UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WAYNE S. DEVOE, :

Plaintiff, :

vs. : No. 3:05cv746(MRK)(WIG)

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, :

Defendant. :
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RECOMMENDED RULING ON PENDING MOTIONS

This action is brought by Plaintiff, Wayne S. DeVoe, against the Commissioner of the Social Security Administration, pursuant to § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), to obtain judicial review of a final decision of the Commissioner denying his application for Disability Insurance Benefits ("DIB") under §§ 216 and 223 of the Social Security Act, 42 U.S.C. §§ 416 and 423. Plaintiff has moved for an order reversing the decision of the Commissioner or, in the alternative, remanding the case to the Commissioner for a new hearing **[Doc. # 9]**. He contends that he has been unable to perform substantial gainful activity since June 2, 2002, because of a low back impairment and a low IQ Defendant has moved for an order affirming the decision of the Commissioner on the ground that it is supported by substantial evidence in the record **[Doc. # 11]**. After a thorough review of the record and the parties' briefs, the Undersigned recommends

that this matter should be remanded for further proceedings consistent with this ruling.

Scope of Review

The district court may "enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). Judicial review of the Commissioner's final decision denying social security benefits, however, is limited. Yancey v. Apfel, 145 F.3d 106, 111 (2d Cir. 1998). It is not the court's function to determine de novo whether the claimant was disabled. See Schaal v. Apfel, 134 F.3d 496, 501 (2d Cir. 1988). Rather, a district court must review the record to determine first whether the correct legal standard was applied and then whether the record contains "substantial evidence" to support the decision of the Commissioner. 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive...."); see Bubnis v. Apfel, 150 F.3d 177, 181 (2d Cir. 1998); Balsamo v. Chater, 142 F.3d 75, 79 (2d Cir. 1998). To determine whether the Commissioner's decision is supported by substantial evidence, the court must consider the entire record, examining the evidence from both sides. Williams v. Bowen, 859 F.2d 255, 258 (2d Cir. 1988).

Substantial evidence need not compel the Commissioner's decision; rather substantial evidence need only be that evidence that "a reasonable mind might accept as adequate to support [the] conclusion" being challenged. Veino v. Barnhart, 312 F.3d 578, 586 (2d Cir. 2002) (internal quotation marks and citations omitted). Thus, the role of this court is not to decide the facts anew, nor to reevaluate the facts, nor to substitute its judgment for that of the Commissioner but rather to determine whether substantial evidence of record supports the Commissioner's decision. Under the standard of review set forth above, absent an error of law, this court must uphold the Commissioner's decision if it is supported by substantial evidence even if this court might have ruled differently. See Eastman v. Barnhart, 241 F. Supp. 2d 160, 168 (D. Conn. 2003).

Procedural History

On July 11, 2002, Plaintiff applied for a period of disability and disability insurance benefits, alleging disability since February 1, 2001 (Tr. 61-63).[1] (At the hearing before the Administrative Law Judge ("ALJ"), Plaintiff testified that he had engaged in substantial gainful employment after 2001. The ALJ determined that his earliest possible onset date of disability was June 2, 2002. Plaintiff has not challenged that finding.

[1] All references to the administrative record are designated as "Tr." followed by a page number.

Thus, for purposes of this appeal, the court will consider June 2, 2002, to be the date of Plaintiff's onset of disability.) Plaintiff's application for disability benefits was initially denied (Tr. 24-30, 33-36, 227-34), and was denied again on reconsideration (Tr. 31-32, 39-42, 237-44). Plaintiff then requested a hearing before an ALJ (Tr. 43), which took place before ALJ Roy Lieberman on February 10, 2004. Plaintiff, represented by counsel, testified at the hearing (Tr. 251-85). Following the hearing, the ALJ obtained a consultative psychological evaluation to further evaluate Plaintiff's cognitive functioning. On August 24, 2004, the ALJ issued a decision denying Plaintiff's application for disability benefits on the ground that Plaintiff retained the residual functional capacity ("RFC") to perform his past relevant work (Tr. 12-23). Plaintiff's request for review by the Appeals Council was denied (Tr. 4-6), making the ALJ's decision the final decision of the Commissioner, subject to judicial review.

