

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

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6  
7 August Term, 2008

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9 (Argued: February 5, 2009

Decided: April 16, 2009  
Amended: May 19, 2009)

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12 Docket No. 08-0659-cv

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15 PAUL POUPORE,

16  
17 *Plaintiff-Appellant,*

18  
19 -v.-

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21 MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY,

22  
23 *Defendant-Appellee.*

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26  
27 Before:

28 WESLEY and LIVINGSTON, *Circuit Judges*, and RESTANI, *Judge*\*.

29  
30 Appeal from an order and judgment of the United States District Court for the Northern  
31 District of New York (Peebles, M.J.) entered on January 25, 2008 affirming the Commissioner's  
32 denial of Poupore's claim for disability insurance benefits under the Social Security Act. Upon  
33 receipt of Appellee's motion for publication of this Court's February 19, 2009 summary order,  
34 and Appellant's petition for rehearing or rehearing *en banc*, we hereby GRANT the motion to  
35 publish, GRANT the petition for rehearing, and issue this opinion to replace the February 19,  
36 2009 summary order.

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\* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

1 AFFIRMED.  
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5 MARK SCHNEIDER, Plattsburgh, NY, *for Plaintiff-Appellant*.  
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7 ARTHUR SWERDLOFF, Special Assistant United States Attorney (Barbara L.  
8 Spivak, Chief Counsel - Region II, Office of the General Counsel, Social Security  
9 Administration, *of counsel*), *for* Glenn T. Suddaby, United States Attorney for the  
10 Northern District of New York, New York, NY, *for Defendant-Appellee*.  
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14 PER CURIAM:

15 Plaintiff-Appellant Paul Poupore appeals from a judgment entered on January 25, 2008,  
16 in the United States District Court for the Northern District of New York (Peebles, M.J.),  
17 affirming the decision of the Commissioner of Social Security (“Commissioner”) denying  
18 Poupore’s claim for disability insurance benefits under the Social Security Act.

19 When a district court has reviewed a determination of the Commissioner, “[w]e review  
20 the administrative record *de novo* to determine whether there is substantial evidence supporting  
21 the Commissioner’s decision and whether the Commissioner applied the correct legal standard.”  
22 *Machadio v. Apfel*, 276 F.3d 103, 108 (2d Cir. 2002). Substantial evidence means “more than a  
23 mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to  
24 support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

25 Poupore argues, relying on the standard set forth in *Curry v. Apfel*, 209 F.3d 117, 122-23  
26 (2d Cir. 2000), that the Commissioner failed to meet his burden of proving that Poupore retained  
27 the residual functional capacity to perform light work, and that such work was available in the  
28 national economy, because the Administrative Law Judge (“ALJ”) erred in (1) concluding that

1 Poupore had the residual functional capacity to perform light and sedentary work; (2) failing to  
2 give adequate weight to the testimony of his treating physician; and (3) finding Poupore's claims  
3 of subjective pain to be less than fully credible.

4 First, even if we assume *arguendo* that the *Curry v. Apfel* standard governs our review,  
5 we find that substantial evidence supports the ALJ's determination that Poupore is not entitled to  
6 disability benefits because he retained the ability to perform light work. The full range of light  
7 work requires intermittently standing or walking for a total of approximately 6 hours of an 8-hour  
8 workday, with sitting occurring intermittently during the remaining time. A person who is  
9 deemed able to perform light work is also capable of doing sedentary work, unless there are  
10 additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.  
11 20 C.F.R. § 404.1567(b).

12 The ALJ's finding that Poupore is capable of performing light work is supported by the  
13 reports of Dr. Black, Poupore's treating orthopedic specialist, who performed his ankle surgery  
14 and treated him from January 2003 through July 2004. Dr. Black consistently stated in his  
15 reports that Poupore was not disabled from all work, but rather would be an excellent candidate  
16 for vocational rehabilitation, and capable of performing lighter work. Indeed, Dr. Black  
17 expressly stated that Poupore would be able to perform a sedentary, light-duty job, which would  
18 involve sitting most of the time, but would allow Poupore to get up and move around from time  
19 to time if necessary. As this Court has previously stated, the requirement that Poupore get up and  
20 move around from time to time does not preclude his ability to perform sedentary work.  
21 *Halloran v. Barnhart*, 362 F.3d 28, 33 (2d Cir. 2004). Thus, we find the ALJ's finding as to

1 Poupore’s residual functional capacity is supported by substantial evidence on the record.

2 We agree in any event with the Commissioner that new regulations abrogate the *Curry v.*  
3 *Apfel* standard of review and clarify that there is only a limited burden shift to the Commissioner  
4 at step five. Under the applicable new regulation, the Commissioner need only show that there is  
5 work in the national economy that the claimant can do; he need not provide additional evidence  
6 of the claimant’s residual functional capacity. 20 C.F.R. § 404.1560(c)(2). These regulations  
7 abrogate *Curry v. Apfel* at least in cases where the onset of disability was after the regulations  
8 were promulgated on August 26, 2003. See *Clarification of Rules Involving Residual Functional*  
9 *Capacity Assessments; Clarification of Use of Vocational Experts and Other Sources at Step 4 of*  
10 *the Sequential Evaluation Process; Incorporation of “Special Profile” Into Regulations*, 68 Fed.  
11 Reg. 51,153 (Aug. 26, 2003).

