UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL A. TRENTINI,	:	
	:	
Plaintiff,	:	
	:	**OPINION AND ORDER**
-against-	:	14-CV-5238 (DLI)
	:	
CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY,	:	
	:	
Defendant.	:	

DORA L. IRIZARRY, Chief United States District Judge:

On September 15, 2011, Plaintiff Michael A. Trentini ("Plaintiff") filed an application for Social Security disability insurance benefits ("DIB") under the Social Security Act (the "Act"), alleging disability beginning on August 3, 2011. *See* Certified Administrative Record ("R."), Dkt. Entry No. 21 at 218-21. His application was denied and he requested a hearing. *Id*. at 97-109. On November 28, 2012 and March 22, 2013, Plaintiff appeared with counsel at hearings before Administrative Law Judge Katherine C. Edgell (the "ALJ"). *Id*. at 35-55 (March 2013), 56-84 (November 2012). In a decision dated June 19, 2013, the ALJ concluded that Plaintiff was not disabled within the meaning of the Act. *Id*. at 22-30. On July 9, 2014, the ALJ's decision became the Commissioner's final decision when the Appeals Council denied Plaintiff's request for review. *Id*. at 1-6. This appeal followed.

On September 8, 2014, Plaintiff filed the present appeal seeking judicial review of the denial of benefits pursuant to 42 U.S.C. § 405(g). *See* Complaint ("Compl."), Dkt. Entry No. 1. On April 10, 2015, the Commissioner moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, seeking affirmance of the denial of DIB. *See* Mem. of Law

in Supp. of Def.'s Mot. for J. on the Pleadings ("Def. Mem."), Dkt. Entry No. 16. In turn, on May 6, 2015, Plaintiff opposed the Commissioner's motion and cross-moved for a judgment on the pleadings, asking that this Court reverse the Commissioner's determination that he is not disabled or, in the alternative, that the matter be remanded for a new hearing. *See* Mem. of Law in Supp. of Pl.'s Mot. for J. on the Pleadings ("Pl. Mem."), Dkt. Entry No. 18. For the reasons set forth below, the Commissioner's motion for judgment on the pleadings is denied; Plaintiff's motion is granted, and this action is remanded to the Commissioner for additional proceedings consistent with this Opinion and Order.

BACKGROUND

A. Non-Medical and Self-Reported Evidence

Plaintiff, a former Sergeant with the Suffolk County Police Department, was born in 1966. R. at 64, 67. He lives with his wife and two small children in an apartment in Westchester County. *Id*. at 254-55. Both he and his wife work. *Id*. at 64-65. He is a college graduate and holds an undergraduate degree in business management. *Id*. at 39, 65-66. Aside from his undergraduate studies, the only other training Plaintiff received was at the New York City and Suffolk County Police Academies. *See id*. at 39, 66-67. Plaintiff was employed by the New York City Police Department from 1987 until 1992 and by the Suffolk County Police Department from 1992 until August 2011. *Id*. at 43, 66-67, 243. The injury giving rise to his disability occurred while on duty as a police officer on December 5, 2010. *Id*. at 263, 453. While attempting to handcuff a suspect, Plaintiff was struck accidentally with a Taser; he jammed the pinky finger on his right hand and twisted his neck and shoulder. *Id*. at 263, 453. Afterward, he did not return to work for about six months, until the beginning of June 2011, but worked only until August 2, 2011. *Id*. at 67.

In a function report dated November 1, 2011, Plaintiff wrote that his daily activities consisted of personal grooming, eating, medical appointments, physical therapy sessions, and resting. *Id*. at 255. He noted that he cared for his children but his "wife and mother-in-law do most of the childcare." *Id*. He was slow getting dressed, but had no problems using the restroom, bathing, shaving, or feeding himself. *Id*. at 255-56. He did not need help or reminders to take his medicine or attend to personal needs. *Id*. at 256. Plaintiff noted that he did light cleaning and went outside two to three times a week. *Id*. at 257. He possessed a driver's license, drove, and went out alone. *Id*. at 257-58. He could pay bills, count change, and manage a savings account. *Id*. at 258. He indicated that he had no restrictions walking, climbing stairs, kneeling, squatting, seeing, hearing, or talking. *Id*. at 260. By that same token, he had no problems paying attention, remembering things, getting along with people in authority, or following spoken and/or written instructions. *Id*. at 261, 263.

