

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

James Steven Carter,

Plaintiff,

v.

**MEMORANDUM OPINION  
AND ORDER**

Civil No. 18-1687 ADM/SER

Andrew Saul,  
Commissioner of Social Security,

Defendant.

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Edward A. Wicklund, Esq., Olinsky Law Group, Syracuse, New York; and Edward C. Olson, Esq., Disability Attorneys of Minnesota, Minneapolis, MN, on behalf of Plaintiff.

Marisa Silverman, Special Assistant United States Attorney, Assistant Regional Counsel, Social Security Administration, Dallas, TX, on behalf of Defendant.

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**I. INTRODUCTION**

This matter is before the undersigned United States District Judge for a ruling on Plaintiff James Steven Carter's ("Carter") Objection [Docket No. 23] to Magistrate Judge Steven E. Rau's June 5, 2019 Report and Recommendation [Docket No. 21] (the "R&R"). Judge Rau recommends granting Defendant Commissioner of Social Security's (the "Commissioner") Motion for Summary Judgment [Docket No. 18] and denying Carter's Motion for Summary Judgment [Docket No. 16]. For the reasons set forth below, Carter's Objection is overruled and Judge Rau's R&R is adopted.

**II. BACKGROUND**

Carter filed for disability insurance benefits ("DIB") under Title II of the Social Security Act, 42 U.S.C. §§ 401-34, and supplemental security income ("SSI") under Title XVI of the Social Security Act, 42 U.S.C. § 1381. The facts and procedural history of this matter are set

forth in Judge Rau’s R&R, and are incorporated by reference. Accordingly, only a brief and abridged version of the relevant facts is presented below.

### **A. Factual Background**

Carter’s relevant medical history of record begins with Dr. Joel S. Giffin’s (“Dr. Giffin”) examination of Carter on December 9, 2014, Carter’s claimed disability onset date. Admin. R. [Docket No. 14] at 37, 352. Dr. Giffin ordered x-rays to investigate Carter’s reported chronic back and knee pain, which Carter reported had been present for over a year. Id. Dr. Giffin read the x-rays, finding the knee and back “normal,” but found on a hip x-ray, “severe right hip DJD [degenerative joint disease, or osteoarthritis] with osteophytes, spurring, loss of joint space.” Id. at 353. As part of the “Assessment/Plan,” Dr. Giffin recorded:

Back and knee pain likely all or mostly from severe right hip DJD. Discussed low likelihood of pain medications or physical therapy benefitting patient with arthritis this severe – he was scared of prospect of surgery but will consider it. He wants a medical opinion form filled out but I won’t do that today on first visit. He states he’ll come back soon. No pain medications today on first visit either though would consider at future visits.

Id. Carter returned to Dr. Giffin one week later on December 15, 2014 for a follow-up. Id. at 355. This time, Dr. Giffin filled out a Request for Medical Opinion (“RMO”), which diagnosed the “severe right hip arthritis” and listed as “employment restriction(s): no lifting more than 10 pounds; no standing or walking without a break.” Id. at 346-47. The prescribed treatment plan was “consult with Orthopedics.” Id. Dr. Giffin checked “Yes” for the RMO question, “has your patient followed the treatment plan,” even though Carter had not yet seen an orthopedic specialist. Id. Based on his assessment, Dr. Giffin stated Carter could work 1-10 hours per week with “frequent breaks to stand/move around.” Id. at 347.

Carter next visited Dr. Giffin on February 16, 2015. Dr. Giffin reported that Carter “was

sent to Orthopedics for severe DJD of right hip,

hasn't gone yet, is scared to do so. Also didn't go to physical therapy. Would like something stronger for pain. Is applying for disability, has a functional capacity form he needs filled out."

Id. at 357. The Assessment/Plan noted Carter "is reluctant to pursue more advanced treatment at this time, mostly due to anxiety/fear of surgery." Also noted,

He is applying for disability and wants a functional capacity evaluation done, will sent [sic] to physical therapy for that. Will also try some tramadol for his pain.

Id. Dr. Giffin instructed Carter to "make an appointment with Summit Orthopedics to talk about your hip – just to talk" to a specialist. Id. at 358.

