 989 F.2d 484 (Table)(1st Cir.1993). **Unpublished**. Absent significant nonexertional limitations, the Grid provides a "streamlined" method by which the Secretary can sustain his burden of proof at step five of the sequential evaluation process.

Heggarty v. Sec'y HHS, 947 F.2d 990 (1st Cir. 1991). If occupational base is significantly limited by a nonexertional impairment, the Secretary may not rely on the Grid to prove that there are other jobs available which the claimant can perform.

Ortiz v. Sec'y HHS, 890 F.2d 520 (1st Cir. 1989) Where a nonexertional limitation only marginally reduces the claimant's ability to perform a full range of unskilled work, the ALJ was justified in basing his determination that the claimant was not disabled on the Grids.

Perez-Torres v. Sec'y HHS, 890 F.2d 1251 (1st Cir. 1989) ALJ was free to rely solely on the Grids where he found that nonexertional impairments did not have a significant impact on the claimant's ability to perform the full range of sedentary work.

Rivera-Figueroa v. Sec'y HHS, 858 F. 2d 48 (1st Cir. 1988). Grid use precluded in view of history of significant mental disorders. Court questions ALJ's ability to assess claimant's RFC when unaided by any physician assessment.

Arce Crespo v. Sec'y HHS, 831 F. 2d 1 (1st Cir. 1987). While the Secretary cannot apply the grid as dispositive in a case like this where claimant has significant nonexertional impairments, the grid may

provide a framework for consideration of how much the individual's work capability is further diminished by the nonexertional limitations.

Rosado v. Sec'y HHS, 807 F.2d 292 (1st Cir. 1986). Misapplication of grid where there is a combination of nonexertional and exertional impairments.

Da Rosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). Where nonexertional factors are implicated, the Secretary must engage in an "individualized analysis" to determine whether the combination of exertional and nonexertional impairments, in light of the claimant's age, education, and work experience, renders her disabled. The testimony of a vocational expert will typically be required in such cases.

Lugo v. Sec'y HHS, 794 F.2d 14 (1st Cir.1986). Grid cannot be applied if claimant's nonexertional impairment significantly affects claimant's ability to perform the full range of jobs requiring medium or lesser work. Secretary must use other means, such as evidence procured from vocational experts, to meet her burden of proving the availability of jobs in the national economy that claimant can perform.

Borrero Lebron v. Sec'y HHS, 747 F.2d 818 (1st Cir. 1984). Secretary was entitled to apply Grid despite claimant's moderate anxiety neurosis, because the court finds substantial support for Appeals Council finding that the level of work the claimant can do is not affected by the nonexertional limitations.

Burgos Lopez v. Heckler, 747 F.2d 37 (1st Cir. 1984). The medical-vocational guidelines are not dispositive of the status of persons whose exertional limitations are further complicated by other non-exertional ailments. The Secretary must engage in an "individualized analysis" to determine whether the combination of exertional and nonexertional impairments, in light of the claimant's age, education, and work experience, renders her disabled.

Zayas v. Sec'y HHS, No. 83-1752 (3/27/84), 732 F.2d 140 (Table)(1st Cir. 1984). **Unpublished (not on Westlaw)**. **Available at DLC**. Any departure from a grid rule must, at a minimun, be explained. ALJ made factual errors in application of grid. Remanded.

Sherwin v. Sec'y HHS, 685 F.2d 1 (1st Cir. 1982), *cert. denied*, 461 U.S. 958, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983). Good explanation of purpose and use of the Grids. The Grids are based on a claimant's exertional capacity and can only be applied when claimant's non-exertional limitations do not significantly impair claimant's ability to perform at a given exertional level.

Torres v. Sec'y HHS, 677 F.2d 167 (1st Cir. 1982). Where the Medical-Vocational Guidelines require a finding of "not disabled," the ALJ need not name specific jobs that the claimant could perform.

Gagnon v. Sec'y HHS, 666 F.2d 662 (1st Cir.1981). Where a claimant has non-strength limitations, the Grids do not accurately reflect what jobs would or would not be available. Where the Grids do not apply, it is likely that the testimony of a vocational expert will be required.

Torres v. HHS, 668 F.2d 67 (1st Cir. 1981). Validity of Grids upheld. "To make review simpler and to avoid unnecessary reversal it would seem to make more sense for an ALJ to stay completely away from the "Guidelines" where nonexertional impairments are so significant that the applicant does not possess the residual functional capacity on which the "Guidelines" are predicated. . . . We remain hopeful that the Secretary, and ALJ's in individual cases, do not adopt these "Guidelines" as a shortcut to disability findings or as a crutch on which to premise alternative employment possibilities in situations where the impairment involved calls for the type of evidence only a qualified expert who has examined the record can provide."

Geoffroy v. HHS, 663 F.2d 315 (1st Cir. 1981). Court gives qualified approval to Grids as valid exercise of Secretary's statutory authority. Secretary may, using Grids, take administrative notice that substantial gainful work existed in the national economy for a person with claimant's impairment, background, age and education.

▸ Applicability, Pain Cases

Nguyen V. Chater, 172 F.3d 31 (1st Cir. 1999). Pain can constitute a significant nonexertional impairment which precludes naked application of the Grid and requires use of a vocational expert.

Heggarty v. Sec'y HHS, 947 F.2d 990 (1st Cir. 1991). Pain can constitute a significant nonexertional impairment which precludes naked application of the Grid and requires use of a vocational expert.

Da Rosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). Pain may be a nonexertional factor which precludes mechanical application of the rules contained in the Grids. If claimant's exertional limitations alone are insufficient for a finding of "disabled," the ALJ may only employ the rules of the Grid as a "framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations."

Burgos Lopez v. Heckler, 747 F.2d 37 (1st Cir. 1984). Pain can constitute a significant nonexertional impairment which precludes naked application of the Grid and requires use of a vocational expert.

Gagnon v. Sec'y HHS, 666 F.2d 662 (1st Cir.1981). Pain can constitute a significant nonexertional impairment which precludes naked application of the Grid and requires use of a vocational expert.

IMPAIRMENTS

▸ Cardiac

Manso-Pizarro v. Sec'y HHS, 76 F.3d 15 (1st Cir. 1996). Ventricular tachycardia, frequent PVCs, sinus tachycardia, arterial hypertension

Dudley v. Sec'y HHS, 816 F.2d 792 (1st Cir. 1987). Secretary allowed to rely on medical advisor's opinion that the treadmill exercise test was acceptable.

Lugo v. Sec'y HHS, 794 F.2d 14 (1st Cir. 1986). Cardiac and mental impairments.

▸ Carpal Tunnel Syndrome

Rivera v. Comm'r of Soc. Sec., No. 98-1377, 181 F.3d 80 (Table) (1st Cir. 1998). **Unpublished**. Where ambiguous medical evidence shows diagnosis of carpal tunnel syndrome, but no opinion as to effect of impairment on ability to do work related activity, court remands to obtain further evidence.

Davila Melendez v. Sec'y HHS, 923 F.2d 839 (Table)(1st Cir. 1990). **Unpublished**. Bilateral carpal tunnel syndrome.

▸ Chronic Fatigue and Immune Dysfunction Syndrome

Abdus-Sabur v. Callahan, 181 F.3d 79 (Table)(1st Cir. 1999). **Unpublished.** Decision denying benefits vacated and remanded where non-examining physicians used out of date definition of Chronic Fatigue Syndrome in evaluating claimant's impairments. Court acknowledges that "...CFS can be a very debilitating disease with symptoms out of proportion with any objective evidence..." Cites SSR 99-2p.

Rose v. Shalala, 34 F.3d 13 (1st Cir. 1994). Even though Chronic Fatigue Syndrome POMS were promulgated after adverse ALJ decision, previous version of same section of POMS re: evaluation of Epstein Barr Virus set forth the same principles. Since historically, EBV and CFS have been used interchangeably (even though the medical evidence is questionable as to whether EBV causes CFS), as a practical matter, the EBV POMS can be applied to CFS cases.

▸ Combination of Impairments

McDonald v. Sec'y HHS, 795 F.2d 1118 (1st Cir.1986). Various non-severe impairments viewed in combination may be disabling.

▸ Epilepsy

Figueroa v. Sec'y HHS, 585 F.2d 551 (1st Cir.1978). Where claimant asserted that seizure medication made him so sleepy, hot and ill-tempered so as to disable him from working, ALJ should have sought further medical evidence or made further inquiry as to whether side effects of medication was disabling.

▸ Fibromylagia (Fibrositis)

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table)(1st Cir. 1994). **Unpublished.** The term fibromyalgia is often used interchangeably with fibromytosis or fibrositis. It causes severe musculoskeletal pain, stiffness and fatigue due to sleep disturbances, although physical examinations will generally be normal. The disease cannot be confirmed by objective tests, rather the diagnosis is made by exclusion and the elicitation of tenderness at certain "focal tender points."

Carbone v. Sullivan, 960 F.2d 143 (Table)(1st Cir. 1992). **Unpublished.** Remand where ALJ failed to explore the physical and mental implications of claimant's fibrositis.

Tsarelka v. Sec'y HHS, 842 F. 2d 529 (1st Cir. 1988). Fibrositis. Although Appeals Council was uncertain that fibrositis is a recognized disease, it emphasized that the nomenclature used to diagnose a condition is immaterial to a finding of disability.

▸ Mental Impairments

▸ Dysthymic Disorder

Dupuis v. Sec'y HHS, 869 F.2d 622 (1st Cir. 1989). Court upholds ALJ's finding that claimant's severe dysthymic disorder met listing 12.04.

Figueroa-Rodriquez v. Sec'y HHS, 845 F.2d 370 (1st Cir. 1988). Dysthymic disorder is severe impairment.

Bianchi v. Sec'y HHS, 764 F.2d 44 (1st Cir. 1985). Dysthymic disorder. Depressive neurosis with agoraphobia and panic attacks. Substantial evidence did not support conclusion that claimant was not disabled by her psychiatric problems.

Gray v. Heckler, 760 F.2d 369 (1st Cir. 1985). Discounts consideration of dysthymic disorder.

- **Generally**

Rodriguez v. Sec'y HHS, No. 94-1858, 46 F.3d 1114 (Table)(1st Cir. 1995). **Unpublished**. The mere existence of an anxiety disorder does not constitute a disability.

Lopez-Merrero v. Sec'y HHS, 23 F.2d 394 (Table)(1st Cir. 1994). **Unpublished**. Under SSR 85-15, the ability to be punctual, attending work on a consistent basis and staying at work all day are demanded by any work environment, regardless of skill level. Moderate limitations in these abilities may erode the occupational base "at lease marginally and possibly more so." But not in this case.

Carbone v. Sullivan, 960 F.2d 143 (Table)(1st Cir. 1992). **Unpublished**. "When medical signs and laboratory findings do not substantiate any physical impairment capable of producing the alleged pain (and a favorable determination cannot be made on the basis of the total record), the possibility of a mental impairment as the basis for the pain should be investigated." Citing Avery.

Figueroa-Rodriquez v. Sec'y HHS, 845 F.2d 370 (1st Cir. 1988). Dysthymic disorder is severe impairment. To determine the severity of a mental impairment, an ALJ must rate the degree of functional loss in four areas that the SSA has identified as essential to work: 1) activities of daily living; 2) social functioning; 3) concentration, persistence, or pace; and 4) deterioration or decompensation in work or work- like settings. Substantial evidence did not support ALJ's finding of a non-severe mental impairment where medical advisor's uncontradicted assessment that claimant had moderate restrictions in activities of daily living.

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). "Stress is not a characteristic of a job, but instead reflects an individual's subjective response to a particular situation ... Without an evaluation of Lancellotta's vocational abilities in light of his anxiety disorder, there is no basis for the ALJ's conclusion that he can perform low stress work."

Lugo v. Sec'y HHS, 794 F.2d 14 (1st Cir. 1986). Although the Secretary is not bound by a psychiatrist's "sweeping conclusion" as to disability, when uncontroverted evidence exists as to mental impairment, the Secretary should assess the impact of the alleged mental impairment on the claimant's ability to engage in SGA.

Hebert v. Sec'y HHS, 758 F.2d 804 (1st Cir. 1985). The fact that the claimant was committed as a "sexually dangerous person" does not mean that he is disabled under the Social Security Act.

Krafsur v. Sec'y HHS, 757 F.2d 446, (1st Cir. 1985). Claimant's work difficulties "stemmed from personality problems that were not such as to constitute mental disability."

Manfredonia v. Heckler, No. 83-1776 (5/9/84), 740 F.2d 952 (Table). **Unpublished**. Non-compliance with treatment in mentally impaired claimant. "It could be unfair for the Secretary to refuse to give disability benefits under § 404.1530 if the claimant's mental impairment was the cause of her not taking medication."

Mullin, et al. v. Sec'y HHS, No. 83-1510 (1/31/84). **Unpublished (not on Westlaw)**. **Available at DLC**. The ALJ's determination that "mild to moderate" depression does not significantly affect his RFC for sedentary work is not supported by substantial evidence.

Goodermote v. Sec'y HHS, 690 F.2d 5 (1st Cir. 1982). Although plaintiff's mental impairment affects five of the ten "functions" on the psychiatric evaluation form, the Court finds the impairment non-severe.

- **Mental Retardation**

Nieves v. Sec'y HHS, 775 F.2d 12 (1st Cir.1985). Under the mental retardation listings for adults, the lowest I.Q. score is to be used in determining whether an adult claimant meets the listing. If claimant's IQ is between 60 and 69, listing 12.05 requires an additional impairment imposing "additional and significant work-related limitation of function," which means that "its effect on a claimant's ability to perform basic work activities is more than slight or minimal." An impairment that meets the severity standard of the sequential evaluation a fortiori satisfies the significant limitations standard.

Diaz v. Sec'y HHS, 746 F.2d 921 (1st Cir.1984). Mental retardation listing for children does not require use of the lowest I.Q score in determining whether impairment meets the listing.

- **Schizophrenia**

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (not on Westlaw)**. **Available at DLC**. Sec's conclusion that claimant with schizophrenia is not disabled is not supported by substantial evidence. Claimant's ability to travel is "weak evidence" of a capacity to work, especially in light of repeated hospitalizations. The conclusions of two doctors that claimant can work are not persuasive, when the doctors' analysis consist of "four checkmarks on a standard form with an additional line or two of 'comments' at the bottom."

Carrillo Marin v. Sec'y HHS, 758 F.2d 14 (1st Cir. 1985). Given claimant's unchallenged diagnosis of chronic schizophrenia coupled with the uncontradicted testimony concerning his degeneration in

recent years and the evidence of gross interference with his interpersonal relations, the ALJ's finding of no severe impairment is not supported by substantial evidence.

Suarez v. Sec'y HHS, 740 F.2d 1 (1st Cir. 1984). A finding of disability under §12.03 of the listings was indicated based on uncontroverted medical evidence; therefore, no further evaluation of the claim was required.

- **Somatoform Disorders**

Ramos v. Barnhart, No. 02-1687, 2003 WL 1411959 (1st Cir. 3/21/03). **Unpublished**. By concluding that claimant did not have a somatoform disorder, the ALJ was substituting his own lay opinion for the uncontroverted medical evidence. Useful discussion of the relationship between somatoform disorders and pain: "the very diagnosis of a somatoform disorder *means* that claimant's symptoms of pain 'are not fully explained by a general medical condition.' In other words, an individual with a diagnosis of somatoform disorder will not have hard test results or a physical impairment that can fully account for all of that person's *credible*, subjective complaints."