Plaintiff also stated that pain in his shoulder and neck woke him up at night and that every day he felt pain when moving his neck, left shoulder, and right pinky, along with numbness in his left pointer finger and thumb. *Id*. at 255, 262. He explained that although he was left-hand dominant, he could not lift his left arm above the shoulder. *Id*. at 260-61. In fact, when lifting things, he tried to avoid putting weight on his right hand or left shoulder. *Id*. at 259. He intimated that he could walk for about ten minutes before stopping to rest for a few minutes and his ability to finish tasks depending on if he was experiencing pain. *Id*. at 261. Stress and lack of sleep impacted his pain levels. *Id*. at 263. At the time, Plaintiff's medications included Hydrocodone, Ibuprofen, Ambien, and Metaxalone. *Id*. at 262.

B. Plaintiff's Testimony Before the ALJ

Plaintiff appeared with counsel at a hearing in White Plains, New York, before the ALJ on November 28, 2012. *See Id*. at 56-84. He drove himself to the hearing. *Id*. at 65. He testified that he lived with his wife who worked and two children, ages two and three. *Id*. at 64. Plaintiff stated that he was injured in December 2010, returned to work in June 2011, and last worked on August 2, 2011. *Id*. at 62, 67. He testified that he had a herniated disc in his neck that caused pain from his left shoulder down to his left pointer finger and thumb. *Id*. at 69. He described pain stretching from his lower back to his right leg and big toe when sitting. *Id*. He had three surgeries on his right pinky, which he could not straighten, and had difficulty moving. *Id*. He had two surgeries on his left shoulder and could not lift it above the shoulder line. *Id*. at 69-70. He said he could move his head about halfway in all directions and he did not need an assistive device. *Id*. at 72. He testified that he saw Dr. Michael Cushner every thirty days[1] for his shoulder, neck, and back, and Dr. Daniel Polatsch every three months for his hand. *Id*. at 71. Treatment included chiropractic and physical therapy sessions. *Id*. at 71-72.

Speaking to his daily activities, Plaintiff testified that he woke up around 8:30 a.m., groomed and fed himself, helped his mother-in-law care for his younger child, played with that child, and napped in the afternoon. *Id*. at 72-74, 82. In the late morning, he would drive to pick his older child up from nursery school and attend that child's therapy sessions. *Id*. at 73, 75. He regularly helped his wife make dinner, do dishes, and run local errands. *Id*. at 75. He could handle money, feed himself, and dress himself. *Id*. at 76.

Plaintiff also testified that he could only stand, walk, or sit for about thirty minutes at a time. *Id*. at 78. He stated that he could pick up and carry items weighing up to ten pounds a short

[1] Dr. Cushner confirmed that saw Plaintiff monthly since December 6, 2010. *Id*. at 592, 599. The relationship between Plaintiff and Dr. Cushner seems to predate the December 5, 2010 incident; based on the record, Dr. Cushner performed surgery on his right knee as early as 2009. *Id*. at 311.

distance, but not repetitively. *Id*. at 79, 82-83. He also noted that, as a result of an injury to the middle finger of the left hand, sometimes the joint in that finger would lock. *Id*. at 80. He woke nightly with pain shooting down his left arm to his hand. *Id*. at 82. He maintained that he could drive without requiring assistive devices. *Id*. at 65, 81. He and his wife flew to Nevada three times to visit his family since his injury in 2010; they upgraded to larger seats in the emergency row and he used Vicodin and muscle relaxers to manage his pain when flying. *Id*. at 78, 81. At the time of the hearing, his medications included a Butrane patch, Vicodin, and Skelaxin. *Id*. at 81-82.

During the supplemental hearing on March 22, 2013, Plaintiff's testimony focused on his work history in law enforcement and duties as a Sergeant with the Suffolk County Police Department. *See generally Id*. at 35-55.

C. Vocational Expert's Testimony Before the ALJ

Esperanza Di Stefano appeared via telephone as a Vocational Expert ("VE") at the supplemental hearing held on March 22, 2013 in White Plains, New York. *Id*. at 37, 44-53. She stated that Plaintiff's past position as a Police Officer was one of "very heavy exertion" and that his most recent position as a Sergeant was considered one of "light exertion." *Id*. at 45. The VE determined that Plaintiff obtained transferrable clerical and communication skills in these previous positions, along with a proven ability to work with others, knowledge of his equipment, and knowledge of laws and regulations. *Id*.

The ALJ then posed a hypothetical to the VE ("Hypo #1") of an individual with Plaintiff's vocational profile, but added limitations that the person could only lift a maximum of ten pounds, required a sit/stand option at thirty-minute intervals, and could not engage in repetitive fingering with the right pinky or reaching with the left arm. *Id*. at 46. The VE stated

that the individual in Hypo #1 could perform various sedentary, semi-skilled jobs. First, the VE identified the position of "information clerk,"[2] which had 973,800 jobs available nationally and 55,230 regionally. *Id*. Alternatively, the VE stated that the individual in Hypo #1 could also perform the duties of a "telephone solicitor,"[3] which had 258,060 positions nationally and 6,390 regionally. *Id*. Finally, the VE said that the individual in Hypo #1 could also meet the needs of an "order filler,"[4] which had 215,390 jobs available nationally and 6,260 regionally. *Id*. at 46-47.

The ALJ then modified the characteristics of the person in Hypo #1, positing a person with Plaintiff's vocational profile who could lift up to ten pounds frequently and a maximum of twenty-five pounds occasionally, and could stand, walk, and sit for a total of one hour a day ("Hypo #2"). *Id*. at 47. The VE testified that the individual in Hypo #2 would not be competitively employable. *Id*.

Using the lifting restrictions from Hypo #2, the ALJ then asked the VE about an individual who: (1) needs a sit/stand option every thirty minutes; (2) could occasionally climb, stoop, kneel, balance, crouch, and crawl; (3) could occasionally lift overhead on the left, and lift only five pounds on the left side; (4) could carry only five to ten pounds, on either side; (5) could manipulate medium-sized objects, but not continually; (5) had a grip strength of 75% with the right hand and 50% with the left; (6) could occasionally perform repetitive tasks with the left shoulder and arm; (7) could perform occasional repetitive tasks with all fingers and the right thumb; (8) could occasionally perform repetitive tasks with the left thumb; (9) could

[2] The ALJ noted in her decision that this job title is listed in the U.S. Department of Labor's *Dictionary of Occupational Titles* at Code 237.367-022. *Id*. at 29; *see also Dictionary of Occupational Titles*, U.S. DEP'T OF LABOR, http://www.oalj.dol.gov/LIBDOT.HTM [hereinafter *DOT*].

[3] This job title is listed in the *Dictionary of Occupational Titles* at Code 299.357-014. *Id*. at 29; *see also DOT*.

[4] The job title of "order seller" is listed in the *Dictionary of Occupational Titles* at Code 238.367-034. *Id*. at 29; *see also DOT*.

occasionally grip and pinch with both hands; and (10) had no fine feeling in his left hand ("Hypo #3"). *Id*. at 48-49. The VE answered that the individual in Hypo #3 could perform the duties of a "host"[5] or a "hotel desk clerk."[6] *Id*. at 50. The former with 253,110 positions available nationally and 7,690 regionally, the latter with 224,430 positions available nationally and 4,430 regionally. *Id*. at 50.

The ALJ then asked the VE to consider an individual who "[c]an't use the right hand but is otherwise limited to light work" ("Hypo # 4"). *Id*. at 50. The VE responded that either the "host" or "hotel desk clerk" would be appropriate for the individual in Hypo # 4. *Id*.

At this juncture, counsel for Plaintiff asked the VE to consider a modification to the characteristics described in Hypo # 3. *Id*. at 52. In this hypothetical, counsel asked the VE to consider the entire litany of restrictions described in Hypo # 3, replacing the limitation of a sit/stand option every thirty minutes with an ultimate constraint of only being able to sit for four hours and stand for one hour, total, daily ("Att'y Hypo"). *Id*. The VE explained that, since the combined time of sitting and standing would only result in five hours and "that's not a fully day's work," there is no fulltime employment for the individual in the Att'y Hypo. *Id*. at 53.

D. Summary of the Medical Evidence

On October 14, 2005, magnetic resonance imaging ("MRI") of Plaintiff's lumbosacral spine revealed degenerative disc disease, most pronounced at L4-5 and L5-S1 with no evidence of significant canal or neural foraminal stenosis. *Id*. at 497. That same study further revealed a diffuse disc bulge with a central focal disc bulge and annular tear at L5-S1. *Id*. Approximately

[5] The VE testified that this job title is listed in the *Dictionary of Occupational Titles* at Code 352.667-010. *Id*. at 50; *see also DOT*.

[6] The VE testified that this job title is listed in the *Dictionary of Occupational Titles* at Code 238.367-038. *Id*. at 50; *see also DOT*.

four years later, on October 1, 2007, another MRI showed Plaintiff had degenerative disc disease at L5-S1 with focal disc herniation. *Id*. at 496.

From November 20 to November 21, 2010, Plaintiff sought treatment at Huntington Hospital, complaining of pain in his left hand. *Id*. at 289-93. However, x-rays did not show any abnormality in the left hand. *Id*. at 292. On December 5, 2010, he went to Huntington Hospital again, this time seeking treatment for a work-related injury—he jammed his right pinky finger and twisted his neck and back after being accidentally tasered by another officer while apprehending a suspect. *Id*. at 263, 282, 453. Neal Hochwald, M.D., the attending physician, diagnosed a right small finger sprain with a "swan-neck deformity" and a mallet deformity at the distal phalangeal joint. *Id*. at 286. Dr. Hochwald put the finger in a splint and suggested using the splint for six weeks. *Id*. Plaintiff was to follow up in a week to ten days. *Id*. at 286-87. Although there was pain and swelling in the injured finger, x-rays showed no definite fracture or dislocation. *Id*. at 286.

From December 2010 to January 2011, Plaintiff underwent physical therapy for the injury to his right pinky. *Id*. at 368. Susan R. Goldberg, a registered occupational therapist ("OTR") with Hand Rehabilitation and PT Group, evaluated Plaintiff on December 14, 2010. *See id*. at 367-71. He no longer had any sensory changes and was able to perform light activities, but not forceful ones and required a splint at all times. *Id*. at 367, 370. OTR Goldberg noted that police officers must grip with force, hold and fire a weapon, and restrain suspects. *Id*. at 370.

Michael Cushner, M.D., of WESTMED Medical Group in Purchase, New York, referred Plaintiff for an MRI of his left shoulder. *See Id*. at 328-29, 365-66. The MRI was performed on December 18, 2010. *Id*. Results revealed that there was a Type II SLAP (superior labrum anterior posterior) tear with superior labrum propagating into posterior superior labrum. *Id*. at 329, 366.

Beyond that, there was mild to moderate degenerative change, capsular thickening in the left acromioclavicular joint, type II curved acromion and traces of fluid in the subacromial/subdeltoid bursa. *Id*. Shortly thereafter, on January 26, 2011, Dr. Cushner performed arthroscopic surgery on Plaintiff's left shoulder. *Id*. at 361-63. The findings included: glenohumeral synovitis; anterior labral tearing; type II acromion anterior lateral spurring; inferior spur distal clavicle acromioclavicular joint; thickened scar tissue subacromial space; superior labral tear, anterior posterior with intact biceps anchor; and grade II cartilage injury inferior portion of glenohumeral joint. *Id*. at 361. The attempted repairs consisted of two anchors placed on the anterior labrum with securing of remnants of anterior labral tissue, as well as anterior capsule. *Id*. at 362.

Later that year, on May 9, 2011, Neil Roth, M.D., a hand surgeon, performed trigger release surgery on Plaintiff's right pinky. *Id*. at 301-03. On June 27, 2011, Dr. Roth performed a second procedure (knee arthroscopy, a shoulder SLAP repair, and a trigger release). *Id*. at 297-300. That same day, Daniel B. Polatsch, M.D., an Assistant Professor of Hand Surgery at Albert Einstein College of Medicine, examined Plaintiff. *Id*. at 379-80. Through examination, Dr. Polatsch found a well-healed transverse incision consistent with the distal palmar crease of the right small finger. *Id*. at 379. He also found a "swan-neck deformity" with a proximal-interphalangeal hyperextension and a distal interphalangeal extensor lag. *Id*. Dr. Polatsch requested authorization for right small finger proximal interphalangeal joint secondary volar plate repair, eight to twelve weeks of outpatient occupational therapy ("OT"), and a splint for three-and-one-half weeks after surgery to coincide with OT. *Id*. at 380.

During a pre-operative examination by Bradford Schiller, M.D., on July 25, 2011, Plaintiff indicated that he exercised four times a week on a treadmill and denied any neurological

weakness, numbness, tingling, back pain, or stiffness. *Id*. at 388. He did, however, complain of joint swelling and muscle pain. *Id*.