The next medical record was generated almost 8 months later on October 8, 2015 by an emergency room visit for injuries Carter sustained in a car accident. Id. at 373. On October 13, 2015, Carter returned to Dr. Giffin. On examination, Carter had "stiff gait, limps favoring the left leg." Id. at 441. Dr. Giffin instructed Carter to "keep moving–stay loose and active as you can." Id. at 442. Carter had a follow-up with Dr. Giffin on October 27, 2015 to address residual issues from the car accident. Id. at 443. Dr. Giffin found that Carter "is walking easily, though has some upper neck pain and some elbow and right knee pain." He also noted, Carter "has chronic bilateral hip pain that is unchanged." Id. Dr. Giffin referred Carter to physical therapy. Carter went to physical therapy in November and December 2015 and reported improvement in mobility and some good and bad days in terms of pain, and that the exercises helped his pain in January and February 2016. Id. at 417, 432. Carter started missing therapy appointments in 2016, until he was discharged from physical therapy on March 25, 2016 as he "did not return." Id. at 431.

On November 30, 2016, over 8 months after his discharge from physical therapy, Carter

again consulted Dr. Giffin's opinion, which was:

he has severe chronic right hip pain, has end-stage arthritis, told h[e] needs a right hip replacement for at least last year. He has chronic pain and weakness in his right knee, all worse since he was in an MVA [motor vehicle accident] Oct 2015. He went to physical therapy for his hip, right knee, shoulder which did help but he still has pain.

Id. at 445. Dr. Giffin's assessed Carter "has clear significant arthritis." Id. In addition, Dr. Giffin reported, Carter "is very reluctant to pursue even the consideration of surgery," so Carter was offered an intra-articular steroid injection, which Carter was willing to consider. Id. at 445-46. Finally, Dr. Giffin instructed Carter to get into a routine; "Exercises, getting out of the house, going to grocery store, etc." Id. at 446.

#### **B. Procedural Background—the ALJ's Decision and R&R**

On January 15, 2015, Carter applied for DIB and SSI benefits, alleging disability beginning on December 1, 2013. Admin. R. at 57, 67, 80-81. By letters dated April 3, 2015, Carter's claims for benefits were denied. Id. at 80-81. On April 29, 2015, Carter requested reconsideration. Id. at 115. On June 3, 2015, reconsideration was denied. Id. at 102, 104.

On June 24, 2015, Carter requested an administrative hearing. Id. at 123. On April 28, 2017, the hearing was held. Id. at 33-56. At the hearing, Carter amended his onset date to December 9, 2014. Id. at 37-39. The Administrative Law Judge ("ALJ") issued a denial of benefits on August 21, 2017. Id. at 17-27. The ALJ found that Carter was not disabled using the five-step analysis articulated in 20 C.F.R. §§ 404.1520(a), 416.920(a). The five-step analysis requires considering (1) whether the applicant is doing any substantial gainful activity, (2) whether the applicant has a severe medically determinable physical or mental impairment, (3) whether the impairment meets or equals one of the listings in 20 C.F.R. Part 404, Subpart P,

Appendix 1 (the “Listings”), (4) whether the applicant can engage in past work, given his residual functional capacity, and (5) whether, given an applicant’s residual functional capacity, the applicant can adjust to other work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). On steps (1) and (2), the ALJ found Carter met the insured status requirements of the Social Security Act through December 31, 2014, that Carter was not engaged in substantial gainful activity since the alleged onset date, and that Carter had severe right hip osteoarthritis with osteophytes, spurring and loss of joint space. Admin. R. at 19-20. On step (3), however, the ALJ determined Carter did not have an impairment or combination of impairments meeting the severity of the Listings. Id. at 21.

Before going from step (3) to step (4), the ALJ assessed Carter’s residual functional capacity (“RFC”). Id. at 21-25. The ALJ observed at the hearing, Carter “asserted that he needs a total hip replacement, but there is no documentation of him ever seeing an orthopedic surgeon, and there is no opinion as to the need for a hip replacement in the record.” The ALJ further noted “the claimed limits on appeal are entirely out of proportion to the objective findings and minimal amount of treatment received for the right hip condition.” As part of the analysis of RFC, the ALJ discussed Carter’s evidence, and lack thereof, of the intensity, persistence, or functionally limiting effects of his pain. The ALJ gave little weight to Dr. Giffin’s second visit RMO, and found that Carter’s inconsistent testimony cast doubt on his subjective complaints of pain in comparison to the objective evidence. Id. at 25. And, on steps (4) and (5), the ALJ found Carter has the “residual functional capacity to perform light work as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b).” Id.