Winn v. Heckler, 762 F.2d 180 (1st Cir. 1985). Court noted that a diagnosis of psychological disorder that transforms emotions into pain is a sufficient basis for the finding of a medical or medically determinable impairment.

- **Musculoskeletal**

Gagnon v. HHS, 666 F.2d 662 (1st Cir. 1981). Leg amputation.

- **Pain**

See **"Pain"** section below.

- **Thoracic Outlet Syndrome**

Torres v. Sec'y HHS, 976 F.2d 724 (Table)(1st Cir. 1992). **Unpublished**. A condition characterized by pain in the arms and weakness and wasting of the small muscles of the hand.

INSURED STATUS - TITLE II

▸ Disabled Adult Child Benefits

Suarez v. Sec'y HHS, 755 F.2d 1 (1st Cir. 1985), cert. denied 474 U.S. 844, 88 L.Ed.2d 109, 106 S.Ct. 133 (1985); rehearing denied 474 U.S. 1097, 88 L.Ed.2d 911, 106 S.Ct. 872 (1986). Eligibility for Disabled Adult Child's benefits requires that disability started before age 22 and continued until benefits are sought.

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (not on Westlaw). Available at DLC**. Eligibility for Disabled Adult Child benefits requires that disability began before age 22 and continued until 6 months prior to application for benefits.

▸ Earnings - Self-Employment

Matta v. Sec'y HHS, 806 F.2d 287 (1st Cir. 1986). SSA not required to accept as conclusive individual's self-employment income as stated in income tax returns. SSA may require additional verification of income.

▸ Employer-Employee Relationship

Oldham v. Sec'y HHS, 718 F.2d 507 (1st Cir. 1983). Court affirms Appeals Council's finding that plaintiff's informal work relationship with his wife and mother-in-law did not constitute employment for purpose of old-age insurance coverage. In a case involving closely related and closely living individuals claiming an employer-employee relationship, the entire picture of the history and circumstances of the parties must be considered.

Velez v. Sec'y HHS, 608 F.2d 21 (1st Cir. 1979). Secretary affirmed in finding that claimant's domestic work for her brother-in-law was not employment and that she lacked sufficient quarters of coverage to be entitled to retirement benefits. The payment of a sum of money alone does not establish an employer-employee relationship. That depends upon the common law rules, including the employer's right to discharge the employee and to control the work and activities of the employee. In a case involving closely related and closely living individuals claiming an employer-employee relationship, the entire picture of the history and circumstances of the parties must be considered.

▸ Onset of Disability Prior to Expiration of Insured Status

Garcia v. Sec'y HHS, 25 F.3d 1037 (Table)(1st Cir. 1994). **Unpublished**. Claimant must show that her disability existed prior to the expiration of her insured status. It is not enough for her to show that her impairment had its roots before her DLI, she must show that her impairments reached a disabling level of severity before her DLI.

Torres v. Sec'y HHS, 845 F.2d 1136 (1st Cir. 1988). Claimant had the burden to show that his disability existed prior to his date last insured.

Cruz Rivera v. Sec'y HHS, 818 F.2d 96 (1st Cir. 1986), *cert. denied,* 107 S.Ct. 903 (1987). Claimant is not entitled to disability benefits unless he can demonstrate that his disability existed prior to the expiration of his insured status.

Deblois v. Sec'y HHS, 686 F.2d 76 (1st Cir.1982). Claimant had burden of establishing by credible evidence that his mental impairment was of a disabling level of severity as of date last insured. It is not sufficient for him to establish that his mental impairment had its roots prior to that date.

▸ Revision of Earnings Record

Matta v. Sec'y HHS, 806 F.2d 287 (1st Cir. 1986). Discusses time limits for correcting earnings record.

Carrasquillo v. Sec'y HHS, No. 83-1013 (12/15/83), 725 F. 2d 665 (Table)(1st Cir. 1983)**. Unpublished (not on Westlaw)**. **Available at DLC**. Reopening for revision of earnings record.

Adames v. Califano, 552 F.2d 1 (1st Cir. 1977). A decision that a claimant lacks the necessary quarters of coverage can be reopened only under certain limited circumstances.

JUDICIAL REVIEW

▸ Abuse of Discretion Standard

Brunel v. Comm'r of Soc. Sec., 248 F.3d 1126 (Table) (1st Cir. 2000). **Unpublished.** "Abuse of discretion occurs when a material factor deserving significant weight was ignored, an improper factor was relied upon, or all proper and no improper factors were assessed, but the district court made a serious mistake weighing them."

▸ Agency Interpretation of Statutes and Regulations

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). When a court reviews an agency's construction of a statute which it administers, there are 2 issues: (1) if Congress spoken to the issue, the court must give effect to the unambiguously expressed intent of Congress; (2) if the statute is silent or ambiguous on an issue, the court must determine whether the agency's position is based on a permissible construction of the statute.

Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265, 152 L.Ed.2d 330 (2002). Agency's construction of statute was permissible, and made considerable sense in terms of the statute's basic objectives. In addition, the agency's regulations reflected the agency's own longstanding interpretation.

Tremblay v. Sullivan, Sec'y HHS, No. 95-2267, 98 F.3d 1333 (1st Cir. 1996)(Table). **Unpublished**. The plain meaning of a statute's text must be given effect unless it would produce an absurd result or one manifestly at odds with the statute's intended effect. Court recognizes an ongoing debate over the propriety of using legislative history as a means to discern a statute's intent but assumes that it may "consult relevant legislative history . . . to confirm an interpretation indicated by the plain language [of a statute]. An agency charged with administering a statute remains free to supplant prior judicial interpretations of that statute as long as the agency interpretation is reasonable (here, Social Security Ruling gave different interpretation than prior court case).

Parisi v. Chater, 69 F.3d 614 (1st Cir. 1995). The plain meaning of a statute's text must be given effect unless it would produce an absurd result or one manifestly at odds with the statute's intended effect.

Sprandel v. Sec'y HHS, 838 F.2d 23 (1st Cir. 1988). Court gives considerable deference to an agency's interpretation of its own regulations,and construe the provisions of the relevant regulations and statutes to have cohesive meaning. It looks first to the intent of Congress as expressed in the statutory language, and, if silent or ambiguous, secondly to whether the administrative interpretation is a "sufficiently rational [choice] to preclude a court from substituting its judgment for that of the [agency]." The validity of a regulation so promulgated will be upheld as long as it is reasonably related to the language or purpose of the Act.

McCuin v. Sec'y HHS, 817 F.2d 161 (1st Cir. 1987). Court gives considerable deference to an agency's interpretation of its own regulations,and construe the provisions of the relevant regulations and statutes to have cohesive meaning.

Mazzola v. Sec'y HHS, 795 F.2d 222 (1st Cir. 1986). Express statutory language indicates legislative intent that revised medical criteria in the Reform Act of 1984 are inapplicable to a claim of mental impairment in which the initial determination, reconsideration, and hearing on the initial disability determination were made or held prior to the Act's enactment. General principle that a court applies regulations that are in effect at the time of judicial decision unless to do so would result in manifest injustice or there is statutory direction or legislative history to the contrary does not help plaintiff in this situation.

▸ Appeals Council Decision to Deny Review

Mills v. Apfel, 244 F.3d 1 (1st Cir. 2001), *cert. denied* 534 U.S. 1085, 122 S.Ct. 822, 151 L.Ed.2d 704 (1/7/2002). Determination by Appeals Council that new evidence is not material is discretionary

and reviewable by Federal Court under *Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957) (standard (reviewable to extent that it rests on an explicit mistake of law or other egregious error).

▸ Default Judgment

Alameda v. HEW, 662 F.2d 1044 (1st Cir. 1980). SSA's Failure to answer complaint. The question presented to us is whether the district court acted within its authority and discretion when in response to this frustrating inaction, it struck the denials in the Secretary's answers, found the claimants entitled to benefits and remanded to the Secretary for computation of benefits.

▸ Denial of Hearing Request

Niemi v. Shalala, No. 95-1743, 81 F.3d 147 (Table)(1st Cir. 1996). **Unpublished**. Absent a colorable constitutional claim, judicial review of ALJ's denial of hearing request on grounds of res judicata and no good cause to reopen is unavailable. Here, requested hearing was for denial of 2nd application that stated same facts and issues as earlier application that was denied initially and not appealed and therefore had become a final determination by the agency.

Pineiro-Sanchez v. Sec'y HHS, No. 95-1496, 89 F.3d 823 (Table)(1st Cir.1995). **Unpublished**. ALJ denied hearing request and dismissed appeal on ground that there was not good cause for late filing of appeal. Claimant appealed and district court dismissed for lack of subject matter jurisdiction, on ground that denial of request to extend time for filing an appeal is not reviewable by Appeals Council or the courts.

▸ Evidence Considered on Review

Mills v. Apfel, 244 F.3d 1 (1st Cir. 2001), *cert. denied* 534 U.S. 1085, 122 S.Ct. 822, 151 L.Ed.2d 704 (1/7/2002). When the Appeals Court properly denies review of an ALJ's decision, the Federal Court may only look at the evidence presented to the ALJ unless there is good cause for failure to present evidence to ALJ.

▸ Exhaustion of Administrative Remedies Requirement

Sims v. Apfel, 530 U.S. 103; 120 S. Ct. 2080; 147 L. Ed. 2d 80 (2000). Although seeking AC review of ALJ decision is generally required in order to exhaust administrative remedies and obtain judicial review, claimant does not waive judicial review of an issue by failing to exhaust that issue by presenting it to the Appeals Council. There is no Appeals Council issue exhaustion requirement.

Mills v. Apfel, 244 F.3d 1 (1st Cir. 2001), *cert. denied* 534 U.S. 1085, 122 S.Ct. 822, 151 L.Ed.2d 704 (1/7/2002). Issue (whether Claimant's sporadic prior employment should have been considered at Step 4) is waived if it is not raised at the ALJ hearing, at least where the Appeals Council refuses to review the ALJ's decision and it becomes a final decision.

▸ Final DecisionTriggering Judicial Review

Sims v. Apfel, 530 U.S. 103; 120 S. Ct. 2080; 147 L. Ed. 2d 80 (2000). Under 42 U.S.C. §405(g), claimants may only obtain judicial review after a final decision of the Commissioner after a hearing. If Appeals Council grants review, its decision is the final decision of the Commissioner. If the AC denies review, the ALJ's decision is the final decision of the Commissioner.

Matos-Cruz v. Comm'r of Soc. Sec., No. 98-1123, 187 F.3d 622 (Table),1998 U.S. App. Unpublished 26085 (1st Cir. 1998). **Unpublished**. Under 42 U.S.C. §405(g), judicial review is limited to any final decision of the Secretary made after a hearing. Appeals Council ruling that there was not good cause to vacate voluntary dismissal of hearing request was not a final decision made after a hearing even though hearing had already commenced when hearing request was withdrawn.

▸ Hearing Triggering Judicial Review

Torres v. Sec'y HHS, 845 F.2d 1136 (1st Cir. 1988). A purely discretionary hearing held for purposes of receiving allegedly new and material evidence is not a hearing within the meaning of 42 U.S.C.S. § 405(g).

▸ Jurisdiction

Weeks v. SSA Comm'r, 230 F.3d 6 (1st Cir. 2000). An Appeals Council order remanding a case to the ALJ for further proceedings is not a final decision appealable to the federal courts. Federal court dismissed appeal for lack of jurisdiction. Court leaves open possibility of exceptions where Appeals Council's action is challenged on constitutional or other procedural grounds, or where there is grave hardship.

Matos-Cruz v. Comm'r of Soc. Sec., No. 98-1123, 187 F.3d 622 (Table) (1st Cir. 1998). **Unpublished**. Court lacks subject matter jurisdiction to review Commissioner's decision not to vacate claimant's voluntary dismissal of hearing request even though dismissal resulted from claimant's mental limitations (as long as there is not a colorable constitutional challenge).

Pineiro-Sanchez v. Sec'y HHS, No. 95-1496, 89 F.3d 823 (Table)(1st Cir.1995). **Unpublished**. Under 42 USC §405(g), court has jurisdiction to review decision denying claimant's request for hearing in the first instance decision - i.e., that the hearing request was filed late (as opposed to decision that there was not good cause for late filing).

Picopo v. Sec'y HHS, 27 F.3d 554 (1994) District Court does lack jurisdiction when claimant fails to file a timely complaint (60 days) after notice of Secretary's final decision.

Griffiths v. Sec'y HHS, 92-2079 - Court could not exercise jurisdiction because notice of appeal failed to specify the plaintiffs as required by Fed. R. App. P. 3(c), but merely stated "Robert Griffith, et. al. This designation was insufficient because Griffith's claim was moot at the time of appeal.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Plaintiff's failure to file a summary judgment motion and failure to raise substantial evidence argument in motion for remand and subsequent motion for reconsideration at District Court deemed to waive substantial evidence argument for appeal purposes.

Dvareckas v. Sec'y HHS, 804 F.2d 770 (1st Cir. 1986). Court does not have jurisdiction to review Secretary's refusal to reopen.

Avery v. Sec'y HHS, 762 F.2d 158 (1st Cir. 1985). Generally, a remand order is an interlocutory order that does not divest a court of jurisdiction over a case. Absent a clear statement to the contrary, legislation should not ordinarily be interpreted to oust a federal court's equitable power, or its jurisdiction over a pending case.

Doe v. Sec'y HHS, 744 F.2d 3 (1st Cir. 1984). Federal courts may not review some types of "final" SSI decisions of ALJs.

Rios v. Sec'y HEW, 614 F.2d 25 (1st Cir. 1980). "Final decision" of the Secretary generally means the initial substantive decision of the Secretary on the benefits claim. 405(g) cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits. This is so principally because the "final decision of the Secretary" refers to the initial substantive decision of the Secretary on the benefits claim.

▸ Magistrate's Recommended Decision

Keating v. Sec'y HHS, 840 F.2d 271 (1st Cir. 1988). Claimant waives right to appellate review if issue not raised before magistrate or not encompassed by claimant's objections to the magistrate's report.

Borden v. Sec'y HHS, 836 F.2d 4 (1st Cir. 1987).

Scott v. Schweiker, 702 F.2d 13 (1st Cir. 1983).

▸ New and Material Evidence

Ciccariello v. Apfel, 215 F.3d 1311 (Table) (1st Cir. 2000). **Unpublished**. Even if evidence submitted to appeals council was new and material, district court did not err in denying remand motion because claimant failed to prove good cause for not offering evidence at alj hearing. Virtually all late-submitted evidence existed prior to alj hearing. Personal, unsworn assertions by claimant's counsel that late-submitted records were previously unavailable because of poor record-keeping of claimant's medical providers is not sufficient to prove good cause.