On August 3, 2011, Dr. Polatsch performed surgery at Beth Israel Medical Center to repair a volar plate in the right small finger and pin the proximal interphalangeal joint. *Id*. at 380, 400-02. Dr. Polatsch found a complete disruption of the volar plate at the base of the middle phalanx. *Id*. at 400. During follow-up examinations, Dr. Polatsch determined that Plaintiff could not return to work and it was unclear when he would be able to do so. *Id*. at 408, 411, 414, 513. In a "Certificate of Professional Care," Dr. Polatsch noted that Plaintiff was unable to work from August 30, 2011 until after an appointment on September 27, 2011. *Id*. at 415.

Dr. Cushner referred Plaintiff for an MRI of his left shoulder, and on September 14, 2011, results showed a partial tear of the supraspinatus tendon at the musculotendinous junction. *Id*. at 442. On September 15, 2011, Dr. Cushner examined Plaintiff and completed a "Certification of Disability," finding "[f]ull [d]isability," and stating that Plaintiff would be unable to work from September 15, 2011 to October 20, 2011. *Id*. at 443. He reported that all of Plaintiff's complaints were consistent with the injury he sustained at work and that the history of his disability is consistent with the physician's findings. *Id*. at 332, 446. Dr. Cushner diagnosed cervical strain, left shoulder pain, thoracolumbar strain, and right hand small finger dislocation. *Id*. at 330, 444. Dr. Cushner recommended left shoulder surgery, home exercises, left shoulder manipulation, medication as needed, and following-up with possible injections. *Id*. at 331, 445. He once again noted that the impairment was "100%." *Id*. at 332, 446

On September 27, 2011, Dr. Polatsch visited Plaintiff and completed a "Follow Up Visit/Progress Report." *Id*. at 417-18. Dr. Polatsch observed diminished soft tissue swelling, intact FDP/FDS, active range of motion of the proximal interphalangeal joint from 5-75 degrees,

and no clicking. *Id*. at 417. He reported that Plaintiff's impairment was "100%." *Id*. Dr. Polatsch indicated that whether Plaintiff would be able to return to work required further evaluation. *Id*. at 418.

Cy Blanco, M.D., also with WESTMED, examined Plaintiff as a Workers' Compensation consult on October 3, 2011. *Id*. at 448-52. He was having numbness/tingling-pain and also complained of back pain, headache, weakness, and sleeplessness. *Id*. at 450-51. Dr. Blanco declared that Plaintiff's impairment was "100%" and associated diagnostic tests indicated herniated discs. *Id*. at 449. Dr. Cushner reexamined Plaintiff on October 13, 2011 as a Workers' Compensation consult follow-up and reported that there was a "[t]otal disability" and the impairment was "100%." *Id*. at 454-55. He made these identical notations again after examining Plaintiff on October 31, 2011. *Id*. at 458-59. A few days later, on November 2, 2011, Dr. Cushner performed another left shoulder arthroscopy and manipulation. *Id*. at 469-85. Following up as a Workers' Compensation consult on November 15, 2011, Dr. Cushner reiterated his previous diagnoses of: cervical strain; left shoulder pain; thoracolumbar strain; and right hand small finger dislocation. *Id*. at 486. He once against found "total disability" and prescribed home exercises, stretching, physical therapy, a follow up within four to five weeks, and medication as needed. *Id*. at 487.

On January 21, 2012, Dr. Cushner repeated his assessment of "total disability" for purposes of Workers' Compensation. *Id*. at 551-53. Approximately three weeks later, on February 16, 2012, Plaintiff saw Dr. Blanco to receive epidural injections for cervical radiculopathy. *Id*. at 548-50. Dr. Blanco, once again, noted that the impairment was "100%." *Id*. at 548. There was a follow up with Dr. Cushner on March 7, 2012, where he was examined by both Cushner and Nurse Practitioner Patricia Pugni ("NP Pugni"). *Id*. at 544-47. The

examination notes documented a normal cervical spine alignment and posture, mild restrictions on range of motion testing, and cervical radiculopathy. *Id*. at 546-47. Once again, the notations indicate that Plaintiff complained of back pain, headaches, general weakness, and trouble sleeping, and that his impairment was "100%." *Id*. at 544, 546. An MRI on March 10, 2012 showed degenerative disc disease at C4-C5 and C6-C7 with left paracentral foraminal disc herniation impinging upon the exiting left C7 nerve root. *Id*. at 558. On April 1, 2012, Plaintiff saw Dr. Cushner again and stated that he felt no relief or improvement despite two cervical epidurals, numbness in his left first and second fingers, and that his pinky finger continued to lock. *Id*. at 542. Plaintiff saw Dr. Polatsch for another surgical procedure on his right pinky on April 25, 2012. *Id*. at 538. In a follow up appointment on May 8, 2012, Dr. Polatsch once again noted that the impairment was "100" percent. *Id*. at 505.

