UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DANIEL DAVEY,	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	3:01cv0252 (SRU)
	:	
JO ANNE B. BARNHART,	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	

ADOPTION OF RECOMMENDED RULING

This action challenged Commissioner Jo Anne B. Barnhart's decision to deny disability benefits to the plaintiff, Daniel Davey. Davey sought review of the denial under section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Davey moved for judgment reversing the decision of the Commissioner; the Commissioner, in turn, moved for order affirming the decision. On March 29, 2004, Magistrate Judge William I. Garfinkel issued a recommended ruling, granting Davey's motion and denying the Commissioner's motion. The Commissioner filed a timely objection. The court now reviews Judge Garfinkel's ruling *de novo*.

The Commissioner objects to Judge Garfinkel's recommended ruling by arguing that the Administrative Law Judge's (ALJ) decision *was* based on substantial evidence, and that Judge Garfinkel simply reached a different conclusion after his review of the evidence. I disagree.

The ALJ based his determination on Davey's account of his daily activities, his ability to supervise his children, a notation by Dr. Ballon encouraging him to find less physically demanding work, the testimony of vocational expert David Soja, and a finding that Davey's complaints of pain were "not entirely credible." These factors do not amount to substantial evidence to support the determination that Davey was not under a disability. Furthermore, the ALJ failed to set forth his reasons for concluding that Davey's testimony was not entirely

credible, and the evidence in the record is not consistent with that conclusion.

First, with respect to daily activities, Davey testified that he could put a load of laundry into the washing machine if the clothes were "downstairs" (presumably, near the washing machine) and could wash "a couple of dishes," but that his wife did the majority of the housework, including grocery shopping, gardening, mowing the lawn, and most of the laundry. (R. at 38). He also testified that he was able to shave, shower, feed and dress himself, and that he spent his days at home with his young children. (R. at 42). These basic abilities provide negligible grounds for concluding that Davey was able to work consistently.

Apart from testimony that he was able to lift his then 25-pound daughter, but feared lifting more, (R. at 39), nothing in the record suggests that Davey engaged in physical exertion related to the supervision of his children. In addition, to relieve Davey his son spent two days per week in day care, a neighbor often assisted him in watching the children, and his wife returned home from work everyday at 2:30 PM. (R. at 42-43).

Dr. Bellow's comment that Davey should "look for something less physically demanding" must be considered in light of the other evidence from Dr. Bellow and other physicians. I agree with Judge Garfinkel's thoughtful analysis of the remark and its significance. (Ruling on Pending Motions at 14-15). In addition, I note the following evidence from Dr. Bellow and Dr. Krompinger.

The September 1999 evaluation by Dr. W. Jay Krompinger reveals that Davey's "prognosis at this point is that this condition is relatively stable, but has precluded him from gainful employment. I do not believe this condition will allow him to do any significant lifting or repetitive bending activity." (R. at 178). That evaluation also noted that Davey "is a good

candidate and an appropriate candidate for Social Security disability." Id. Dr. Krompinger's October 1999 evaluation repeated the conclusion that Davey "is worthy of [Social Security] assistance based on his functional restrictions and present disability status." (R. at 181).

Similarly, on September 8, 1998, Dr. Jonathan Ballon found that Davey might "ultimately have to put up with a certain amount of pain and make the best of it." (R. at 141). On November 6, 1998, Dr. Ballon reported that Davey's "symptoms are about the same" and documented a report to Davey's wife that "there was nothing further to be done for him surgically." (R. at 144). Nothing in the record suggests that Dr. Ballon affirmatively diagnosed Davey as able to perform light work. Dr. Ballon's "encourag[ing] [Davey] to look for something less physically demanding" does not suggest otherwise. (R. at 140).

The fourth factor used by the ALJ, the testimony of Soja, a vocational expert, is particularly problematic. The Commissioner notes in his objection that the ALJ relied on Soja's testimony that Davey could work in certain settings. In fact, Soja testified that assuming Davey's credibility, Davey *would not* be able to find suitable employment and *would* be deemed disabled. (R. at 53). Soja only indicated that there were suitable jobs available when asked about a hypothetical person, the same age and with the same education, work history, "light work" exertional impairment, and physical limitations as Davey. (R. at 51-52). The ALJ excluded considerations of Davey's subjective experience of pain and evaluations by Davey's physicians from the hypothetical question. Soja never testified that Davey was suitable for any job.

The fatal consideration, therefore, appears to be the ALJ's credibility determination of Davey's subjective pain. Judge Garfinkel aptly noted that, although the Commissioner may make credibility determinations of any witnesses, "a finding that the witness is not credible must

nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record." (Ruling on Pending Motions at 12, citing Williams ex rel. Williams v. Bowen, 859 F.2d 255, 260-61 (2d Cir. 1988)).

Because of the negligible evidence opposing Davey's disability claim and the ALJ's failure to detail the reasons behind his critical credibility determination of Davey, the court accepts and adopts Judge Garfinkel's recommended ruling with one correction: although Soja testified that the "hypothetical individual" similar to Davey could perform a number of sedentary jobs, Soja never testified that *Davey* would be able to perform those jobs or that a hypothetical individual suffering from the pain described by Davey could perform them.

Judge Garfinkel's recommended ruling entered March 29, 2004, is hereby adopted. The Commissioner's motion for order affirming its decision (doc. # 21) is DENIED. The Commissioner's objection to the recommended ruling (doc. # 26) is OVERRULED. Davey's motion for judgment (doc. # 18) is GRANTED, and the matter is reversed and remanded to the Commissioner with directions to properly develop the record regarding Davey's disc herniation and assess his subjective complaints of pain and his ability to work consistently.

It is so ordered.

Dated at Bridgeport, Connecticut, this 18th day of November 2004.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge