

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EDWARD J. FITZPATRICK,

Plaintiff,

-against-

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.
-----x

MEMORANDUM AND ORDER

10-CV-4250 (FB)

Appearances:

For the Plaintiff:

CHRISTOPHER JAMES BOWES, ESQ.
54 Cobblestone Drive
Shoreham, NY 11786

For the Defendant:

LORETTA E. LYNCH, ESQ.
United States Attorney
CANDACE SCOTT APPLETON, ESQ.
Assistant United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201

BLOCK, Senior District Judge:

1 Plaintiff, Edward Fitzpatrick (“Fitzpatrick”), seeks review of the final decision
2 of the Commissioner of Social Security (“Commissioner”) denying his application for benefits
3 under the Social Security Act (the “Act”). Both parties move for judgment on the pleadings
4 pursuant to Federal Rule of Civil Procedure 12(c).

5 Fitzpatrick, a former firefighter, applied for benefits on January 9, 2004 alleging
6 that he became disabled on July 28, 2002 when he fell down a flight of stairs and injured his
7 knees and back. In a decision dated September 14, 2009, following hearings held on July 31,
8 2008 and February 19, 2009, an Administrative Law Judge (“ALJ”) determined that Fitzpatrick
9 was not disabled under the Act. In evaluating that ruling, the Court “review[s] the

1 administrative record de novo to determine whether there is substantial evidence supporting
2 the Commissioner’s decision and whether the Commissioner applied the correct legal
3 standard.” *Acierno v. Barnhart*, 475 F.3d 77, 80-81 (2d Cir. 2007) (quoting *Pollard v. Halter*, 377
4 F.3d 183, 188 (2d Cir. 2004)). The ALJ erred in two respects.

5 First, the ALJ violated the treating physician rule when she failed, without
6 adequate explanation, to give controlling weight to the opinion of Fitzpatrick’s treating
7 physician and orthopedic surgeon, Dr. Daniel Wilen (“Dr. Wilen”). AR at 209. Instead, the
8 ALJ credited the opinion of consulting physician Dr. Arthur Brovender, who based his own
9 review on a partial record devoid of Dr. Wilen’s notes. AR at 526-27. In so doing, the ALJ
10 failed to consider the detailed medical records that Fitzpatrick provided, and to take into
11 account Dr. Wilen’s expertise as a specialist in orthopedics or the duration and frequency of
12 his treatment relationship with Fitzpatrick. *See Clark v. Commissioner of Social Security*, 143 F.3d
13 115, 118 (2d Cir. 1998) (listing factors the ALJ must consider when treating physician’s opinion
14 is not given weight). Even if Dr. Wilen’s clinical findings were inadequate, the ALJ “has an
15 affirmative obligation to develop the administrative record” by seeking additional information
16 before relying on a contrary, non-contemporaneous opinion. *Schaal v. Apfel*, 134 F.3d 496, 505
17 (2d Cir. 2008) (internal quotation marks omitted).

18 Second, the ALJ improperly found that Fitzpatrick’s subjective complaints of
19 pain were not “corroborated by objective medical evidence.” AR at 207. This assessment is
20 not supported by substantial evidence. The documented, permanent damage that Fitzpatrick
21 suffered to his spine and knees could reasonably be expected to cause him pain. Additional

1 evidence of record, including Fitzpatrick's testimony, prescriptions lists and Dr. Wilen's
2 treatment notes, shows that Fitzpatrick's daily activities were limited due to pain, that he has
3 had two knee surgeries and that he has taken a variety of pain medications. *See, e.g., Genier*
4 *v. Astrue*, 606 F.3d 46, 49-50 (2d Cir. 2010) (citing 20 C.F.R. § 404.1539(c)).

5 For the foregoing reasons, the Commissioner's motion is denied and the case is
6 remanded for further proceedings. On remand, the ALJ should properly apply the treating
7 physician rule, and then proceed to assess claimant's credibility in light of the newly
8 developed record and the evidence as a whole.

9 **SO ORDERED.**

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11

FREDERIC BLOCK
12 Senior United States District Judge

13 Brooklyn, New York
14 September 26, 2011
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