Discussion

A. "Disability" under the Social Security Act

In order to establish an entitlement to disability benefits under the Social Security Act, a claimant must prove that he is "disabled" within the meaning of the Act. A claimant may be considered disabled only if he cannot perform any substantial gainful work because of any medically determinable physical or

mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); Shaw v. Chater, 221 F.3d 126, 131 (2d Cir. 2000). The impairment must be of such severity that the claimant is not only unable to do his previous work but, additionally, considering his age, education, and work experience, he cannot engage in any other kind of substantial gainful employment which exists in the national economy, regardless of whether such work exists in the immediate area where he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. § 423(d)(2)(A); see Heckler v. Campbell, 461 U.S. 458, 460 (1983). "Work which exists in the national economy" means work which exists in significant numbers either in the region where he lives or in several regions in the country. 42 U.S.C. § 423(d)(2)(A).

The Social Security Administration has promulgated regulations that set forth a sequential, five-step process for evaluating disability claims. 20 C.F.R. § 404.1520. First, the ALJ must determine whether the claimant is currently working. 20 C.F.R. § 404.1520(b). If the claimant is currently employed, the claim is disallowed. Id. If the claimant is not working, as a second step, the ALJ must make a finding as to the existence of a severe mental or physical impairment that significantly limits

the ability to do basic work activities; if none exists, the claim is denied. 20 C.F.R. § 404.1520(c). Once the claimant is found to have a severe impairment, the third step is to compare the claimant's impairment with those in Appendix 1 of the regulations (the "Listings"). 20 C.F.R. § 404.1520(d); Bowen v. Yuckert, 482 U.S. 137, 141 (1987). If the claimant's impairment meets or equals one of the impairments in the Listings, the claimant is presumed to be disabled. 20 C.F.R. § 404.1520(d); see Schaal, 134 F.3d at 501; Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982). If the claimant's impairment does not meet or equal one of the listed impairments, as a fourth step, he will have to show that he does not possess the residual functional capacity[2] to perform his past relevant work. 20 C.F.R. § 404.1520(e). If the claimant cannot perform his former work, the burden then shifts to the Commissioner to show that the claimant is prevented from doing any other work. Butts v. Barnhart, 388

[2] "Residual functional capacity" ("RFC") refers to what a claimant can still do in a work setting despite the physical and mental limitations caused by his impairments, including related symptoms such as pain. In assessing an individual's RFC, the ALJ is to consider his symptoms (such as pain), signs and laboratory findings together with the other evidence. See 20 C.F.R. § 404.1545. "Ordinarily, RFC is the individual's maximum remaining ability to do sustained work activities in an ordinary work setting on a regular and continuous basis, and the RFC assessment must include a discussion of the individual's abilities on that basis. A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." Social Security Regulations (SSR) 96-8p; see Melville v. Apfel, 198 F.3d 45, 52 (2d Cir. 1999).

F.3d 377, 383 (2d Cir. 2004), amended on other grounds on reh'g, 416 F.3d 101 (2d Cir. 2005). A claimant is entitled to receive disability benefits only if he cannot perform any alternate gainful employment. 20 C.F.R. § 404.1520(f); see Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996). This final step entails consideration of the claimant's age, education, work experience, and his RFC to work. 20 C.F.R. § 404.1520(f).

The initial burden of establishing disability is on the claimant. 42 U.S.C. § 423(d)(5); see Green-Younger v. Barnhart, 335 F.3d 99, 106 (2d Cir. 2003). Once the claimant demonstrates that he is incapable of performing his past work, the burden shifts to the Commissioner to show that the claimant has the residual functional capacity to perform other substantial gainful activity in the national economy. See Butts v. Barnhart, 416 F.3d 101, 103 (2d Cir. 2005); Curry v. Apfel, 209 F.3d 117, 123 (2d Cir. 2000); Bapp v. Bowen, 802 F.2d 601, 604 (2d Cir. 1986); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980).

B. Plaintiff's Background

Plaintiff was born on November 12, 1961. He has a seventh grade education, having dropped out of school in eighth grade at the age of 17 because he could not read. He also has had vocational training at a culinary school to be an assistant chef. His past relevant work includes work as a cook, chef's assistant, carpenter, and steel grinder.