12 Poupore’s reply brief might be read to argue that the ALJ made an error of law by  
13 applying the new regulations to the present case, since Poupore’s disability arose and his  
14 application for benefits was filed before the new regulations were promulgated. There is some  
15 authority that suggests this contention is without merit, notwithstanding *Bowen v. Georgetown*  
16 *Univ. Hosp.*, 488 U.S. 204 (1988), because the regulations do not have the kind of retroactive  
17 effect that *Bowen* restricts. See *Combs v. Comm’r of Social Security*, 459 F.3d 640, 646 (6th Cir.  
18 2006) (en banc) (plurality opinion) (“[C]laimants have no settled expectation that the agency will  
19 use one as opposed to another algorithm for determining whether the statutory requirements are  
20 met.”); *Pine Tree Med. Assocs. v. Sec’y of Health & Human Servs.*, 127 F.3d 118, 121 (1st Cir.  
21 1997) (“[T]he mere filing of an application is not the kind of completed transaction in which a

1 party could fairly expect stability of the relevant laws as of the transaction date.”).

2           Nevertheless, we decline to reach the issue. Although we generally will remand “[w]here  
3 there is a reasonable basis for doubt whether the ALJ applied correct legal principles,” *Schaal v.*  
4 *Apfel*, 134 F.3d 496, 504 (2d Cir. 1998) (quoting *Johnson v. Bowen*, 817 F.2d 983, 986 (2d Cir.  
5 1987)), Poupore failed to argue to the district court or in his opening brief on appeal that there  
6 was a question as to whether the ALJ applied the correct legal principles, and we therefore  
7 exercise our discretion to treat this claim of error as waived. *See JP Morgan Chase Bank v. Altos*  
8 *Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (“[A]rguments not made in an  
9 appellant’s opening brief are waived even if the appellant pursued those arguments in the district  
10 court or raised them in a reply brief.”); *Norton v. Sam’s Club*, 145 F.3d 114, 117 (2d Cir. 1998)  
11 (“Issues not sufficiently argued in the briefs are considered waived and normally will not be  
12 addressed on appeal.”). Although claimants in Social Security cases are not subject to some  
13 issue exhaustion requirements, *see Sims v. Apfel*, 530 U.S. 103 (2000), at least where the  
14 claimant is represented by counsel before the district court, the claimant must present the relevant  
15 legal arguments in that forum in order to preserve them for appellate review. We note for the  
16 benefit of the parties that on the record before us the result likely would be the same, even if we  
17 were to reach the merits of Poupore’s argument. *See Schaal*, 134 F.3d at 504 (“Where  
18 application of the correct legal standard could lead to only one conclusion, we need not  
19 remand.”).

20           With respect to Poupore’s next argument, substantial evidence supports the ALJ’s finding  
21 that the testimony of one of Poupore’s treating physicians, Dr. Amir, was not entitled to

1 significant weight. A medical opinion may be given significant weight only if it is “well-  
2 supported by medically acceptable clinical and laboratory diagnostic techniques and is not  
3 inconsistent with the other substantial evidence in [the] case record.” 20 C.F.R. §  
4 404.1527(d)(2). Dr. Amir’s September 2004 assessment that Poupore was limited to less than  
5 sedentary work was unsupported by any medical evidence. Dr. Amir did not support his  
6 conclusion with any clinical findings made in the course of his treatment, but rather relied upon  
7 the “evaluation by Dr. Black, orthopedics,” as support for his assessment. However, as discussed  
8 above, Dr. Black’s treatment notes do not support a conclusion that Poupore is entirely unable to  
9 perform even light, sedentary work. Thus, the ALJ did not err in according Dr. Amir’s  
10 assessment with lesser weight.

11 Finally, substantial evidence supports the ALJ’s finding that Poupore’s subjective  
12 complaints of pain were insufficient to establish disability. His subjective complaints were  
13 unsupported by objective medical evidence tending to support a conclusion that he has a  
14 medically determinable impairment that could reasonably be expected to produce the symptoms  
15 alleged. *See* 20 C.F.R. § 404.1529(b), (c). The ALJ properly noted that Poupore recovered well  
16 from his left ankle injury, that Dr. Amir reported that Poupore had no muscle spasm or  
17 motor/sensory loss and no contractures, ankylosis or subluxation, and that Dr. Black believed he  
18 could return to lighter work. Further, the ALJ correctly noted that Poupore was able to care for  
19 his one-year-old child, including changing diapers, that he sometimes vacuumed and washed  
20 dishes, that he occasionally drove, and that he watched television, read, and used the computer.  
21 Given all the evidence before him, the ALJ properly found that Poupore’s testimony about his

1 limitations was not fully credible.

2 We have reviewed Poupore's remaining claims and find them to be similarly without  
3 merit.

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5 **Conclusion**

6 The district court's order entered on January 25, 2008 affirming the Commissioner's  
7 denial of Poupore's claim for disability insurance benefits under the Social Security Act is hereby  
8 AFFIRMED.

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