Delgado v. Sec'y HHS, No. 94-1609, 43 F.3d 1456 (Table)(1st Cir. 1994). **Unpublished**. District court erred in failing to remand case to ALJ where claimant proffered new and material evidence of rheumatoid arthritis diagnosed after adverse ALJ decision and the evidence was unavailable at time of administrative proceedings.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). In order to be new and material, evidence must not be cumulative, and it must be meaningful - neither pleonastic nor irrelevant to the basis for the earlier decision. New evidence is material where the Secretary's decision "might reasonably have been different" had the evidence been considered. Party can't meet new and material requirement simply by retaining an expert to reappraise the evidence and reach a conclusion different from that of the ALJ.

Falu v. Sec'y HHS, 703 F.2d 24 (1st Cir. 1983). New evidence is material where the Secretary's decision "might reasonably have been different" had the evidence been considered.

▸ Opportunity to Present Arguments

Banks v. Shalala, 43 F.3d 11 (1st Cir. 1994). District court erred in *sua sponte*, affirming denial of benefits without affording claimant an opportunity to brief the issues in the case. Follows holdings of 4th, 5th and 6th circuits. Claimant filed a Rule 59(e) motion to alter or amend the judgment after district court's affirmance and appealed to circuit court when district court denied the motion.

Reyes Robles v. Finch, 409 F.2d 84 (1st Cir. 1969). Purpose of D.Ct. review is to make a determination of whether the findings of the Secretary are supported by substantial evidence, not to conduct a de novo review of the evidence proffered at the ALJ level.

▸ Remand

Seavey v. Barnhart, 276 F.3d 1 (1st Cir. 2001). If an essential factual issue has not been resolved and there is no clear entitlement to benefits, the court must remand for further proceedings rather than order award of benefits. Court should order payment of benefits rather than remand only in the unusual case in which the underlying facts and law compel only one conclusion and SSA has no

discretion to act in any way other than to pay benefits (i.e., where there is overwhelming proof of disability).

Freeman v. Barnhart, 274 F.3d 606 (1st Cir. 2001). Where ALJ's decision failed to cite jobs testified to by VE, remand, rather than payment of benefits was appropriate remedy because it was not clear that claimant was entitled to benefits. Remand is proper remedy where there are conflicts in the evidence that must be resolved.

Mills v. Apfel, 244 F.3d 1 (1st Cir. 2001), *cert. denied* 534 U.S. 1085, 122 S.Ct. 822, 151 L.Ed.2d 704 (1/7/2002). Courts can remand for further proceedings where post-hearing evidence is new and material and there is good cause for failure to present it on a timely basis. Citing

Budzko v. Comm'r of Soc. Sec., No. 99-1932, 229 F.3d 1133 (Table)(1st Cir. 2000). **Unpublished**. No legal error in district court judge's refusal to remand case for taking of additional evidence (report from consulting expert written 9 months after federal court appeal filed) because no good cause for failure to incorporate evidence into the record in prior proceeding. "The mere fact that the date on the report postdates the agency proceedings does not establish good cause...Nor does the fact that claimant did not anticipate the ALJ's negative ruling.

Weeks v. SSA Comm'r, 230 F.3d 6 (1st Cir. 2000). An Appeals Council order remanding a case to the ALJ for further proceedings is not a final decision appealable to the federal courts.

Ciccariello v. Apfel, 215 F.3d 1311(Table) (1st Cir. 2000). **Unpublished**. Even if evidence submitted to appeals council was new and material, district court did not err in denying remand motion because claimant failed to prove good cause for not offering evidence at alj hearing. Virtually all late-submitted evidence existed prior to alj hearing. Personal, unsworn assertions by claimant's counsel that late-submitted records were previously unavailable because of poor record-keeping of claimant's medical providers is not sufficient to prove good cause.

Ward v. Comm'r of Soc. Sec., 211 F.3d 652 (1st Cir. 2000). Remand for legal error not required where there is independent legal ground for the decision (application of correct legal standard would lead to the same result).

Faria v. Comm'r of Social Secuirty, No. 97-2421, 1998 U.S. App. Unpublished 26013 (1st Cir. October 2,1998). Court refuses to remand for ALJ's failure to secure medical treatment notes or ask further questions where claimant has not shown how he was prejudiced by ALJ's shortcomings.

Gilbert v. Sullivan, No.93-2309, 48 F.3d 1211 (Table) (1st Cir. 1995). **Unpublished**. Where record is complete, where critical evidence is sufficient and uncontroverted (evidence re: content of notice and claimant's reliance on it), and where the question to be decided by the court is largely legal (whether the reopening rules should be relaxed), a remand is not required and a reversal by the circuit court is warranted.

Delgado v. Sec'y HHS, No. 94-1609, 43 F.3d 1456 (Table)(1st Cir. 1994). **Unpublished**. District court erred in failing to remand case to ALJ where claimant proferred to district court new evidence of rheumatoid arthritis diagnosed after adverse ALJ decision. A remand is indicated when "were the proposed new evidence to be considered, the Secretary's decision 'might reasonably have been different."

John Banks v. Sec'y HHS, 43 F.3d 11 (1st Cir. 1994). District Court's sua sponte affirmance or denial of claimant without giving notice to parties and without affording

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Remand from District Court for taking of new evidence requires demonstrating that new evidence is fresh and meaningful and there is good cause for failure to have seasonably presented evidence. New evidence must be direct not derivative.

Berrios v. Sec'y HHS, 796 F.2d 574 (1st Cir. 1986). Neither the court nor the Appeals Council, composed of lay persons, is competent to interpret and apply raw, technical medical data. Accordingly, where no assessment exists of claimant's vocational capabilities in light of her physical limitations, remand is called for (citing Richardson v. Perales, 402 U.S. 389, 408 [1971]).

Soto v. Sec'y HHS, 795 F.2d 219 (1st Cir. 1986). The court is "ill-equipped to sort out a record that admits of conflicting interpretations."

Bianchi v. Sec'y HHS, 764 F.2d 44 (1st Cir. 1985). Hearing transcript unintelligible: "good cause" for remand.

Carillo Marin v. Sec'y HHS, 758 F.2d 14 (1st Cir. 1985). "Good cause" for remand due to Secretary's failure to develop record.

Falu v. Sec'y HHS, 703 F.2d 124 (1st Cir. 1983). Remand is appropriate only if court concludes that the Secretary's decision "might reasonably have been different" had the new evidence been before him at the time of the hearing.

▸ Reopening

Rivera v. Sec'y HHS, No. 95-2185, 89 F.3d 823 (Table)(1st Cir. 1996). **Unpublished**. Absent a colorable constitutional claim, a district court does not have jurisdiction to review the Secretary's discretionary decision not to reopen an earlier adjudication.

Gilbert v. Sullivan, No.93-2309, 48 F.3d 1211 (Table)(1st Cir. 1995). **Unpublished**. Circuit court's review of district court's dismissal for lack of subject matter jurisdiction is *de novo*. Reopening decisions are not subject to judicial review unless a colorable constitutional claim is presented.

Cruz-Gonzalez v. Sec'y HHS, 23 F.2d 394 (Table)(1st Cir. 1994). **Unpublished**. General rule is that a denial of a request to reopen is not reviewable in court, but there is an exception where a colorable constitutional claim is presented.

Colon v. Sec'y HHS, 877 F.2d 148 (1st Cir. 1989). The denial of a request to reopen an application for disability benefits is ordinarily not reviewable in federal court, although an exception to this jurisdictional bar exists in "rare instances" where a colorable constitutional claim has been presented.

Torres v. Sec'y HHS, 845 F.2d 1136 (1st Cir. 1988). Reopenings are permitted for "good cause," if new and material evidence is presented. Absent a colorable constitutional claim, a district court does not have jurisdiction to review SSA's discretionary decision not to reopen an earlier adjudication.

Dudley v. Sec'y HHS, 816 F.2d 792 (1st Cir. 1986).

Dvareckas v. Sec'y HHS, 804 F.2d 770 (1st Cir. 1986). Absent a colorable constitutional claim not present here, a district court does not have jurisdiction to review the Secretary's discretionary decision not to reopen an earlier adjudication."

Suarez v. Sec'y HHS, 755 F.2d 1 1st Cir.(1st Cir. 1985) cert. denied 474 U.S. 844, 88 L.Ed.2d 109, 106 S.Ct. 133 (1985); rehearing denied 474 U.S. 1097, 88 L.Ed.2d 911, 106 S.Ct. 872 (1986).

Califano v. Sanders, 430 U.S. 99, 108, 51 L.Ed. 2d 192, 97 S.Ct. 980 (1977). Where there is a colorable constitutional claim, it is error for district court to dismiss appeal of denial of reopening for lack of subject matter jurisdiction.

Matos v. Sec'y HEW, 581 F.2d 282 (1st Cir. 1978).

Adames v. Califano, 552 F.2d 1 (1st Cir. 1977). The decision not to reopen a claim is not subject to judicial review absent a constitutional claim.

Sampson v. Califano, 551 F.2d 881 (1st Cir. 1977). Califano v. Sanders, (430 U.S. 99 [1977]) foreclosed judicial review of reopening decision absent a constitutional claim.

Ruiz Olan v. Sec'y HEW, 511 F.2d 1056 (1st Cir. 1975).

Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973). Supports judicial review of reopening decisions.

Torres v. Sec'y HEW, 475 F.2d 466 (1st Cir. 1973). Raises, but does not resolve, the issue of whether a claimant's mental disability should relieve him of the time limitations on reopening.

▸ Res Judicata

Torres v. Sec'y HHS, 845 F.2d 1136 (1st Cir. 1988). A dismissal of a hearing request on res judicata grounds, where the current claim has the same factual basis as the earlier decision, is not reviewable.

Dvareckas v. Sec'y HHS, 804 F.2d 770 (1st Cir. 1986). Appeal barred by *res judicata* where, even though claimant's second application was not identical to the first and additional medical reports were submitted, the claim for disability in both cases was based on essentially the same condition.

Rios v. Sec'y HEW, 614 F.2d 25 (1st Cir. 1980). District Court was without jurisdiction to review dismissal of Rios' third claim for benefits when dismissal was based on grounds of res judicata and insufficient new evidence.

Matos v. Sec'y HHS, 581 F.2d 282 (1st Cir. 1978). A claimant who was earlier denied at reconsideration, and then filed a new claim but presented no new evidence, cannot get a hearing and/or court review. *Res judicata* operates even if earlier decision was below hearing level.

Sampson v. Califano, 551 F.2d 881 (1st Cir. 1977). Claimant's 1973 claim was properly dismissed on *res judicata* grounds, since the claim was identical to one heard and denied in 1965, after claimant's eligibility for benefits expired. Claimant's contention that his condition had deteriorated after his eligibility lapsed does not affect the finality or validity of the prior determination.

Ruiz Olan v. Sec'y HEW, 511 F.2d 1056 (1st Cir. 1975).

▸ Standard of Review

Pineiro-Sanchez v. Sec'y HHS, No. 95-1496, 89 F.3d 823 (Table)(1st Cir. 1995). **Unpublished**. District court dismissals for lack of subject matter jurisdiction are reviewed de novo.

Torres v. Sec'y HHS, 845 F.2d 1136 (1st Cir. 1988). Court reviews the grant of summary judgment de novo.

Slessinger v. Sec'y HHS, 835 F.2d 937 (1st Cir. 1987). Even in the presence of substantial evidence, the Court may review conclusions of law.

Rodriquez v. Celebrezze, 349 F.2d 494 (1st Cir. 1965). "Substantial evidence" is the standard of review by the District Court; issues of credibility and drawing of inferences are for the Secretary.

▸ Waiver of Issues Not Raised Below

Cushman v. Apfel, 215 F.3d 1311 (Table)(1st Cir. 2000). **Unpublished.** Issues raised on appeal not raised in district Court and not preserved for appellate court review.

Alston v. Apfel, No. 98-2001, 187 F.3d 621 (Table) (1st Cir. 1999). **Unpublished**. Arguments not fully developed in the lower court are deemed waived on appeal. It is not enough to merely mention a possible argument; a litigant has an obligation to spell out the argument squarely and distinctly.

Vasquez v. Sec'y HHS, No. 94-1793, 45 F.3d 424 (Table) (1st Cir. 1995). **Unpublished**. A party waives appellate review of an issue determined by a magistrate where the party has failed to file a timely objection to the determination of the issue**.**

Galarza v. Sec'y HHS, 19 F.3d 7 (Table)(1st Cir. 1994). **Unpublished**. Failure, after proper notice, to raise objection to specific issue in Magistrate's report results in waiver of that issue before the federal appeals court.

Keating v. Sec'y HHS, 848 F.2d 271, 273 (1st Cir. 1988).

MEDICAID

Com. of Mass. v. Sec'y HHS, 616 F.Supp. 687 (D.Mass.1985), aff'd in part, vacated in part, 816 F.2d 796 (1st Cir.1987), cert. granted, Bowen v. Massachusetts, 484 U.S. 1003, 108 S.Ct. 693, 98 L.Ed.2d 645 (1988), aff'd in part, rev'd in part, Bowen v. Massachusetts, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988). State entitled to reimbursement from medicaid for "habilitative services" even though services were provided by state's Department of Education and "educational activities" are not reimbursable.

MA Association of Older Americans v. Comm'r of Public Welfare, 803 F.2d 35 (1st Cir. 1985). Contemp action. Mass. Department of Public Welfare's (now called Department of Transitional Assistance) policy of automatic termination of Medicaid when AFDC or SSI benefits declared invalid. DPW may not terminate the Medicaid benefits of any recipient whose AFDC or SSI benefits have been or are about to be terminated, unless and until it has first: (a) Determined on the basis of facts in the recipient's case file that the recipient no longer meets the eligibility criteria for receiving Medicaid benefits; and (b) Provided the recipient with written notice of the proposed

termination, at least ten days in advance of the effective date of the proposed termination. Recipient has right to a fair hearing to challenge the Medicaid termination and may continue to receive Medicaid pending the hearing decision if the request for fair hearing is filed within ten days from the date on which the termination notice is provided. *See also* Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749 (1st Cir.1983)(preliminary injunction granted).

MEDICARE

Mass. Medical Society v. Dukakis, et al., 815 F.2d 790 (1st Cir. 1987). Upholds law which requires all physicians to charge Medicare patients no more than the Medicare-determined reasonable fee.

St. Elizabeth's Hosp. of Boston v. Sec'y HHS, 746 F.2d 918 (1st Cir. 1984). Affirms Secretary's decision that hospital's neurology/neurosurgery unit and its interim coronary care unit were not special care units for purposes of Medicare reimbursement.

NON-DISABILITY ELIGIBILITY ISSUES (SSI)

▸ Civilly committed

Quintal v. Sec'y HHS, No. 94-1607, 42 F.3d 1384 (Table)(1st Cir. 1994). **Unpublished**. Claimant, civilly committed to treatment center for sexually dangerous persons which is part of correctional facility, is prohibited from receiving benefits. He is not eligible for benefits under rehabilitation program provision.

▸ Deeming - Parent to Child

Kozera v. Spirito, 723 F.2d 1003 (1st Cir. 1983). Step-parent to child deeming and federal financial participation in states' welfare programs.

Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980). Regulations permitting not-actually-available funds to be attributed to disabled step-child, where regs were not promulgated in accordance with the APA, are procedurally defective and hence invalid.

▸ Eligible Couple

Sprandel v. Sec'y HHS, 838 F.2d 23 (1st Cir. 1988). Court upholds validity of SSI regulation that eligible individual married to eligible spouse continues to be treated as member of an eligible couple for first six months of separation.

▸ In-Kind Support and Maintenance

Usher v. Schweiker, 666 F.2d 652 (1st Cir. 1981). Effect of reduced rent on SSI. Upheld constitutionality of SSI regulation counting below-market rent charged by relative/landlord as in-kind income even though government rental subsidies do not count as in-kind income. Appeal after remand, Usher v. Sec'y HHS, 721 F.2d 854 (1st Cir. 1983), dealt with Privacy Act issue.

OVERPAYMENT

▸ Recoupment

Szlosek v. Sec'y HHS, 861 F.2d 13 (1st Cir. 1988). Title II benefits recouped for overpayment recovery can be counted as income when determining SSI payment levels. Counting withheld Title II amounts as income does not violate the availability principle. This was brought as a class action with a Massachusetts class certified.

▸ Waiver

Knapp v. Sec'y HHS, 810 F.2d 315 (1st Cir. 1987). Recipient who failed to report changes in her husband's overtime earnings between annual evaluations was "not without fault."

Dolbashian v. Sec'y HHS, 688 F.2d 4 (1st Cir. 1982). The conclusion that someone is performing substantial gainful activity does not necessarily mean that the individual was at fault for receiving the payments for which he was not eligible. The regulations specify that whether someone is at fault depends upon the particular circumstances-circumstances which, in this case, the ALJ did not examine. Remand for further consideration of issue of fault, with instruction that "although the ALJ concluded previously that reimbursement would not defeat the purpose of the act or be against equity and good conscience, he should reconsider these issues on remand if he finds that appellant was not at fault."

PAIN

▸ Credibility

Dupuis v. Sec'y HHS, 869 F.2d 622 (1st Cir. 1989) Claimant did not seek medical treatment during the time in question therefore there was no credible medical evidence supporting claim of pain during that time period. Appeals Council in this own motion review, did not have to defer to the ALJ's interpretation.

DaRosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). ALJ improperly discounted Claimant's testimony concerning his pain and physical limitations because the extent of pain alleged was not corroborated by objective medical evidence. ALJ must make specific findings as to the relevant evidence he considered in determining to disbelieve the appellant.

Avery v. Sec'y HHS, 797 F.2d 19 (1st Cir. 1985). Where the degree of pain alleged is greater than that which can reasonably be anticipated based on the objective physical findings the Secretary should explore other information. SSR 82-58.

Gray v. Heckler, 760 F.2d 369 (1st Cir. 1985).

Delaney v. Sec'y HHS, No. 83-1606 (3/22/84), 732 F.2d 140 (Table). **Unpublished**. Detailed analysis of pain. VE testimony.

Acevendo Ramirez v. Sec'y HHS, 550 F.2d 1286 (1st Cir. 1977). ALJ does not have to explicitly state that she is discrediting the claimant's subjective testimony concerning the extent of his pain.

Reyes Robles v. Finch, 409 F.2d 84 (1st Cir. 1969). The facts that appellee allegedly took no medication, slept 11-13 hours a night and failed to seek medical treatment are arguably inconsistent with his complaints of pain and lend credence to the Secretary's suspicions that he may have been exaggerating.

▸ Generally

Ramos v. Barnhart, No. 02-1687, 2003 WL 1411959 (1st Cir. 3/21/03). **Unpublished**. Court reversed and remanded where the ALJ improperly concluded that the claimant did not have a severe mental impairment (somatoform disorder) and that pain did not pose a significant functional limitation for the claimant. Useful discussion of the relationship between somatoform disorders and pain: "the very diagnosis of a somatoform disorder *means* that claimant's symptoms of pain 'are not fully explained by a general medical condition.' In other words, an individual with a diagnosis of somatoform disorder will not have hard test results or a physical impairment that can fully account for all of that person's *credible*, subjective complaints."

Nguyen V. Chater, 172 F.3d 31(1st Cir. 1999). Pain can constitute a significant nonexertional impairment which precludes naked application of the Grid and requires use of a vocational expert.

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table)(1st Cir. 1994). **Unpublished**. In light of numerous doctors' reports that claimant suffered some loss of function due to his subjective symptoms, the court questions whether the ALJ, as a layman, was qualified to conclude that claimant suffered from no exertional limitations even if caused by a mental impairment, but in this case the court finds substantial evidence to support the finding of a light RFC.

Vasquez v. Sec'y HHS, 29 F.3d 619 (Table)(1st Cir. 1994). **Unpublished**. Where there is not medical evidence to suggest an objective basis for the claimant's disabling pain, the ALJ, who observed the claimant's demeanor at the hearing was entitled to make a credibility determination re: claimant's pain and to conclude that her pain did not disable her from performing within sedentary to light demands.

Carbone v. Sullivan, 960 F.2d 143 (Table)(1st Cir. 1992). **Unpublished**. Objective medical evidence of disabling pain need not consist of concrete physiological data alone but can consist of a medical doctor's clinical assessment. Once claimant meets threshold burden of establishing a clinically determinable medical impairment that can reasonably be expected to produce the pain alleged, SSA is not free to discount pain complaints simply because the alleged severity is not corroborated by objective medical findings. Rather, those complaints must be considered along with all other relevant evidence, and "detailed descriptions of [claimant's] daily activities" must be obtained. When medical signs and laboratory findings do not substantiate any physical impairment capable of producing the alleged pain (and a favorable determination cannot be made on the basis of the total record), the possibility of a mental impairment as the basis for the pain should be investigated."

Perez v. Sec'y HHS, 958 F.2d 445 (1st Cir. 1991) Given the paucity of medical evidence to suggest an objective physical basis for disabling pain, the ALJ's observation of claimant's demeanor at the hearing constituted substantial evidence and met the requirements of Avery.

Ortiz v. Sec'y HHS, 890 F.2d 520 (1st Cir. 1989) The Court "pays particular attention' to the ALJ's evaluation of complaints of pain in light of their subjective nature," quoting Sherwin v. Sec'y HHS, 685 F.2d 1,3 (1st. Cir., 1982).

Perez-Torres v. Sec'y HHS, 890 F.2d 1251 (1st Cir. 1989) Complaints of pain found credible only in part. Because claimant sought no treatment for pain, ALJ was free to discount complaints of severity. Because pain did not significantly limit claimant's ability to work, ALJ was permitted to base his decision entirely on the GRIDS.

Dupuis v. Sec'y HHS, 869 F.2d 622 (1st Cir. 1989). Where claimant did not seek medical treatment for pain, there was no credible evidence supporting the claim of pain. Complaints of pain need not be precisely corroborated by objective findings, but they must be consistent with medical findings.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). ALJ's rejection of claimant's pain supportable on this record.

Albors v. Sec'y HHS, 817 F.2d 146 (1st Cir. 1986). Pain rejected as disabling because non-examining physician took pain into account in determining RFC, and claimant takes only aspirin.

Da Rosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). Pain may be a nonexertional factor to be considered in combination with exertional limitations, even though it may also serve as a separate and independent ground for disability.

Avery v. Sec'y HHS, 797 F.2d 19 (1st Cir. 1986). Leading case setting out analysis to be used in analyzing pain. There must be a clinically determinable medical impairment that can reasonably be expected to produce the pain alleged. Other evidence including statements of the claimant or his doctor, consistent with the medical findings, shall be part of the calculus. Symptoms such as pain can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder. ALJ must consider six factors in evaluating a claimant's subjective allegations of pain:

(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.

Polk v. Sec'y HHS, No. 85-1369 (3/13/86), 787 F.2d 579 (Table) (1st Cir. 1986). **Unpublished (not on Westlaw). Available at DLC**. Remand in pain case where ALJ mischaracterized claimant's description of her daily activities and made inadequare findings re: pain.

Winn v. Heckler, 762 F.2d 180 (1st Cir. 1985). Claimant's fully healed right knee fusion does not constitute a medically determinable cause of claimant's subjective complaints of disabling pain. Subjective complaints of pain must be considered and evaluated, but only if there is a medically determinable impairment that could cause the pain. Court noted that a diagnosis of psychological disorder that transforms emotions into pain is a sufficient basis for the finding of a medical or medically determinable impairment.

Burgos Lopez v. Sec'y HHS, 747 F.2d 37 (1st Cir. 1984). Secretary not obliged to take claimant's assertions of disabling pain at face value.

Melendez v. Sec'y HHS, No. 82-1920 (10/14/83), 725 F.2d 664 (Table)(1st Cir. 1983). **Unpublished (not on Westlaw). Available at DLC**. ALJ erred in concluding that treating doctor's report was based solely on claimant's subjective complaints.

Gagnon v. Sec'y HHS, 666 F.2d 662 (1st Cir. 1981). Pain may be a nonexertional factor to be considered in combination with exertional limitations, even though it may also serve as a separate and independent ground for disability.

Rico v. Sec'y HEW, 593 F.2d 431 (1st Cir. 1979), *cert. denied*, 444 U.S. 858, 100 S.Ct. 120, 62 L.Ed.2d 78 (1979). The Secretary is not at the mercy of every claimant's subjective assertions of pain," however, administrative law judges should make specific findings when the issue of pain arises.

Thompson v. Califano, 556 F.2d 616 (1st Cir. 1977). Discussion of observable signs of pain.

Miranda v. Sec'y HEW, 514 F.2d 996 (1st Cir. 1975). Although Secretary is not required to accept at face value a claimant's allegation that pain is disabling, pain may reach a disabling level, and claimant is entitled to have the question faced squarely. Case remanded where there was insufficient evidence regarding the extent and seriousness of the pain associated with claimant's chronic lumbosacral strain and its relationship, if any, to claimant's capacity for work.

PRIVACY ACT

Usher v. Sec'y HHS, 721 F.2d 854 (1st Cir. 1983). The purpose of the Privacy Act, 5 U.S.C. § 552a, is "to let citizens know why and for what reasons the United States is asking them questions." SSA did not violate Privacy Act when it requested rental value information from claimant's landlords without indicating the purposes and routine uses of such information where Plaintiff suffered no adverse effect from SSA's actions (neither the information given to SSA nor the reduction in benefits was erroneous). However, Court stated that there was no statutory basis for SSA's refusal to give the information.

REOPENING

See also Reopening Section in JUDICIAL REVIEW above.

Niemi v. Shalala, No. 95-1743, 81 F.3d 147 (Table)(1st Cir. 1996). **Unpublished.** Absent a colorable constitutional claim, judicial review of ALJ's denial of hearing request on grounds of res judicata and no good cause to reopen is unavailable.

Gilbert v. Sullivan Sec'y HHS, 48 F.3d 1211 (1st Cir. 1995). Notice - reopening Secretary could not constitutionally refuse to reopen plaintiff's first application and that claimant should have been awarded SSDI benefits reverse remand.

McCuin v. Sec'y HHS, 817 F.2d 161 (1st Cir. 1987). (Medicare case) Reopening by Appeals Council limited to 60 days; reopening after 60 days allowed only on the motion of claimants.

Carrasquillo v. Sec'y HHS, No. 83-1013 (12/15/83), 725 F. 2d 665 (Table). **Unpublished (not on Westlaw)**. **Available at DLC**. Reopening for revision of earnings record (20 CFR §404.990) supplants reopening for good cause (20 CFR §404.989)

Pasquale v. Finch, 418 F.2d 627 (1st Cir. 1969). Plaintiff must show an attempt to reopen for "good cause" within four years of the "notice of initial determination."

REPRESENTATIVE PAYMENT

Washington State Dept. of Social and Health Services, Et Al v. Guardianship Estate of Keffeler, No. 01-1420, 537 U.S. _____ (2003). No violation of anti-assignment provision of the Social Security Act (42 U.S.C. §407(a)) where State Dept. of Social and Health Services, acting as representative payee of children to whom it provides foster care, uses SSDI and SSI benefits to reimburse itself for cost of foster care. Dept.'s role as rep. payee and use of benefits to pay for foster care do not constitute "execution, levy, attachment, garnishment, or other legal process" under §407(a).

RESIDUAL FUNCTIONAL CAPACITY (RFC)

▸ Alternate Sit-Stand

Brunel v. Comm'r of Soc. Sec., 248 F.3d 1126 (Table) (1st Cir. 2000). **Unpublished.** "Abundant case law advises ALJs to take vocational evidence when faced with claimant's with unusual needs to alternate sitting and standing." Court rejects ALJ's ambiguous finding regarding Claimant's need for

alternate sitting and standing. SSR 96-9p requires that ALJs specify the frequency of Claimant's need for alternate sitting and standing with respect to morning, lunch, and afternoon breaks permitted by sedentary work.

Nguyen v. Chater, 172 F.3d 31 (1st Cir. 1999). Inability to remain seated may erode the sedentary occupational base.

Gentle v. Sec'y HHS, 21 F.3d 419 (1st Cir. 1994). Claimant with ability to alternate between sitting and standing positions found to have sufficient residual functioning capacity for unskilled work. The need to alternate between sitting and standing does not preclude all sedentary work. SSR 83-12 provides that "unskilled jobs are particularly structured so that a person cannot ordinarily sit or stand at will." This does not mean that there are no sedentary unskilled jobs which allow a person to sit and stand at will.

Rosado, 807 F.2d 292 (1st. Cir. 1986). Language in SSR 83-12 stating that a person who must alternate between sitting and standing is not "functionally capable of doing . . . the prolonged sitting contemplated in the definition of sedentary work" only refers to the full range of sedentary work.

Arocho v. Sec'y HHS, 670 F.2d 374 (1st Cir. 1982) Remand where hypothetical to vocational expert asked about jobs in which the claimant could "alternate position, sit or stand," and VE's did not state whether jobs listed were available on a part-time basis or could be performed while walking.

▸ Bending

Chester v. Callahan, 193 F.3d 10 (1st Cir. 1999). The ability to stoop incorporates the ability to bend.

Frustaglia v. Sec'y HHS, 829 F.2d 192 (1st Cir.1987). Stooping means to "bend forward from the waist."

▸ Climbing

Gonzalez-Alemen v. Sec'y HHS, No. 95-2168, 86 F.3d 1146 (Table)(1st Cir. 1996). **Unpublished**. Where RFC indicates that claimant can never climb and is limited in his ability to be around moving machinery but ALJ does not mention these restrictions at all in her decision, Court can't determine whether the claimant's non-exertional limitations are sufficiently minimal to permit the ALJ to rely on the Grid or whether vocational evidence was required. Remand.

▸ Driving, Ability to

Nguyen V. Chater, 172 F.3d 31(1st Cir. 1999). The fact that claimant stated "I drive" on initial application form does not contradict his alleged inability to remain seated. ALJ never inquired into extent of claimant's ability to drive or driving activity subsequent to application.

▸ Environmental Conditions in Workplace

Galarza v. Sec'y HHS, 19 F.3d 7 (Table)(1st Cir. 1994). **Unpublished.** ALJ did not err in taking administrative notice of the DOT and relying on the DOT's job descriptions which reflected a general absence of environmental concerns in the relevant job categories - customer service representative and photographic supplies salesperson. In light of the administrative notice of the DOT, a VE was not needed to testify about the environmental conditions in the relevant work sites.