Until Plaintiff injured his back in 1988, he worked as a carpenter, doing heavy carpentry work such as rough framing (Tr. 263, 270). After two on-the-job injuries in 1988, Plaintiff was told that he could no longer do construction work and received vocational rehabilitation training to become a chef's assistant, although because of his difficulties with reading, Plaintiff testified that the training was "on-the-job training. They taught me everything and they told me what was in the recipes" (Tr. 257, 264).

In 1989 and 1990, he worked at a machine shop as a steel grinder (Tr. 264-65). From 1991 to April 2002, he worked as a chef's assistant, cook, and in the catering business, although at times he could only work part-time (Tr. 64-70, 258-63). Plaintiff testified that he quit work in April 2002 because he "just couldn't do it, stand up for long periods of time anymore" (Tr. 258, 274). He stated that his back had bothered him ever since his work-related accidents in 1988 (Tr. 274). In February 2001, it was bothering him so much that he quit work completely, but after he and his wife separated, he went back to work on a part-time basis because he needed the money (Tr. 259-61). At the time of the hearing on February 10, 2004, Plaintiff was working eight hours a week at a Friendly's Restaurant, cooking breakfast two mornings a week (Tr. 262).

Plaintiff alleges an inability to work due primarily to

persistent lower back and leg pain, with spasms, tingling, and numbness of his lower extremities, relating back to 1988. In 1990, Plaintiff received an 18% impairment rating of the lumbar spine (Tr. 50, 220).[3] Plaintiff also claims to have a low IQ, which prevents him from doing work of any kind.[4]

Plaintiff received extensive treatment for his back injuries from 1988 to 1990 (Tr. 132-204). After 1990, there is no evidence in the record that Plaintiff received treatment for his back problems until 2002, when Plaintiff saw his family doctor, Dr. Schwartz for complaints of a recurrence of his lumbar pain, spasms, pain down his left leg, and leg weakness (Tr. 223). In February 2002, an MRI of Plaintiff's lumbar spine revealed a small cystic lesion likely representing a synovial cyst at L5-S1, which was external to the spinal column and did not involve the spinal canal nor impinge at all on the nerve roots or the thecal sac (Tr. 217, 220). There was no evidence of a herniated disc or central or neural foraminal narrowing (Tr. 217). Dr. Schwartz

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[3] Dr. Zimmering's records indicate that Plaintiff received an 18% impairment rating to his lumbar spine (Tr. 220). A letter from Plaintiff's attorney dated February 17, 1992, states that he was awarded a 15% permanent partial disability rating of his back with a maximum medical improvement date of July 19, 1990 (Tr. 50). For purposes of this appeal, this discrepancy is not significant.

[4] As discussed infra, the only medical record relating to Plaintiff's alleged mental impairments is the psychological evaluation ordered by the ALJ and performed by Dr. Gloria Losada-Zarate on April 21, 2004 (Tr. 246-48).

referred Plaintiff to Dr. Zimmering for an orthopedic consultation. After examining Plaintiff and the MRI results, Dr. Zimmering concluded that the synovial cyst was of "no significance regarding his back and leg symptoms" (Tr. 221). He did not feel that surgical intervention was warranted. He noted Plaintiff's 18% impairment rating, which he interpreted as indicating a "permanent difficulty having reached maximum medical improvement over a decade ago" (Tr. 221). He saw no need for further diagnostic studies and recommended physical therapy, aquatic therapy, medications for pain, or possibly a chronic pain management program (Tr. 221). Dr. Schwartz's reports indicate that Plaintiff was seen by Pain Management and had physical therapy which did not seem to help (Tr. 219). He prescribed Flexeril, Zanaflex, and Vicodin (Tr. 219-24). As of February 10, 2004, Plaintiff testified that he was taking Neurotin, Klonopin, Vicodin, and Lexapro (Tr. 275-76).

Plaintiff testified that he is able to drive but with difficulty, due to spasms and discomfort (Tr. 256). He has problems going up and down stairs (Tr. 256). He has difficulty sleeping because of spasms in his lower back and legs (Tr. 267). He cannot sit or stand or walk for long periods of time (Tr. 268). During the day, he lies down and relaxes a lot, he goes to the park that is nearby to watch the birds or walk around, and he watches television (Tr. 268-69). He uses a cane, which allows

him to walk further than he could otherwise (Tr. 268). He used to work on antique cars, but is unable to do that anymore (Tr. 269). He can take care of himself in terms of bathing and getting dressed (Tr. 269).

C. The ALJ's Decision

The ALJ, following the five-step sequential evaluation process, found that Plaintiff was not disabled. First, he determined that Plaintiff had not engaged in substantial gainful employment since June 2, 2002. Next, he found that Plaintiff's "back pain syndrome secondary to mild degenerative disc disease with a cystic lesion at L5-S1" and his "learning disorder, language" were "severe" impairments. 20 C.F.R. § 404.1520(c). At step three, he found that these medically determinable impairments did not meet or medically equal one of the listed impairments in the Listings, although he did not specificially discuss any of the Listings. The ALJ next found that Plaintiff's allegations regarding his limitations were not totally credible and that he had the RFC to lift/carry up to ten pounds frequently and twenty pounds occasionally, sit, stand, and walk up to six hours each in an eight-hour workday with no work requiring more than simple, repetitive tasks or moderate work pressures and demands. He found that Plaintiff's past relevant work as a steel grinder did not require the performance of work-related activities exceeding his RFC and, thus, Plaintiff's medically

determinable back pain and learning disorder in language did not prevent him from performing his past relevant work. Accordingly, he found that the Plaintiff was not under a "disability" as that term is defined by the Social Security Act, at any time through the date of his decision.

D. The Parties' Contentions

Plaintiff contends that the ALJ erred in finding that his mental impairments did not meet Listing 12.05C at step three in the sequential evaluation process. Listing 12.05C relates to mental retardation where the claimant's IQ is in the 60 to 70 range and there are other mental of physical impairments present that impose additional limitations. See Prentice v. Apfel, No. CIV A96CV851, 1998 WL 166849, at *3 (W.D.N.Y. Apr. 8, 1998). Listing 12.05C provides as follows:

> Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22. The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
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> > C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05.

Plaintiff relies on the psychological evaluation performed by Gloria Losada-Zarate, Psy. D., which showed that Plaintiff had

a Verbal IQ of 67, a Performance IQ of 79, and a Full Scale IQ of 70 (Tr. 248). Additionally, she found that the test results showed that he was functioning within the "Borderline to Low Average range of intelligence" and that there was evidence of "deficits in language, working memory, and processing speed" (Tr. 248).

Additionally, Plaintiff cites to the ALJ's determination that his back pain syndrome and learning disorder were "severe" impairments, which, Plaintiff maintains, supports a finding that he had both a physical impairment and mental impairment that significantly limited his ability to do basic work activities. Thus, he argues, the second requirement of Listing 12.05C – that he possess a "physical or other mental impairment imposing an additional and significant work-related limitation of function" – was met.

Defendant responds that Plaintiff has failed to carry his burden of showing how his impairment satisfied the diagnostic description of "mental retardation" in the introductory paragraph of Listing 12.05, as required by 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00A. Defendant argues that mental retardation is an integral part of the Listing and that no medical source ever diagnosed Plaintiff with mental retardation. Further, Defendant contends that the record fails to show that Plaintiff suffered from "significantly subaverage general intellectual functioning

with deficits in adaptive functioning." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05. Citing to Dr. Losada-Zarate's conclusion that Plaintiff was in the borderline to low average range of intelligence, Defendant maintains that this did not place him in the mentally retarded range and there was no evidence of "deficits in adaptive functioning"[5] before the age of 22.

E. Whether Substantial Evidence Supports The ALJ's Decision That Plaintiff's Impairments Did Not Meet The Listings

The ALJ never addressed the question of whether Plaintiff carried his burden of demonstrating that his mental impairment met the requirements of Listing 12.05C. The ALJ's decision states only that Plaintiff's "medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4" (Tr. 23). There is nothing in his decision to indicate whether he even considered Listing 12.05C.