On August 21, 2017, Carter requested a review of the ALJ’s decision by the Social

Security Administration Appeals Council. *Id.* at 1-6. On April 16, 2018, the Appeals Council denied the request for review. *Id.* at 1.

On June 18, 2018, Carter filed this federal court action. Both parties moved for summary judgment, and the matter was referred to Judge Rau. Judge Rau concluded substantial evidence in the record supported the ALJ's decision, and recommended granting the Commissioner's motion for summary judgment. Judge Rau found no error in the ALJ's findings or conclusions. Judge Rau considered Carter's argument that the ALJ should be required to develop the record further by ordering an examination of Carter by an orthopedic specialist. However, Judge Rau declined to find error where Carter himself failed to seek an orthopedic specialist opinion, particularly where the record included sufficient evidence to support the ALJ's RFC determination. Carter now objects to the R&R.

### **III. DISCUSSION**

#### **A. Standard of Review**

##### **1. Objections to the R&R**

A district court must make an independent, de novo review of those portions of an R&R to which a party objects and "may accept, reject, or modify, in whole or part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); see also D. Minn. LR 72.2(b).

## **2. Review of ALJ's Decision**

The Commissioner's decision to deny social security benefits must be affirmed if it conforms to the law and is supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g); McDade v. Astrue, 720 F.3d 994, 998 (8th Cir. 2013). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a decision." Juszczyk v. Astrue, 542 F.3d 626, 631 (8th Cir. 2008). The reviewing court must consider both evidence that supports the Commissioner's decision and evidence that detracts from it, and the reviewing court must uphold the Commissioner's decision if it is supported by substantial evidence, even when substantial evidence exists in the record that would have supported a contrary decision or when the reviewing court would have reached a different conclusion. Holley v. Massanari, 253 F.3d 1088, 1091 (8th Cir. 2001); see also Chismarich v. Berryhill, 888 F.3d 978, 980 (8th Cir. 2018).

### **B. Carter's Objections to the R&R are Overruled**

Carter objects to the ALJ's decision, not to order an orthopedic consultative examination to assess the nature and extent of Carter's limitations, and objects to the R&R's conclusion that the ALJ's decision was not erroneous. Carter argues that the orthopedic specialist was a "necessary source" to consult about Carter's condition. Carter also argues that this failure to consult an orthopedic specialist led the ALJ to undervalue Carter's subjective complaints, and thus led to an RFC unsupported by substantial evidence. Carter argues that the R&R ignored this secondary argument altogether.

After de novo review of those portions of the objected to R&R, the Court adopts the R&R, finding the ALJ's decision is supported by substantial evidence. The ALJ did not need to

order an orthopedic assessment because he had sufficient medical evidence: (a) to properly assess the nature and extent of Carter's limitations; and (b) to properly consider Carter's subjective complaints of pain.

Prior to step (4), the ALJ was required to assess Carter's RFC. 20 C.F.R. § 404.1520(a)(4). The ALJ needed to assess Carter's RFC "based on all the relevant medical and other evidence" in the record. 20 C.F.R. §§ 404.1520(e), 404.1545. "Medical records, physician observations, and the claimant's subjective statements about his capabilities may be used to support the RFC." Perks v. Astrue, 687 F.3d 1086, 1092 (8th Cir. 2012). The ALJ is "required to order medical examinations and tests only if the medical records presented to him do not give sufficient medical evidence to determine whether the claimant is disabled." Johnson v. Astrue, 627 F.3d 316, 320 (8th Cir. 2010) (quoting Barrett v. Shalala, 38 F.3d 1019, 1023 (8th Cir. 1994)); see also 20 C.F.R. § 404.1519a.