Pelletier v. Sec'y HEW 525 F.2d 158 (1st Cir. 1975). To meet her initial burden it was not enough for claimant to show simply that her specific job as an illustrator entailed exposure to smoke and fumes; she would have to show that such exposure would be a condition of this sort of work generally. Remand where the record shows no meaningful inquiry by the ALJ into whether or not it the claimant could engage in her former type of work, technical illustration, without exposure to substances to which claimant is allergic. Although claimant did not raise the issue at the hearing, her original written application for disability stated that she was allergic to rubber cement, paint thinner, and fixative sprays and that the latter two items are used in art departments.

▸ Erosion of Occupational Base

Nguyen V. Chater, 172 F.3d 31(1st Cir. 1999). The inability to remain seated may constitute an exertional impairment which significantly erodes the sedentary occupational base and requires use of additional vocational resources.

Chester v. Callahan, 193 F.3d 10 (1st Cir. 1999). Physical RFC limited to sitting 4 hours/day erodes the sedentary occupational base more than slightly and requires the ALJ to cite examples of occupations or jobs the claimant can do and the incidence of such work in the region. "An ability to stoop occasionally is required in most unskilled sedentary occupations and a complete inability to stoop would significantly erode the unskilled sedentary occupational base and a finding that the individual is disabled would usually apply."

Lopez-Merrero v. Sec'y HHS, 23 F.3d 394 (Table)(1st Cir. 1994). **Unpublished**. Under SSR 85-15, the ability to be punctual, attending work on a consistent basis and staying at work all day are demanded by any work environment, regardless of skill level. Moderate limitations in these abilities may erode the occupational base "at lease marginally and possibly more so." But not in this case.

Gagnon v. Sec'y HHS, 666 F.2d 662 (1st Cir.1981). Nonexertional factors, including need to avoid moving machinery, marked temperature, humidity changes, dust, fumes and gases; fainting spells,

pain, and significant postural/manipulative limitations as a result of his missing leg, could well limit the number of jobs within the "light work" category which claimant might be able to perform.

▸ Hands, Ability to Use/Manual Dexterity

Rivera v. Comm'r of Soc. Sec., 229 F.3d 1133 (Table)(1st Cir. 2000). **Unpublished.** Ability to engage in repetitive wrist motion is normally an exertional capacity. Here, claimant didn't develop argument that need to avoid repetitive wrist motion was a nonexertional impairment.

Cruz-Cajigas v. Comm'r of Soc. Sec., No. 97-2118, 1998 U.S. App. Unpublished 13180 (1sr Cir. June 18, 1998). Claimant's loss in manual dexterity could affect her ability to perform light unskilled work. Referring to SSR 83-14 ("many" unskilled light jobs require the gross use of the hands to grasp, hold, and turn objects) and SSR 85-15 (the ability tp work with the whole hand, e.g., to seize, hold, grasp and turn, is required in almost all jobs).

Rivera v. Comm'r of Soc. Sec., No. 98-1377, 181 F.3d 80 (Table)(1st Cir. 1998). **Unpublished**. Where sedentary work is involved, "good use of the hands and fingers" is required. Carpal Tunnel Syndrome case.

Rodriguez v. Sec'y HHS, No. 94-1858, 46 F.3d 1114 (Table)(1st Cir. 1995). **Unpublished.** ALJ erred in relying on the Sedentary grid rules to conclude that the claimant was not disabled because if claimant cannot perform continuous hand-finger activities such as typing, she can't perform the full range of sedentary work.

Torres v. Sec'y HHS, 976 F.2d 724 (Table)(1st Cir. 1992). **Unpublished**. Remand where hypothetical was materially deficient in failing to include the limitation on repeated fine manipulation. The claimant's functioning, as found by the ALJ, fell somewhere in between that posited in the two hypotheticals posed by the ALJ -claimant could generally use her hands, but should not repeatedly perform fine movements-but the VE was not asked, and did not directly say, what jobs claimant could handle if she were so restricted.

Heggarty v. Sullivan, 947 F.2d 990 (1st Cir. 1991). Most sedentary jobs require good use of the hands and fingers.

Davila Melendez v. Sec'y HHS, 923 F.2d 839 (Table)(1st Cir. 1990). **Unpublished**. Bilateral carpal tunnel syndrome.

Mullin, et al. v. Sec'y HHS, No. 83-1510 (1/31/84). **Unpublished (not on Westlaw). Available at DLC**. "Careful evaluation of the claimant's fine coordination in his right hand is especially important for sedentary work, "Most sedentary occupations fall within the skilled, semi-skilled, professional, administrative, technical, clerical, and benchwork classifications."

▸ Household, Ability to Function In

Bianchi v. Sec'y HHS, 764 F.2d 44 (1st Cir. 1985.) In light of claimant's demonstrated social and occupational maladjustment, her ability to relate to household members and function within her own household environment is not "substantial evidence" that she is able to perform gainful employment.

▸ Medical Findings Connecting Impairment to RFC

Rivera-Torres v. Sec'y HHS, 837 F.2d 4 (1st Cir. 1998). An explanation of claimant's functional capacity from a doctor is needed. Without an RFC evaluation from a doctor, the ALJ cannot conclude that claimant's musculoskeletal problems would not prevent him from performing his past work. The ALJ, a lay factfinder, lacks sufficient expertise to conclude claimant has the ability to be on his feet all day, constantly bending and lifting 25 pound weights.

Perez v. Sec'y HHS, 958 F.2d 445 (1st Cir. 1991). ALJ is not qualified to interpret raw medical data in functional terms, but in this case, ALJ warranted in finding that claimant's physical impairments do not impose significant exertional limits without medical assessment of RFC. ALJ's observations at hearing were important Avery considerations in light of paucity of medical evidence.

Davila Melendez v. Sec'y HHS, 923 F.2d 839 (Table)(1st Cir. 1990). **Unpublished**. RFC assessment forms are necessary in cases like this because the raw medical data contained in charts, examination notes and doctors' reports are generally unintelligible to a lay fact finder such as an ALJ, who is not qualified to translate the data into conclusions about the claimant's residual functional capacity.

Gordils v. Sec'y HHS, 921 F.2d 327 (1st Cir. 1990) The Secretary is not precluded from rendering a common-sense judgment about RFC based upon medical findings as long as he does not overstep the bounds of a layperson's competence.

Class Rosario v. Sec'y HHS, 915 F.2d 1556 (Table)(1st Cir. 1990). **Unpublished**. The reports in the record were limited to medical findings stated in medical terms that carry no readily discernible message about the physical capacities of the claimant. Because "the ALJ, a lay fact- finder, lack[ed] sufficient expertise" to interpret these labels, the medical reports did not provide "substantial evidence" for his conclusions about the claimant's residual functional capacity.

Rodriguez v.Sec'y HHS, 893 F.2d 401 (1st Cir. 1989). Substantial evidence does not exist to support a finding that exertional impairments are not disabling where the record does not contain any evidence of RFC. The ALJ is not qualified to assess RFC on the basis of bare medical findings.

Rosado v. Sec'y HHS, 807 F.2d 292 (1st Cir. 1986). Bare medical findings are unintelligible to a lay person in terms of residual functional capacity. Medical advisor needed to assess RFC before vocational expert can competently testify re: vocational possibilities.

Berrios v. Sec'y HHS, 796 F.2d 574 (1st Cir.1986). The Appeals Council, composed of lay persons, was not competent to interpret and apply raw, technical medical data to claimant's ability to sit, bend or reach.

Lugo v. Sec'y HHS, 794 F.2d 14 (1st Cir.1986). None of the physicians who examined claimant provided any medical findings concerning the impact of his heart condition on his residual functional capacity. Neither the Appeals Council nor the court is qualified to make this medical judgment about residual functional capacity based solely on bare medical findings as to claimant's heart condition.

Evangelista v. Sec'y HHS, 826 F.2d 136 (1st Cir. 1987). Medical information not only diagnosed claimant's impairments, but related the consequential physical limitations to specific residual functional capacities.

▸ Mental

Lopez-Merrero v. Sec'y HHS, 23 F.2d 394 (Table)(1st Cir. 1994). **Unpublished**. Under SSR 85-15, the ability to be punctual, attending work on a consistent basis and staying at work all day are demanded by any work environment, regardless of skill level. Moderate limitations in these abilities may erode the occupational base "at lease marginally and possibly more so." But not in this case.

Gentle v. Shalala, 21 F.3d 419 (Table) (1st Cir. 1994). **Unpublished**. Court upholds ALJ's determination that claimant's mental impairments did not significantly limit the range of sedentary work he could perform where mental RFCs indicated moderate impairments in many areas required for all work.

Ortiz v. Sec'y HHS, 890 F.2d 520 (1st Cir. 1989) . Under SSR 85-15, the ability to be punctual, attending work on a consistent basis and staying at work all day are demanded by any work environment, regardless of skill level. Moderate limitations in these abilities may erode the occupational base "at lease marginally and possibly more so."

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. A substantial loss of ability to meet any of these basic work- related activities would severely limit the potential occupational base. This, in turn, would justify a finding of disability because even favorable age, education, or work experience will not offset such a severely limited occupational base." Social Security Ruling 85-15.

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (not on Westlaw). Available at DLC**. Secretary's conclusion that claimant with schizophrenia is not disabled is not supported by substantial evidence. Claimant's ability to travel is "weak evidence" of a capacity to work, especially in light of repeated hospitalizations. The conclusions of two doctors that claimant can work are not persuasive, when the doctors' analysis consist of "four checkmarks on a standard form with an additional line or two of 'comments' at the bottom."

Nieves v. Sec'y HHS, 775 F.2d 12 (1st Cir. 1985). An IQ score of 63 and a steady work history are not necessarily incompatible. Claimant's work-related functions only became significantly limited when she developed a physical impairment in addition to her mild mental retardation.

Bianchi v. Sec'y HHS, 764 F.2d 44 (1st Cir. 1985). Substantial evidence did not support conclusion that claimant was not disabled by her psychiatric problems. Claimant's history of losing or leaving jobs because of panic attacks supported the conclusion that her ability to perform substantial gainful employment was significantly impaired by her psychiatric disorders.

Carrillo Marin v. Sec'y HHS, 758 F.2d 14 (1st Cir. 1985). Certain mental abilities are a prerequisite to working: the regulations suggest as prerequisite to working: the ability to understand, carry out and remember simple instructions, to use sound judgment, to respond appropriately to supervision, co-workers and usual work situations and to deal with changes in a routine work setting.

Mullin, et al. v. Sec'y HHS, No. 83-1510 (1/31/84). **Unpublished (not on Westlaw). Available at DLC**. The ALJ's determination that "mild to moderate" depression does not significantly affect his RFC for sedentary work is not supported by substantial evidence.

▸ Need to Use Bathroom

Piper v. Chater, No. 97-1972, 134 F.3d 361 (Table) (1st Cir. 1998). **Unpublished**. Where ALJ's hypothetical to the VE included the limitation that the claimant had to use the bathroom "at will" and VE testified that the need for "frequent" bathroom trips (i.e., 8-10 in an 8-hour day in addition to breaks and lunch) would preclude sedentary and light work, but ALJ's decision only referred to "at-will" limitation and there was no explicit finding as to whether claimant's need was "frequent," court concludes that ALJ implicitly determined, and evidence supported, that claimant did not use the bathroom so frequently as to preclude work. Referring to Ellison v. Sullivan, 921 F.2d 816, 822 (8th Cir. 1990) (ALJ may not ignore a critical assumption underlying a VE's testimony).

▸ Repetitive Wrist Motion

Rivera v. Comm'r. of Soc. Sec., No. 99-2344, 229 F.3d 1133 (Table)(1st Cir. 2000). **Unpublished**. Ability to engage in repetitive wrist motion is normally an exertional capacity. Claimant didn't show that need to avoid repetitive wrist motion was a nonexertional impairment.

▸ Sedentary Work

Chester v. Callahan, 193 F.3d 10 (1st Cir. 1999). RFC limited claimant to four hours of sitting, less than the six hours usually required for sedentary work.. This limitation erodes the occupational base more than slightly and, while it does not mandate a finding of disabled, it does require the ALJ to "cite examples of occupations or jobs the individual can do and provide a statement of the incidence of such work in the region where the individual resides or in several regions of the country." SSR 96-9p, It is not clear at all that claimant's job as a residential counselor was sedentary in nature.

Rivera v. Comm'r of Soc. Sec., No. 98-1377, 181 F.3d 80 (Table)(1st Cir. 1998). **Unpublished**. Where sedentary work is involved, "good use of the hands and fingers" is required.

Gonzalez-Alemen v. Sec'y HHS, No. 95-2168, 86 F.3d 1146 (Table)(1st Cir. 1996). **Unpublished**. Even sedentary work may require the ability to ascend or descend stairs on a daily basis. Referring to SSR 85-15 (observing that usual everyday activities at work include ascending or descending ramps or a few stairs). Moreover, the Secretary's own regulations state that approximately 85 percent of unskilled, sedentary jobs are in the machine trades and benchwork occupational categories.

Heggarty v. Sullivan, 947 F.2d 990 (1st Cir. 1991). Most sedentary jobs require good use of the hands and fingers.

Rodriguez Pagan v. Sec'y HHS, 819 F.2d 1 (1st Cir. 1987).

Rosado v. Sec'y HHS, 807 F.2d 292 (1st Cir. 1986). Definition of an requirements for, sedentary work. In prima facie case, the Secretary cannot rely on a presumption of sitting ability sufficient to do sedentary work.

Da Rosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). Sedentary jobs generally require that the worker have the capacity to remain seated most of the day.

Gallo v. Sec'y HHS, 786 F.2d 1 (1st Cir. 1985).

Thomas v. Sec'y HHS, 659 F.2d 8 (1st Cir. 1981). All sedentary jobs require that a worker have the capacity to remain seated most of the day. Persons who must often interrupt their sitting with standing for significant periods of time are prevented from reliably attending to work in a seated position. However, where claimant need only interrupt his sitting with brief periods of standing in

order to relieve pain and stiffness in his knee, the evidence is strong that he does "have the capacity to remain seated most of the day."

▸ Sitting

Chester v. Callahan, 193 F.3d 10 (1st Cir. 1999). Where RFC limited claimant to four hours of sitting , less than the six hours usually required for sedentary work, the sedentary occupational base is eroded more than slightly. While this does not mandate a finding of disabled, it does require the ALJ to "cite examples of occupations or jobs the individual can do and provide a statement of the incidence of such work in the region where the individual resides or in several regions of the country." Citing SSR 96- 9p.

Nguyen V. Chater, 172 F.3d 31 (1st Cir. 1999). The inability to remain seated may constitute an exertional impairment which significantly erodes the sedentary occupational base and requires use of additional vocational resources.

Gentle v. Shalala, 21 F.3d 419 (Table) (1st Cir. 1994). **Unpublished**. Substantial evidence affirmance of denial. No error where ALJ found that claimant retained the RFC for the full range of sedentary work reduced only by the need to alternate between sitting and standing and VE identified unskilled jobs where a person could sit and stand at will. The need to alternate between sitting and standing does not preclude all sedentary work. SSR 83-12 provides that "unskilled jobs are particularly structured so that a person cannot ordinarily sit or stand at will." This does not mean that there are no sedentary unskilled jobs which allow a person to sit and stand at will.

Rosado v. Sec'y HHS, 807 F.2d 292 (1st. Cir. 1986). Language in SSR 83-12 stating that a person who must alternate between sitting and standing is not "functionally capable of doing . . . the prolonged sitting contemplated in the definition of sedentary work" only refers to the full range of sedentary work.

▸ Stooping

Chester v. Callahan, 193 F.3d 10 (1st Cir. 1999). The ability to stoop incorporates the ability to bend. "An ability to stoop occasionally is required in most unskilled sedentary occupations and a complete inability to stoop would significantly erode the unskilled sedentary occupational base and a finding that the individual is disabled would usually apply."

Frustaglia v. Sec'y HHS, 829 F.2d 192 (1st Cir.1987). Stooping means to "bend forward from the waist."

▸ Stress

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). "Stress is not a characteristic of a job, but instead reflects an individual's subjective response to a particular situation." Stress is a factor which must be considered on an individualized basis for performing a range of work at step 5. Vocational evidence that there are a significant number of jobs in the economy that would be "low stress" for the average worker falls short of the requirements of Ruling 85-15. ALJ must undertake subjective, individualized inquiry into what job attributes are likely to produce disabling stress in the claimant, and what, if any, jobs exist in the economy that do not possess these attributes.

▸ Travel to Work, Ability

Edwards v. Sec'y HHS, No. 94-1345, 34 F.3d 1065 (Table) (1st Cir. 1994). **Unpublished.** Lack of public transportation to job is irrelevant.

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (not on Westlaw). Available at DLC**. Secretary's conclusion that claimant with schizophrenia is not disabled is not supported by substantial evidence. Claimant's ability to travel is "weak evidence" of a capacity to work, especially in light of repeated hospitalizations.

Lopez Diaz v. Sec'y HEW, 585 F.2d 1137 (1st Cir. 1978), appeal after remand, Lopez-Diaz v. Sec'y HHS, 673 F.2d 13 (1st Cir. 1982). Although distance from work and inconvenience of commute are not relevant factor in the disability determination process, if a hypothetical claimant could not transport herself to work, utilizing some normal means of transportation, regardless of where she resides, then disability benefits are appropriate for the actual claimant. ALJ erred by failing to consider claimant's impairment - caused inability to travel to and from work place.

▸ Willingness to Work

Schena v. Sec'y, 635 F.2d 15 (1st Cir. 1980). It was a mistake for ALJ to equate claimant's expressions of willingness to try to work with capacity to work.

RES JUDICATA

See also Res Judicata section of JUDICIAL REVIEW above.

Niemi v. Shalala, No. 95-1743, 81 F.3d 147 (Table)(1st Cir. 1996). **Unpublished**. Absent a colorable constitutional claim, judicial review of ALJ's denial of hearing request on grounds of res judicata and no good cause to reopen is unavailable.

Matos v. Sec'y HHS, 581 F.2d 282 (1st Cir. 1978). A claimant who was earlier denied at reconsideration, and then filed a new claim but presented no new evidence, cannot get a hearing and/or court review. *Res judicata* operates even if earlier decision was below hearing level.

SEQUENTIAL EVALUATION PROCESS

▸ Generally

Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265, 152 L.Ed.2d 330 (2002). Duration requirement in the definition of disability means that both the medical impairment and the inability to engage in substantial gainful activity (SGA) must have lasted or be expected to last for a continuous period of not less than 12 months.

Goodermote v. Sec'y HHS, 690 F.2d 5 (1st Cir. 1982). Good description of the sequential evaluation process.

Krafsur v. Sec'y HHS, 757 F.2d 446 (1st Cir. 1985). Since plaintiff failed to raise sequential evaluation issue, the court does not have to consider the overall validity of the process.

▸ Step 1 - Substantial Gainful Activity

▸ Generally

Bianchi v. Sec'y HHS, 764 F.2d 44 (1st Cir. 1985). In light of claimant's demonstrated social and occupational maladjustment, her ability to relate to household members and function within her own household environment is not "substantial evidence" that she is able to perform gainful employment.

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (not on Westlaw). Available at DLC**. Past insubstantial work cannot demonstrate an ability to perform SGA.

Dolbashian v. Sec'y HHS, 688 F.2d 4 (1st Cir. 1982). Substantial gainful activity was defined as that which involves the performance of significant physical or mental duties for profit even if no profit is realized.

Geoffroy v. Sec'y HHS, 663 F.2d 315 (1st Cir. 1981).

- **Part-Time Work**

Skodras v. Callahan, No. 98-1677, 181 F.3d 80 (Table)(1st Cir. 1999). **Unpublished**. Claimant did not meet her burden of proving she was not engaged in SGA during the time covered by her application. Court finds that claimant's part-time work is SGA and that she can return to past part-time work. Court doesn't address issue of whether the ability to do part-time work precludes a disability finding where the claimant did not do part-time work in the past or is not currently doing part-time work at SGA level.

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table)(1st Cir. 1994). **Unpublished**. Even part-time work may constitute SGA. The fact that all of claimant's past work was part time does not require a finding of disability.

Dolbashian v. Sec'y HHS, 688 F.2d 4 (1st Cir. 1982). Performance on a part-time basis did not preclude a finding that the work was substantial.

- **Self-Employment**

Dolbashian v. Sec'y HHS, 688 F.2d 4 (1st Cir. 1982). Although claimant's profit was not significant and may be attributable in part to the gratuitous assistance he received from others, this does not prevent a finding that the activity was gainful and that profit resulted in part from his efforts. Supervisory, managerial, advisory or other significant personal services rendered by self-employed individuals demonstrate an ability to engage in substantial gainful activity.

- **12-Month Duration Requirement**

Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265, 152 L.Ed.2d 330 (2002). Duration requirement in the definition of disability means that both the medical impairment and the inability to engage in substantial gainful activity (SGA) must have lasted or be expected to last for a continuous period of not less than 12 months.

Chester v. Callahan, 193 F.3d 10 1999 (1st Cir. 1999). Medical records showing treatment limited to 10 months is evidence that impairment did not last the required 12 months.

- **Step 2 - Severity**

May v. Comm'r of Soc. Sec., No. 97-1367, 125 F.3d 841 (Table)(1st Cir. 1997). **Unpublished**. An impairment or combination of impairments is severe if it "significantly limits [claimant's] physical or mental ability to do basic work activities." Under SSR 85-28, a claim may only be denied at Step 2 where medical evidence establishes only a"slight abnormality or combination of abnormalities which

would have not more than a minimal effect on an individual's ability to work even if the individual's age, education or work experience were specifically considered..."

Vasquez v. Sec'y HHS, No. 94-1793, 45 F.3d 424 (Table) (1st Cir. 1995). **Unpublished**. ALJ could conclude that mental impairment is not severe where record portrays a relatively mild mental impairment that responded well to medication and where claimant never clarified how impairment limited his ability to work.

Luis Sanchez-Quiles v. Sec'y HHS, 9 F.3d 1535 (1st Cir. 1993). Findings of medical equivalence must be based on medical findings that are at least equal in severity and duration to the listed findings.

Figueroa-Rodriquez v. Sec'y HHS, 845 F.2d 370 (1st Cir. 1988). To determine the severity of a mental impairment, an ALJ must rate the degree of functional loss in four areas that the SSA has identified as essential to work: 1) activities of daily living; 2) social functioning; 3) concentration, persistence, or pace; and 4) deterioration or decompensation in work or work- like settings. Substantial evidence did not support ALJ's finding of a non-severe mental impairment where medical advisor's uncontradicted assessment that claimant had moderate restrictions in activities of daily living.

Vazquez Vargas v. Sec'y HHS, 838 F.2d 6 (1st Cir. 1988). ALJ used correct standard for assessing severity.

Barrientos v. Sec'y HHS, 820 F.2d 1 (1st Cir. 1987). Post - McDonald decision. Discussion of SSR 85-28.

Gonzalez Perez v. Sec'y HHS, 812 F.2d 747 (1st Cir. 1987). Post - McDonald severity ruling.

Fernandez v. Sec'y HHS, 826 F.2d 164 (1st Cir. 1987). Alcoholism and severity. Post McDonald; application of SSR 85-28.

Cruz Rivera v. Sec'y HHS, 818 F.2d 96 (1st Cir. 1986). Denial on severity grounds upheld. Epilepsy began after date last insured.

Gonzalez-Ayala v. Sec'y HHS, 807 F.2d 255 (1st Cir. 1986). Step 2 termination.

McDonald v. Sec'y HHS, 795 F.2d 1118 (1st Cir. 1986). Step 2 (sequential evaluation) severity requirement is hereinafter to be a de minimus policy, designed to do no more than to screen out groundless claims. Various non-severe impairments viewed in combination may be disabling. SSR 85-28.

Munoz v. Sec'y HHS, 788 F.2d 822 (1st Cir. 1986).

Gallo v. Sec'y HHS, 786 F.2d 1 (1st Cir. 1985).

Nieves v. Sec'y HHS, 775 F.2d 12 (1st Cir. 1985).

Carillon Marin v. Sec'y HHS, 750 F. 2d 14 (1st Cir. 1985). Given unchallenged diagnosis of chronic schizophrenia, coupled with uncontradicted testimony concerning claimant's degeneration in recent years and evidence of gross interference with his interpersonal relations, finding of no severe impairment was not supported by substantial evidence. If Secretary is doubtful as to severity of claimant's mental disorder, appropriate course is to request a consultative evaluation, not to rely on the lay impressions of the ALJ. ALJ incorrectly applied "Listing" standard at Step 2.

Krafsur v. Sec'y HHS, 757 F.2d 446 (1st Cir. 1985).

Goodermote v. Sec'y HHS, 690 F.2d 5 (1st Cir. 1982). Although plaintiff has several impairments, court holds that there was considerable evidence in the record that he was able to work with these problems for many years. Further, plaintiff's mental impairment is found to be non-severe, although it moderately restricts five out of ten basic work-related functions.

Gonzalez v. Richardson, 455 F.2d 953 (1st Cir. 1972).

▸ Step 3 - Meeting or Equaling a Listed Impairment

See also Burden of Proof in EVIDENCE section above.

Nazario v. Comm'r of Soc. Sec., 129 F.3d 1252 (Table)(1st Cir. 1997). **Unpublished**. In order for an impairment to equal a listing, there must be medical findings equivalent to all of the criteria in the listing.

Luis Sanchez-Quiles v. Sec'y HHS, 9 F.3d 1535 (1st Cir. 1993). Findings of medical equivalence must be based on medical findings that are at least equal in severity and duration to the listed findings.

Hernandez-Torres v. Sec'y HHS, 968 F.2d 1210 (Table) (1st Cir. 1992) **Unpublished**. Appellant bore the burden of proving that his condition met or equaled the level of severity required for presumptive disability status.

Cassas v. Sec'y HHS, 893 F.2d 454 (1st Cir. 1990). Regulations provide that in order to receive widow(er)s benefits, impairments must meet or equal a listing, and that age, education and work

experience are not to be considered in disability determination. Court holds that residual functional capacity cannot be ignored in considering medical equivalence to a listing in widow(er)s cases.

McDonald v. Sec'y HHS, 795 F.2d 118 (1st Cir. 1986). See "severity" for discussion.

Pitchard v. Schweiker, 692 F.2d 198 (1st Cir. 1982).

Goodermote v. Sec'y HHS, 690 F.2d 5 (1st Cir. 1982). Meeting a listing automatically entitles claimant to benefits.

Rodriquez v. Sec'y HHS, 647 F.2d 218 (1st Cir. 1981). Court consider the medical opinion given by one or more physicians designated by the Secretary in deciding medical equivalence.

Currier v. HEW, 612 F.2d 594 (1st Cir. 1980).

Reyes Robles v. Finch, 409 F.2d 84 (1st Cir. 1969).

Rodriquez v. Celebrezze, 349 F.2d 494 (1st Cir. 1965).

▸ Step 4 - Past Work

See also Burden of Proof in EVIDENCE section above.

Cushman v. Apfel, 215 F.3d 1311 (Table)(1st Cir. 2000). **Unpublished**. No error in ALJ's failure to elicit VE testimony re: impact of claimant's nonexertional limitations on her ability to perform her past work. At Step 4, the claimant is the primary source for vocational documentation. Claimant has duty to describe her impairments so as to raise the point to the Commissioner how the impairments preclude the performance of her prior work.

Abdus-Sabur v. Callahan, 181 F.3d 79 (Table) (1st Cir. 1999). **Unpublished.** Claimant raises argument, unopposed by SSA, that a person who is not working cannot be found "not disabled" based on a capacity for part-time work except in the rare circumstance (not present in this case) where the claimant's past work was part-time and claimant retains that capacity to perform that work. Court doesn't address this issue.

Santiago v. Comm'r of Soc. Sec., No. 97-2088, 141 F.3d 1150 (Table)(1st Cir. 1998). **Unpublished**. Claimant who never explained how her impairments prevented her from returning to her past work failed to meet her burden at Step 4.

Manso-Pizarro v. Sec'y HHS, 76 F.3d 15 (1st Cir. 1996). At Step 4, the ALJ is entitled to credit the claimant's own description of her past work and her functional limitations, but the ALJ has some burden independently to develop the record. Citing Santiago, 944 F.2d 1 (1st. Cir. 1991). Remand.

Alvarez v. Sec'y HHS, No. 95-1028, 62 F.3d 1411 (Table) (1st Cir. 1995). **Unpublished**. In order to meet burden at step 4, claimant must show that her impairments would prevent her from returning to past work as it typically exists in the economy, not that she is unable to return to a specific job that may have unusual requirements for that type of work.

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table)(1st Cir. 1994). **Unpublished**. Even part-time work may constitute substantial gainful activity, so the fact that all of claimant's past positions were part-time jobs does not require a finding of disability.

Santiago v. Sec'y HHS, 944 F.2d 1 (1st Cir. 1991). At Step 4, claimant will be found not disabled when she retains the RFC to perform the actual functional demands and job duties of a particular past relevant job, as she performed it. The claimant is the primary source for vocational documentation. It's claimant's duty to describe her impairments so as to raise the point to the Commissioner how the impairments preclude the performance of her prior work.

Rivera-Torres v. Sec'y HHS, 837 F.2d 4 (1st Cir. 1998). Work occurring more than 15 years prior to period of disability usually not considered relevant. Without an RFC evaluation from a doctor, the ALJ cannot conclude that claimant's musculoskeletal problems would not prevent him from performing his past work.

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (not on Westlaw). Available at DLC**. At Step 4, test is whether claimant has ability to return to past relevant work performed at substantial gainful activity level. Past insubstantial activity cannot demonstrate an ability to perform SGA.

Gray v. Heckler, 760 F.2d 369 (1st Cir. 1985). The Secretary can rely on a job held more than 10 years ago in determining whether claimant can return to prior work. In order to meet burden at step 4, claimant must establish that she cannot return to her former type of work, not just her inability to return to a particular past job.

Lopez-Diaz v. Sec'y, 673 F.2d 13 (1st Cir. 1982). ALJ can base adverse decision on claimant's ability to do past work which claimant did more than 15 years ago, the 15 year limit applies only to transferability under a grid analysis, and the grid comes into play only after a finding that the claimant cannot perform past work.

Gonzalez Perez v. Sec'y of HEW, 572 F.2d 886 (1st Cir. 1978).

Pelletier v. Sec'y HEW, 525 F.2d 158 (1st Cir. 1975). To meet her initial burden it was not enough for claimant to show simply that her specific job as an illustrator entailed exposure to smoke and fumes; she would have to show that such exposure would be a condition of this sort of work generally.

▸ Step 5 - Other Work

Seavey v. Barnhart, 276 F.3d 1 (1st Cir. 2001). At Step 5, SSA bears burden to come forward with evidence showing that there are jobs the claimant can do despite limitations. Since SSA is not represented as a litigant, it is better to think of Step 5 not as a shifting of burdens, but as a rule that the claimant is not under any obligation to produce evidence at Step 5.

Freeman v. Barnhart, 274 F.3d 606 (1st Cir. 2001). If applicant has met her burdens of production and proof at Steps 1-4 of sequential evaluation, then SSA has burden at Step 5 of coming forward with evidence of specific jobs in the national economy that the applicant can still perform. ALJ met burden at Step 5 to come forward with evidence by introducing testimony of vocational expert.

Mills v. Apfel, 244 F.3d 1 (1st Cir. 2001), *cert. denied* 534 U.S. 1085, 122 S.Ct. 822, 151 L.Ed.2d 704 (1/7/2002). ALJ did not err in deciding the case at step 4 instead of step 5 because the result would have been the same. Court assumes that assembly line and motel laundress jobs, or substantially similar jobs, exist in the economy and that claimant is not disabled if she is capable of doing these jobs.

Gonzalez-Alemen v. Sec'y HHS, No. 95-2168, 86 F.3d 1146 (Table)(1st Cir. 1996). **Unpublished**. ALJ's determination at Step 5 does not meet substantial evidence standard where claimant has nonexertional limitations including complete inability to climb stairs and limitations in ability to be around moving machinery and ALJ relied on GRID at Step 5 to find claimant not disabled. ALJ's decision fails to mention nonexertional impairments and record does not illuminate for lay reader the nature and extent of these limitations. Without more information about limitations, court cannot determine whether nonexertional limitations are sufficiently minimal to allow application of the Grid or whether VE testimony was required to meet burden at Step 5.

Edwards v. Sec'y HHS, No. 94-1345, 34 F.3d 1065 (Table) (1st Cir. 1994). **Unpublished**. The Secretary bears the burden of proving the existence of jobs in the economy that the claimant can perform. Not error for the ALJ to determine number of available jobs by adjusting VE's numbers down by percentages the VE said would account for claimant's limitations. 67,500 jobs is significant number

Keating v. Sec HHS, 848 F.2d 271 (1st Cir. 1988). To show that work exists in significant numbers, the Secretary must show significant, not isolated, numbers of jobs which the claimant can perform.

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986): The burden of showing the existence of other jobs in the national economy that the claimant can perform (Step 5) rests on the Secretary.

Sherwin v. Sec'y, 685 F.2d 1, (1st Cir. 1982). The burden of showing the existence of other jobs in the national economy that the claimant can perform (Step 5) rests on the Secretary.

SUBSTANCE ABUSE

▸ Materiality

Budzko v. Comm'r of Soc. Sec., No. 99-1932, 229 F.3d 1133 (Table) (1st Cir. 2000). **Unpublished**. Substantial evidence supports ALJ's ruling that substance abuse is materia land finding that if claimant's substance abuse were to cease, he would have no severe physical or mental Impairment where treatment records indicate diagnosis of substance abuse only, not personality disorder.

SUBSTANTIAL GAINFUL ACTIVITY

▸ Generally

Bianchi v. Sec'y HHS, 764 F.2d 44 (1st Cir. 1985). In light of claimant's demonstrated social and occupational maladjustment, her ability to relate to household members and function within her own household environment is not "substantial evidence" that she is able to perform gainful employment.

Rose v. Sec'y HHS, No. 86-1010 (9/22/86), 802 F.2d 442 (Table)(1st Cir. 1986). **Unpublished (not on Westlaw). Available at DLC**. Past insubstantial work cannot demonstrate an ability to perform SGA.

Dolbashian v. Sec'y HHS, 688 F.2d 4 (1st Cir. 1982). Substantial gainful activity was defined as that which involves the performance of significant physical or mental duties for profit even if no profit is realized.

Geoffroy v. Sec'y HHS, 663 F.2d 315 (1st Cir. 1981).

▸ Part-Time Work

Skodras v. Callahan, No. 98-1677, 181 F.3d 80 (Table)(1st Cir. 1999). **Unpublished**. Claimant did not meet her burden of proving she was not engaged in SGA during the time covered by her application. Court finds that claimant's part-time work is SGA and that she can return to past part-time work. Court doesn't address issue of whether the ability to do part-time work precludes a disability finding where the claimant did not do part-time work in the past or is not currently doing part-time work at SGA level.

Mitchell v. Sec'y HHS, 21 F.3d 419 (Table)(1st Cir. 1994). **Unpublished**. Even part-time work may constitute SGA. The fact that all of claimant's past work was part time does not require a finding of disability.

Dolbashian v. Sec'y HHS, 688 F.2d 4 (1st Cir. 1982). Performance on a part-time basis did not preclude a finding that the work was substantial.

▸ Self-Employment

Dolbashian v. Sec'y HHS, 688 F.2d 4 (1st Cir. 1982). Although claimant's profit was not significant and may be attributable in part to the gratuitous assistance he received from others, this does not prevent a finding that the activity was gainful and that profit resulted in part from his efforts. Supervisory, managerial, advisory or other significant personal services rendered by self-employed individuals demonstrate an ability to engage in substantial gainful activity.

▸ 12-Month Duration Requirement

Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265, 152 L.Ed.2d 330 (2002). Duration requirement in the definition of disability means that both the medical impairment and the inability to engage in substantial gainful activity (SGA) must have lasted or be expected to last for a continuous period of not less than 12 months.

Chester v. Callahan, 193 F.3d 10 1999 (1st Cir. 1999). Medical records showing treatment limited to 10 months is evidence that impairment did not last the required 12 months.

SUSPENSION OF BENEFITS

▸ Incarceration

Muldoon v. SSA, 229 F.3d 1133 (Table)(1stCir. 2000), cert. denied, 531 U.S. 1175, 121 S.Ct. 1147, 148 L.Ed.2d 1010, 69 USLW 3555 (U.S. Feb 20, 2001) (NO. 00-7746). **Unpublished.** Prohibition on receipt of SSDI for persons confined pursuant to a felony conviction is constitutional. Effective

April 7, 2000, disqualified class enlarged to include those who are confined pursuant to conviction of "a criminal offense."

TREATMENT

▸ Side Effects of Medication

Figueroa v. Sec'y HHS, 585 F.2d 551 (1st Cir.1978). Where claimant asserted that seizure medication made him so sleepy, hot and ill-tempered so as to disable him from working, ALJ should have sought further medical evidence or made further inquiry as to whether side effects of medication was disabling.

▸ Failure to Seek or Follow Treatment

Rivera v. Apfel, No. 00-1476, 248 F.3d 1127 (Table)(1st Cir. 2000). **Unpublished**. Three year gap in treatment supports nondisability decision.

Chester v. Callahan, 193 F.3d 10 1999 (1st Cir. 1999). Medical records showing treatment limited to 10 months is evidence that impairment did not last the required 12 months.

Diaz v. Chater, No. 98-1425, 181 F.3d 79 (Table)(1st Cir. 1998). **Unpublished**. Claimant's failure to seek treatment undermines probative value of non-medical evidence of restricted activities.

Bermudez v. Sec'y HHS, No. 96-2318, 129 F.3d 1252 (Table) (1st Cir. 1997). **Unpublished**. ALJ may draw from claimant's failure to seek treatment for nearly 21 years a negative inference with respect to claimant's limitations.

Rice v. Chater, 86 F.3d 1 (1st Cir. 1996). Claimant's failure to seek treatment is not evidence of medical improvement where claimant didn't seek treatment for 2.5 years prior to initial disability finding.

Griswold v. Sec'y HHS, No. 94-2168, 57 F.3d 1061 (Table) (1st Cir. 1995). **Unpublished**. The failure to follow restorative treatment without good cause can lead to a finding of not disabled. Here, claimant took medication but failed to pursue therapy that was recommended to her. Evidence that claimant had appointment with counselor but failed to follow through shows that she was aware of the appropriateness of counseling.

Rodriguez v. Sec'y HHS, No. 94-1858, 46 F.3d 1114 (Table) (1st Cir. 1995). **Unpublished**. Implicit in a finding of disability is a determination that existing treatment alternatives would not restore a claimant's ability to work. Claimant did not offer good reason for failing to take advantage of the various pain remedies that were offered to her. Claimant said bad side effects, but medical records don't show reports of adverse side effects.

Irlanda Ortiz v. Sec'y HHS, 955 F.2d 765 (1st Cir. 1991). Gaps in the medical record that show a lack of treatment are "evidence" for purposes of the disability determination.

Tsarelka v. Sec'y HHS, 842 F.2d 529 (1st Cir. 1988). The failure to follow restorative treatment without good cause can lead to a finding of not disabled.

Bianchi v. Sec'y HHS, 764 F.2d 44 (1st Cir. 1985). If an impairment reasonably can be remedied by treatment, it cannot serve as a basis for a finding of disability.

Manfredonia v. Heckler, No. 83-1776, 740 F.2d 952 (Table) (1st Cir. 1984). **Unpublished (not on Westlaw)**. **Available at DLC**. Possibility of mental impairment causing failure to take medication where medical report states that non-compliance "may be inherent to suspicious paranoia."

Zavas v. Sec'y HHS, No. 83-1752, 732 F.2d 140 (Table)(1st Cir. 1984). **Unpublished (not on Westlaw)**. **Available at DLC**. No substantial evidence that hypertension not controlled due to claimant's failure to follow prescribed treatment.

Schena v. Sec'y HHS, 635 F.2d 15 (1st Cir. 1980). Claimant's decision not to have spinal surgery did not bar him from receiving SSDI benefits given surgery's uncertain and sometimes adverse consequences. Denial of social security disability benefits because of claimant's alleged willful refusal to follow "recommended" course of treatment erroneously disregarded language of regulation speaking in terms of willful failure to follow "prescribed" treatment. Assessment as to whether social security disability benefits claimant's refusal to undergo treatment is reasonable should be made in light of such variables as risks involved, likelihood of success, consequences of failure and availability of alternative treatment; and reasonable fear of painful or dangerous surgery may justify refusal of treatment.

Torres Gutierrez v. HEW, 572 F.2d 7 (1st Cir. 1978). Where claimant does not follow the prescribed medical advice which would remedy or reduce his impairments, such conduct is "arguably inconsistent with his complaints of pain."

Reyes Robles v. Finch, 409 F.2d 84 (1st Cir. 1969). Fact that claimant failed to seek medical treatment was arguably inconsistent with his complaint of pain and lent credence to suspicions that he may have been exaggerating.

TIME

▸ Filing Deadlines

Pineiro-Sanchez v. Sec'y HHS, No. 95-1496, 89 F.3d 823 (Table)(1st Cir. 1995). **Unpublished**. Hearing request is deemed filed on the date of mailing, not when the District Office receives it.

Piscopo v. Sec'y HHS, 27 F.3d 554 (Table)(1st Cir. 1994). **Unpublished**. The 60-day filing period set forth in 42 USC 405(g) is not jurisdictional, but rather constitutes a statute of limitations. As such, the limitation period constitutes a condition on the waiver of sovereign immunity that must be strictly construed. Pro se claimant's appeal not timely filed where claimant filed appeal more than 65 days from mailing of Appeals Council denial notice. The fact that the claimant only goes to her Post Office box every week or two and did not pick up the SSA notice until 2 weeks after the date on the notice does not rebut the presumption that the SSA notice was received within 5 days of mailing. Relevant time is when the letter was delivered to the PO Box, not when claimant picked it up.

▸ Good Cause for Late Filing

Scarpa v. Murphy, et al., 782 F.2d 300 (1st Cir. 1986). "Good cause" for late filing. Rule permitting extension of appeal period in case of "good cause," F.R.A.P. Rule 4(a)(5), 28 U.S.C.A., applies both before and after expiration of appeal time. Extension of time for filing notice of appeal was warranted following post office's late delivery of notice of appeal, despite appellant's omission of street number from address of court to which notice was sent, where there was no reason to believe, due to post office's proximity to courthouse, that delivery would be delayed.

▸ Timeframe for Administrative Decisions

Heckler v. Day, 467 U.S. 104, 104 S.Ct. 2249, 81 L.Ed.2d 88 (1984). Court abolished judicially imposed mandatory time limits for ALJ hearings and decisions because they fail to take into account the differences in the facts and circumstances of each individual case. Delays may be analyzed for reasonableness only in the context of individual cases, and so any class-wide time requirements are inappropriate.

Crosby, et al. v. SSA, 796 F.2d 576 (1st Cir. 1986). "It would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims." Suit for injunction requiring Social Security Administration to adjudicate claims for disability benefits without further delay could not be litigated as class action, as any delays could be analyzed for reasonableness only in context of individual cases.

TRIAL WORK PERIOD

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Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265, 152 L.Ed.2d 330 (2002). An individual is not entitled to a trial work period if he or she performs work demonstrating the ability to engage in SGA within 12 months of the onset of the impairment(s) that prevented the performance of SGA and before the date of any notice of determination or decision finding that he or she is disabled.

UNEMPLOYMENT COMPENSATION

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Perez v. Sec'y HEW, 622 F.2d 1 (1st Cir. 1980). Although Court has reservations about the significance of evidence that claimant collected unemployment benefits, Court is reluctant to say that a claimant's decision to hold himself out as able to work for the purpose of receiving unemployment benefits may never be considered on the issue of disability. Secretary's consideration of the claimant's receipt of unemployment benefits is not subject to reversal where claimant's receipt of such benefits was not a decisive factor in the denial of benefits and where there was medical and vocational evidence supporting the decision.

VOCATIONAL EXPERT

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▸ Hypothetical Questions

Piper v. Chater, No. 97-1972, 134 F.3d 361 (Table) (1st Cir. 1998). **Unpublished.** Where ALJ's hypothetical to the VE included the limitation that the claimant had to use the bathroom "at will" and VE testified that the need for "frequent" bathroom trips (i.e., 8-10 in an 8-hour day in addition to breaks and lunch) would preclude sedentary and light work, but ALJ's decision only referred to "at-will" limitation and there was no explicit finding as to whether claimant's need was "frequent," court concludes that ALJ implicitly determined, and evidence supported, that claimant did not use the bathroom so frequently as to preclude work.

Mendez v. Sec'y HHS, 48 F.3d 1211 (Table) (1st Cir. 1995). **Unpublished.** ALJ's use of hypothetical upheld when assumptions correspond to medical evidence.

Garay v. Sec'y HHS, No. 94-1515, 46 F.3d 1114 (Table)(1st Cir. 1995). **Unpublished**. In order for a vocational expert's answer to a hypothetical to be relevant, the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities. ALJ's hypothetical, which stated that claimant had a mental condition and specifies areas where claimant's

functioning is normal but did not identify any specific mental impairments or functional limitations, did not describe claimant's mental limitations.