The court agrees with Defendant that to meet the requirements of Listing 12.05C, Plaintiff must demonstrate more than an IQ in the 60 to 70 range. See Anderson v. Apfel, 996 F. Supp. 869, 872-73 (E.D. Ark. 1998). Plaintiff's impairment must

[5] According to the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders at 42 (4th ed. Text Rev. 2000), "adaptive functioning" refers to how well an individual copes with common life demands and meets standards of personal independence.

first satisfy the diagnostic description of mental retardation in the introductory paragraph and then must meet any one of the four sets of criteria, set forth in paragraphs A through D. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00A ("If your impairment satisfies the diagnostic description in the introductory paragraph and any one of the four sets of criteria, we will find that your impairment meets the listing.") (emphasis added). While the underlying diagnostic description must be met, the court disagrees with Defendant's contention that there must be a specific diagnosis of "mental retardation." See Maresh v. Barnhart, — F.3d —, 2006 WL 452904, at * 2 (8th Cir. 2006) (holding that a formal diagnosis of "mental retardation" is not required to satisfy the listing requirements of Listing 12.05). Indeed, the Regulations state that Plaintiff must show that his impairment satisfies "the diagnostic description" – not the specific diagnosis – in the introductory paragraph. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00A (emphasis added).

Listing 12.05 describes mental retardation as "significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22." Defendant argues first that Plaintiff's intellectual functioning was not "significantly subaverage." While Dr. Losada-Zarate did not use those precise

words to describe Plaintiff's IQ scores, she did conclude that his test scores "suggest that Mr. Devoe is functioning within the Borderline to Low Average range of intelligence" (Tr. 248). Moreover, two of his three scores fell squarely within the range set forth in Listing 12.05C. The court finds that these test scores and Dr. Losada-Zarate's conclusions support a finding that Plaintiff's IQ was "significantly subaverage" for purposes of meeting or medically equaling the requirements of Listing 12.05C.

Defendant next argues that the record contains no evidence to demonstrate deficits in adaptive functioning prior to the age of 22. The record contains no medical records prior to 1983 when Plaintiff would have turned 22. However, Plaintiff testified that, after repeating five grades, he quit school in eighth grade at the age of 17 because he could not read. He told the examining psychologist that he has a "reading disability from when [he] was younger" (Tr. 279). At the same time, the record shows that, despite his low IQ, Plaintiff has been able to work in various occupations since 1977. The "Medical Source Statement of Ability To Do Work-Related Activities (Mental)" completed by Dr. Losada-Zarate indicated that Plaintiff was "moderately impaired" in his ability to understand, remember, and carry out short, simple instructions as well as detailed instructions, and that he was "slightly impaired" in his ability to make judgments on simple work-related decisions (Tr. 249). His ability to

respond appropriately to supervision, co-workers, and work pressures in a work setting, however, was not affected by his impairment (Tr. 250). This evidence, plus Plaintiff's IQ scores from 2004, were factors the ALJ should have considered in determining whether Plaintiff had deficits in adaptive functioning and whether these deficits were manifested prior to age 22.

In Prentice v. Apfel, 1998 WL 166849, at *4, the claimant had been in special education classes during school and his grades were not very good. He dropped out of school after the tenth grade at the age of 16 or 17, in part because of the frustration caused by his poor performance. He testified that he really did not know how to read and write. He was able to read headlines, simple notes, or shopping lists, and he could read a newspaper article slowly, but he could not remember what he read. He could sign his name but could not write a letter. The court held that an inability to read and write despite years of schooling was a "clear manifestation" of mental retardation occurring before the age of 22, as required by Listing 12.05, especially if there is nothing in the record reflecting a change in the claimant's IQ Id.

Similarly, in the case of Vasquez-Ortiz v. Apfel, 48 F. Supp. 2d 250, 257 (W.D.N.Y. 1999), where there was no evidence in the record concerning the plaintiff's mental functioning prior to

the age of 22, the court held that it was permissible to consider circumstantial evidence to establish the "developmental" element of this listed impairment. "Absent any evidence of a change in plaintiff's intellectual functioning, it is appropriate to assume that plaintiff's IQ has not changed since his twenty-second birthday." Id.; see also Maresh, 2006 WL 452904, at *2 (holding that the plaintiff's impairment manifested itself during his developmental period where the evidence showed that he had struggled through special education classes through ninth grade and then dropped out of school, where he currently had trouble reading, writing and with math, and where his verbal IQ score of 70 was recorded when he was 37, since an IQ score is presumed to remain stable over time); 65 Fed. Reg. 50,753 (2000) (explaining that the regulations "permit us to use judgment, based on current evidence, to infer when the impairment began") (emphasis added).