The ALJ was not required to order an orthopedic specialist evaluation to conclude his RFC analysis because he had the medical reports of Dr. Giffin, physical therapy records, the neurological exams, and Carter's own statements at the hearing, plus Carter's record of non-treatment. The medical records examined by the ALJ gave him sufficient basis to determine if Carter was disabled. An orthopedic specialist opinion was not a critical piece of evidence needed to assess the nature and extent of Carter's limitations. Briefly, Dr. Giffin referred Carter multiple times to an orthopedist to talk about the possibility of surgery improving Carter's mobility and relieving his reported pain, but Dr. Giffin never described surgery as Carter's only option. Dr. Giffin also recommended physical therapy, pain medication, and later, steroid injections for the hip as alternative treatment options. Given Carter's reports of pain, Dr. Giffin

was doubtful that such treatment would be effective, but because of Carter's fear of surgery, these other treatment options were worth pursuing to see if they would improve Carter's reported pain and mobility issues. Carter chose not to pursue these treatment options until many months later, if at all. Carter never expressed fear of physical therapy or the steroid injections. The record does not show whether Carter ever sought steroid injections. The record further shows Carter chose not to get physical therapy until after he was in a car accident, 10 months after his claimed disability onset date. When he did get the physical therapy, the ALJ observed that Carter reported some improvement in his pain management and mobility. For whatever reason, Carter chose not to continue with the physical therapy. This evidence weakens Carter's claim that he suffers from disabling hip pain. See Patrick v. Barnhart, 323 F.3d 592, 596 (8th Cir. 2003) ("If an impairment can be controlled by treatment or medication, it cannot be considered disabling.") (citation omitted). In addition, the ALJ stated Carter was always "without need for an assistive device for ambulation, and with an entirely normal neurological exam, including grossly normal movement and muscle tone." Admin. R. at 25.

Before treatment, Dr. Giffin opined Carter could work 1-10 hours a week with frequent breaks to stand and move around. The ALJ found that this opinion by Dr. Giffin was meant as a "temporary" opinion before Carter's visit to the orthopedics specialist.<sup>1</sup> Carter now argues that in making this finding the ALJ meant the orthopedics specialist referral was "necessary" to provide a functional capacity analysis. However, it is equally plausible that the ALJ interpreted

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<sup>1</sup> Although not explicitly stated, the ALJ likely concluded that Dr. Giffin's RMO was "temporary" because when Dr. Giffin filled out a Request for Medical Opinion, the prescribed treatment plan was "consult with Orthopedics." Id. at 346-47. Dr. Giffin checked "Yes" for the RMO question, "has your patient followed the treatment plan," even though Carter had not seen (and as far as the medical record shows, would not see) an orthopedic specialist.

the referral as one of several courses of treatment, not as a referral for further diagnosis, or functional capacity analysis. “[I]f it is possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings” the decision must be affirmed. Oberst v. Shalala, 2 F.3d 249, 250 (8th Cir. 1993). Even if Dr. Giffin meant for the orthopedist to provide another functional capacity analysis, the other history of treatment and Carter’s non-treatment decisions provides substantial evidence for the ALJ to make an informed decision without the orthopedist’s opinion. Johnson v. Astrue, 627 F.3d 316, 320 (8th Cir. 2010). The ALJ relied on the substantial evidence in this record to find a light work RFC; therefore, Carter’s first objection is overruled.

The ALJ also assessed Carter’s subjective complaints. Carter argues that the R&R ignored his subjective complaints argument. But the R&R addressed Carter’s subjective complaints in conjunction with his claims that a functional analysis was needed from an orthopedic specialist. R&R at 13-14. The ALJ, and the R&R, compared the objective medical record to Carter’s subjective complaints of pain. Carter’s failure to pursue any course of treatment weighed heavily against his claims of disabling pain and limitations of movement. In finding that the record did not support Carter’s subjective complaints, the ALJ also considered factors such as Carter’s conservative treatment, failure to follow through on treatment recommendations, sporadic work history, home and childcare activities, and inconsistent statements at the administrative hearing. Carter’s disagreement with the ALJ’s conclusions is not sufficient to find legal error in the ALJ’s analysis, which was thorough and adhered to the required step-by-step analysis.

#### IV. CONCLUSION

Based upon the foregoing, and all of the files, records, and proceedings herein, **IT IS**

**HEREBY ORDERED** that:

1. James Steven Carter's Objection [Docket No. 23] is **OVERRULED**;
2. The Commissioner's Motion for Summary Judgment [Docket No. 18] is **GRANTED**;
3. Carter's Motion for Summary Judgment [Docket No. 16] is **DENIED**;
4. The Commissioner's denial of DIB and SSI benefits is **AFFIRMED**;
5. All claims in the Complaint [Docket No. 1] are **DISMISSED**.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

BY THE COURT:

s/Ann D. Montgomery  
ANN D. MONTGOMERY  
U.S. DISTRICT JUDGE

Dated: September 9, 2019.