Rose v. Shalala, 34 F.3d 13 (1st Cir. 1994). Where hypothetical to VE assumed a condition not supported by the medical evidence, the ALJ could not rely on the VE's opinion as a basis for non-disability finding.

Torres v. Sec'y HHS, 976 F.2d 724 (Table)(1st Cir. 1992). **Unpublished**. Remand where hypothetical was materially deficient in failing to include the limitation on repeated fine manipulation. The claimant's functioning, as found by the ALJ, fell somewhere in between that posited in the two hypotheticals posed by the ALJ -claimant could generally use her hands, but should not repeatedly perform fine movements-but the VE was not asked, and did not directly say, what jobs claimant could handle if she were so restricted.

Maldonado v. Sec'y HHS, 972 F.2d 337 (Table)(1st Cir. 1992). **Unpublished**. The ALJ's hypotheticals to a vocational expert should convey the claimant's limitations precisely in order to yield relevant responses.

Davila Melendez v. Sec'y HHS, 923 F.2d 839 (Table)(1st Cir. 1990). **Unpublished**. The hypothetical question to VE failed to account for the possibility that claimant was impaired in her ability to use both her left and right hands. The hypothetical question, based on imperfect assumptions, necessarily produced an imperfect response, which could not provide the requisite "substantial evidence" for the ALJ's determination of nondisability.

Torres v. Sec'y HHS, 870 F.2d 742 (1st Cir. 1989). ALJ must determine what evidence he credits in order to pose a hypothetical which will be relevant and helpful.

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). Hypothetical to vocational expert is inadequate because it failed to elicit from the vocational expert any testimony directed specifically to the conditions that are likely to produce stress in the claimant.

Arocho v. Sec'y of HHS, 670 F.2d 374 (1st Cir. 1982). The ALJ's report failed to clarify ambiguity in evidence of RFC. ALJ's assumptions about claimant's RFC was clearly not transmitted to the vocational expert. The hypothetical asked only about jobs in which the claimant could alternate position, sit or stand. For a vocational expert's answer to a hypothetical to be relevant, "the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities." The ALJ must clarify the outputs by deciding what testimony will be credited and resolving ambiguities, and accurately transmit the clarified output to the expert in the form of assumptions.

- **Need for Vocational Expert**

Brunel v. Comm'r of Soc. Sec., No. 00-1142, 248 F.3d 1126 (Table) (1st Cir. 2000). **Unpublished.** ALJs advised to take vocational evidence when faced with claimant's with unusual needs to alternate sitting and standing.

Cushman v. Apfel, 215 F.3d 1311 (Table)(1st Cir. 2000). **Unpublished**. ALJ's failure to elicit VE testimony re: impact of claimant's nonexertional limitations on her ability to perform her past work. At Step 4, the claimant is the primary source for vocational documentation.

Nguyen V. Chater, 172 F.3d 31 (1st Cir. 1999). Pain can constitute a significant nonexertional impairment which precludes naked application of the Grid and requires use of a vocational expert.

Gonzalez-Alemen v. Sec'y HHS, No. 95-2168, 86 F.3d 1146 (Table)(1st Cir. 1996). **Unpublished**. ALJ's determination of nondisability at Step 5, based upon the Grid, does not meet substantial evidence standard where RFC indicates that claimant can never climb and is limited in his ability to be around moving machinery but ALJ does not mention these restrictions at all in her decision. Court can't determine whether the claimant's non-exertional limitations are sufficiently minimal to permit the ALJ to rely on the Grid or whether vocational evidence was required. Remand.

Heggarty v. Sec'y HHS, 947 F. 2d 990 (1st. Cir. 1991) If occupational base is significantly limited by a nonexertional impairment, then the Secretary may not rely on the GRID to prove that there are other jobs available; usually a vocational expert is required.

Da Rosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). Where nonexertional factors are implicated, the Secretary must engage in an "individualized analysis" to determine whether the combination of exertional and nonexertional impairments, in light of the claimant's age, education, and work experience, renders her disabled. The testimony of a vocational expert will typically be required in such cases.

Lugo v. Sec'y HHS, 794 F.2d 14 (1st Cir.1986). Grid cannot be applied if claimant's nonexertional impairment significantly affects claimant's ability to perform the full range of jobs requiring medium or lesser work. Secretary must use other means, such as evidence procured from vocational experts, to meet her burden of proving the availability of jobs in the national economy that claimant can perform.

Burgos Lopez v. Sec'y HHS, 747 F.2d 37 (1st Cir. 1984). Court suggests Secretary present "more specific expert evidence concerning [the claimant's] ability to function in the workplace, coupled with a vocational expert's testimony as to the availability of jobs in the national economy which someone possessing claimant's ... limitations might fill."

Rowan v. Sec'y HHS, No. 83-1181 (12/14/83), 725 F.2d 665 (Table) (1st Cir. 1983). **Unpublished. Not on Westlaw**. **Available at DLC**. Remand for taking of further VE testimony in regard to perceptual dysfunction (person with one eye).

Gagnon v. Sec'y HHS, 666 F.2d 662 (1st Cir.1981). Where a claimant has non-strength limitations, the Grids do not accurately reflect what jobs would or would not be available. Where the Grids do not apply, it is likely that the testimony of a vocational expert will be required.

▸ Vocational Reference Materials

Edwards v. Sec'y HHS, No. 94-1345, 34 F.3d 1065 (Table) (1st Cir. 1994). **Unpublished**. Where VE testifies to availability of jobs, using general job titles not DOT numbers, claimant cannot prove that the VE misrepresented the exertional requirements of the jobs by comparing some DOT listings with the jobs she assumed the VE referred to in his testimony. Without DOT #s from the VE, it is impossible to verify whether the VE's testimony contradicts the DOT listings. Here, claimant was represented at the hearing by an experienced attorney who did not ask the VE for DOT numbers, did not object to the VE's testimony, and did not raise the issue of VE mistake until the motion for reconsideration of the district court's decision.

Galarza v. Sec'y HHS, 19 F.3d 7(Table) (1st Cir. 1994). **Unpublished.** ALJ may take administrative notice of the Dictionary of Occupational Titles (DOT) and rely on the DOT's job descriptions which reflected a general absence of environmental concerns in the relevant job categories. Vocational Expert testimony about environmental conditions not needed.

Gray v. Heckler, 760 F.2d 369, 372 (1st Cir. 1985). Approves administrative notice of occupational reference materials for information regarding various types of work. Court notes that the 4th circuit has held that the Secretary may rely on general categories in the Supplement to the DOT as presumptively applicable to the claimant's past work.

Hernandez v. Weinberger, 493 F.2d 1120 (1st Cir. 1974). Step 5 burden is not met by ALJ taking administrative notice of the general availability of light and sedentary work in the national economy.

VOCATIONAL FACTORS

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▸ Americans with Disabilities Act (ADA)

Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 996 (1999). No inherent conflict between receipt of Social Security Disability Insurance and employment discrimination claim under the Americans with Disabilities Act. Being "disabled" for SSDI purposes does not preclude proving essential element of ADA claim - that person, with or without reasonable accommodation, can perform the essential functions of a job. SSA does not take the possibility of reasonable accommodation into account when determining disability for SSDI purposes.

▸ Age

Arce Crespo v. Sec'y HHS, 831 F.2d 1 (1st Cir. 1987). Age and transferable skills. Advanced age, 55 or over, is point where age significantly affects person's ability to do substantial gainful activity

Coghlan v. Sec'y HHS, 753 F.2d 1067 (1st Cir. 1984). **Unpublished (not on Westlaw). Available ar DLC**. For claimants over 60 years old, skills are not transferable unless they are highly marketable.

Fogg v. Schweiker, No. 81-1232 (Oct. 13, 1981). **Unpublished (not on Westlaw). Available at DLC**. Appropriate to use chronological age alone, not physiological age, in grid analysis. See also SSR 82-46c.

▸ Employability

Edwards v. Sec'y HHS, No. 94-1345, 34 F.3d 1065 (Table)(1st Cir. 1994). **Unpublished**. Not error for the ALJ to determine number of available jobs by adjusting VE's numbers down by percentages the VE said would account for claimant's limitations. 67,500 jobs is significant number.

Keating v. Sec'y HHS, 848 F.2d 271 (1st Cir. 1988). The standard is not employability, but capacity to do the job. "... not whether claimant could actually locate a job but whether health limitations would prevent him from engaging in substantial gainful work."

Lopez Lopez v. Sec'y HHS, 512 F.2d 1155 (1st Cir. 1975). In determining claimant's ability to work, considerations derived from local hiring practices, employer preferences for physically superior workers, and the claimant's actual chances of being hired are irrelevant and must be disregarded.

▸ English Language Ability

Maldonado v. Sec'y HHS, 972 F.2d 337 (Table)(1st Cir. 1992). **Unpublished.** Claimant's inability to communicate in English does not call for the application of Grid Rule 202.09, for "it is the ability to communicate in Spanish, not in English, that is vocationally relevant in Puerto Rico."

Fiqueroa-Rodriquez v. Sec'y HHS, 845 F.2d 870 (1st Cir. 1988).

Arce Crespo v. Sec'y HHS, 831 F.2d 1 (1st Cir. 1987). Where claimant is a resident of Puerto Rico, the ALJ was justified in treating claimant's fluency in Spanish as tantamount to fluency in English for vocational purposes. Court takes judicial notice that for the most part it is the ability to communicate in Spanish, not in English, that is vocationally important in Puerto Rico. The court

does not, however, endorse substituting Spanish for English in the requirements of the grid whenever a claimant resides in Puerto Rico.

Falu v. Sec'y HHS, 703 F.2d 124 (1st Cir. 1983).

▸ Sedentary Work

Rivera v. Comm'r of Soc. Sec., No. 98-1377, 181 F.3d 80 (Table)(1st Cir. 1998). **Unpublished**. Where sedentary work is involved, "good use of the hands and fingers" is required.

Heggarty v. Sullivan, 947 F.2d 990 (1st Cir. 1991).

Rodriguez Pagan v. Sec'y HHS, 819 F.2d 1 (1st Cir. 1987).

Rosado v. Sec'y HHS, 807 F.2d 292 (1st Cir. 1986). Definition of an requirements for, sedentary work. In prima facie case, the Secretary cannot rely on a presumption of sitting ability sufficient to do sedentary work.

Da Rosa v. Sec'y HHS, 803 F.2d 24 (1st Cir. 1986). Sedentary jobs generally require that the worker have the capacity to remain seated most of the day.

Gallo v. Sec'y HHS, 786 F.2d 1 (1st Cir. 1985).

Thomas v. Sec'y HHS, 659 F.2d 8 (1st Cir. 1981). All sedentary jobs require that a worker have the capacity to remain seated most of the day. Persons who must often interrupt their sitting with standing for significant periods of time are prevented from reliably attending to work in a seated position. However, where claimant need only interrupt his sitting with brief periods of standing in order to relieve pain and stiffness in his knee, the evidence is strong that he does "have the capacity to remain seated most of the day."

▸ Significant Numbers of Jobs

Edwards v. Sec'y HHS, No. 94-1345, 34 F.3d 1065 (Table)(1st Cir. 1994). **Unpublished**. Not error for the ALJ to determine number of available jobs by adjusting VE's numbers down by percentages the VE said would account for claimant's limitations. 67,500 jobs is significant number.

Keating v. Sec HHS, 848 F.2d 271 (1st Cir. 1988). To show that work exists in significant numbers, the Secretary must show significant, not isolated, numbers of jobs which the claimant can perform.

▸ Stress

Lancellotta v. Sec'y HHS, 806 F.2d 284 (1st Cir. 1986). "Stress is not a characteristic of a job, but instead reflects an individual's subjective response to a particular situation. Stress is a factor which must be considered on an individualized basis for performing a range of work at step 5. Vocational evidence that there are a significant number of jobs in the economy that would be "low stress" for the average worker falls short of the requirements of Ruling 85-15. ALJ must undertake subjective, individualized inquiry into what job attributes are likely to produce disabling stress in the claimant, and what, if any, jobs exist in the economy that do not possess these attributes.

▸ Transferrable Skills

Pineault v. Sec'y HHS, 848 F.2d 9 (1st Cir. 1988). In determining whether a claimant of advanced age (55 and older) is able to transfer skills to sedentary work, must first show that skills are highly marketable.

Arce Crespo v. Sec'y HHS, 831 F.2d 1 (1st Cir. 1987). Age does not seriously limit transferability of skills, under age 55.

Albors v. Sec'y HHS, 817 F.2d 146 (1st Cir. 1986). Managerial skills have universal applicability (across industry lines); transfer can therefore be accomplished with very little vocational adjustment, even in an individual of advanced age.

Coghlan v. Sec'y HHS, 753 F.2d 1067 (1st Cir. 1984). **Unpublished (not on Westlaw). Available ar DLC**. For claimants over 60 years old, skills are not transferable unless they are highly marketable.

Vasquez v. Sec'y HHS, 683 F.2d 1 (1st Cir. 1982). Court remanded where ALJ relied on Grid rule requiring transferrable skills but failed to find explicitly (or to indicate the basis for his implicit finding) that 55-year old claimant's skills were transferable.

▸ Transportation to Work

Edwards v. Sec'y HHS, No. 94-1345, 34 F.3d 1065 (Table) (1st Cir. 1994). **Unpublished.** Lack of public transportation to job is irrelevant.

Lopez Diaz v. Sec'y HEW, 585 F.2d 1137 (1st Cir. 1978), appeal after remand, Lopez-Diaz v. Sec'y HHS, 673 F.2d 13 (1st Cir. 1982). Although distance from work and inconvenience of commute are not relevant factor in the disability determination process, if a hypothetical claimant could not transport herself to work, utilizing some normal means of transportation, regardless of where she

resides, then disability benefits are appropriate for the actual claimant. ALJ erred by failing to consider claimant's impairment - caused inability to travel to and from work place.

▸ Willingness to Work

Schena v. Sec'y, 635 F.2d 15 (1st Cir. 1980). It was a mistake for ALJ to equate claimant's expressions of willingness to try to work with capacity to work.

WINDFALL OFFSET PROVISION

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Ward v. Comm'r of Soc. Sec., 211 F.3d 652 (1st Cir. 2000). Where claimant received both Social Security retirement benefits and civil service pension, Windfall Elimination Provision, 42 U.S.C. §415(a)(7), formula applied to reduce Social Security benefits. Applies to those eligible for periodic pension payments after 1985. Eligible means satisfies all the prerequisites for payment of pension.

Splude v. Apfel, 165 F.3d 85 (1st Cir. 1999). Windfall Offset Provision (42 U.S.C. §1320a-6(a)) does not violate anti-assignment clause even though it does not refer explicitly to it. There's no statutory or constitutional violation in provision allowing deduction from SSD retro to recoup overpayment of SSI retro. Provision should be read as an internal computation of how much SSI and SSD a person is due - whereby a prior overpayment of one benefit reduces the amount of the other benefit paid for the same time period.

Tremblay v. Sec'y HHS, 98 F.3d 1333 (1st Cir. 1996). Social Security benefits of claimant may be reduced upon receipt by claimant of disability pension under Civil Service Retirement System.

Schena v. Sec'y HHS, 635 F.2d 15 (1st Cir. 1980). It was mistake on part of administrative law judge to equate claimant's expressions of willingness to try to work with capacity to work.