Assuming that Plaintiff can meet his burden of satisfying the diagnostic description of mental retardation in the introductory paragraph, he must also satisfy the requirements of paragraph C.

Here, there is no question that Plaintiff's IQ scores meet the severity requirement of Listing 12.05C. The regulations provide that in cases where more than one IQ score has been provided from the tests administered – i.e., where verbal, performance, and full-scale IQs are provided – the lowest of the

scores should be used in conjunction with Listing 12.05. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(D). Here, Plaintiff's lowest score was 67, which falls within the 60 to 70 range set forth in paragraph C.

The second requirement of paragraph C is that Plaintiff possess a physical or other mental impairment imposing an additional or significant work-related limitation of function. Plaintiff relies on the ALJ's finding at step two that his back pain syndrome and his learning disorder were "severe" impairments, 20 C.F.R. § 404.1520(c), to meet this requirement.[6] Defendant concedes that there is no dispute that the ALJ properly

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[6] The Regulations provide that for purposes of paragraph C, "the degree of functional limitation imposed by the additional impairment(s) will be assessed to determine if the claimant's physical or mental ability to do basic work activities is significantly limited, i.e., is a 'severe' impairment(s), as defined in § 404.1520(c) and § 416.920(c)." "If the additional impairment(s) does not cause limitations that are 'severe' as defined in § 404.1520(c) and 416.920(c), we will not find that the additional impairment(s) imposes 'an additional and significant work-related limitation of function,' even if you are unable to do your past work because of the unique features of that work." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00A. Thus, the Regulations themselves tie the functional limitation required by paragraph C to the "severity" regulation governing step two in the sequential evaluation process. See also Keitt v. Barnhart, No. 04-CV-1347, 2005 WL 1258918, at *5 (E.D.N.Y. May 27, 2005) (holding that the correct standard for determining whether an impairment in addition to low IQ imposes a significant work-related limitation under Section 12.05C is the severity test); Baneky v. Apfel, 997 F. Supp. 543, 546 (S.D.N.Y. 1998) (adopting the severity test on the grounds that the language is essentially the same as Listing 12.05C and that a contrary interpretation would render Listing 12.05C's provisions for those with low IQs superfluous).

determined that these impairments were "severe." (Def.'s Mem. at 10.)

The difficulty in this case is that, while the ALJ found at step two that Plaintiff's "back pain syndrome" and "learning disorder, language" were "severe" impairments, that determination was based on both of his limitations, including his low IQ, and thus does not answer the question of whether, absent consideration of his low IQ, his other limitations would meet the severity test. See Keitt, 2005 WL 1258918, at *6.

Because the record does not indicate whether the ALJ specifically considered whether Plaintiff's mental impairment met the requirements of Listing 12.05C, the court cannot determine whether his decision is supported by substantial evidence and, therefore, recommends remanding this matter. See Smith v. Barnhart, No. 04-7027, 2006 WL 467958, at *5 (10th Cir. Feb. 28, 2006); Prentice, 1998 WL 166849, at *6. Whether the evidence supports a conclusion that Plaintiff possessed a deficit in adaptive functioning manifested during the developmental period, prior to when he turned 22, and whether Plaintiff suffered from a physical or mental impairment other than his low IQ that imposed an additional and significant work-related limitation of function are matters that must be addressed by the ALJ in the first instance. Accordingly, the court recommends remanding this case for a determination, consistent with this opinion, as to whether

Plaintiff's mental condition met or medically equaled the requirements of Listing 12.05C.

Conclusion

For the reasons set forth above, the court recommends that the Plaintiff's Motion to Reverse the Decision of the Commissioner, or, in the Alternative, to Remand for Further Proceedings **[Doc. # 9]** should be granted as to Plaintiff's request for a remand, but denied in all other respects. The Court further recommends that the Defendant's Motion to Affirm the Decision of the Commissioner **[Doc. # 11]** should be denied.

SO ORDERED, this 15th day of March, 2006, at Bridgeport, Connecticut.

/s/ William I. Garfinkel
WILLIAM I. GARFINKEL,
United States Magistrate Judge