On May 22, 2012, in yet another visit to Dr. Cushner, Plaintiff complained about neck pain, numbness in his left first and second fingers, and that he had not seen any improvement from the cervical epidural. *Id*. at 538. Dr. Cushner, once again, noted "total disability." *Id*. at 539-40. Similarly, the notes from a follow up visit with Dr. Polatsch on June 1, 2012 once again indicate that the impairment is "100" percent. *Id*. at 501.

Plaintiff saw Dr. Cushner again on June 17, 2012, complaining of hand pain. *Id*. at 536. At the time, his prescriptions included Ibuprofen, Skelaxin, Ambien, Valacyclovir Hcl, Fluocinonide, Vicodin, and Flexeril. *Id*. He followed up with NP Pugni on June 19, 2012, who once again assessed cervical radiculopathy. *Id*. at 532-35. On July 10, 2012, Dr. Cushner once again commented that there was "total disability." *Id*. at 531.

Plaintiff returned to Dr. Blanco for a cervical epidural steroid injection on July 20, 2012. 521-26. Dr. Blanco once again noted that Plaintiff suffered from cervical radiculopathy and had a

history of hand pain, shoulder pain, and hand pain. *Id*. at 522-23, 525-26. The impairment was assessed as "100%." *Id*. at 522. 525.

Dr. Cushner completed a Medical Assessment of Ability to Do Work-Related Activities Form concerning Plaintiff's condition on November 20, 2012, noting that he had been treating Plaintiff monthly since December 6, 2011. *Id*. at 592-93. The diagnosis was cervical and lumbar radiculopathy. *Id*. at 592. Dr. Cushner determined that Plaintiff could lift ten pounds frequently and no more than twenty-five pounds occasionally. *Id*. at 592. Dr. Cushner further noted that Plaintiff could sit, stand, and/or walk for fifteen to thirty minutes, total, for each activity every day. *Id*. at 593. Plaintiff occasionally could climb, stoop, kneel, crouch, and crawl. *Id*. at 593. His ability to reach, feel, handle, push, and pull were impaired. *Id*. That same day, Dr. Cushner also completed a Hand/Upper Extremity Functional Capabilities Form. *Id*. at 594-95. There, Dr. Cushner noted that Plaintiff occasionally could reach overhead and lift less than five pounds with his left arm. *Id*. at 594. The doctors observed that Plaintiff could manipulate small and medium size objects with both hands, albeit with difficulty. *Id*. at 594. Grip strength was reduced to 75% in the right hand and 50% on the left, with continuous pain in both. *Id*. at 594-95.

On April 3, 2012, Dr. Cushner completed a second Medical Assessment of Ability to Do Work-Related Activities Form. *Id*. 599-600. In that form, he diagnosed cervical and lumbar radiculopathy, left shoulder status post-surgery, and right fifth trigger finger status post-surgery. *Id*. at 599. The notes reflect that Plaintiff's ability to lift and carry was impaired and that he was limited to lifting a maximum of twenty-five pounds occasionally and of ten pounds frequently. *Id*. Dr. Cushner maintained that Plaintiff's ability to stand and/or walk and sit was limited to two hours, total, in an eight-hour workday. *Id*. at 600. The ability to reach, feel, handle, push, and pull all were impaired. *Id*.

Plaintiff had follow up appointments with NP Pugni on January 9, 2013 and February 5, 2013. *Id*. at 568-74. On both dates, NP Pugni reported that Plaintiff's cervical radiculopathy was stable and that symptoms worsened after sitting for longer than thirty minutes. *Id*. at 568, 571-72, 574. NP Pugni assessed that Plaintiff's impairment was "100%." *Id*. at 568, 572. Her findings on both dates included: intact coordination (*e.g.*, finger/nose, heel/knee); intact recent and remote memory; the absence of scoliosis in the lumbar spine; level shoulders, scapulae, and pelvis; symmetric arm/trunk relationship; unimpaired trunk mobility, lateral lift to the left and right; and normal heel walk and toe walk. *Id*. at 570, 573. On both dates, the lumbar extension was to twenty degrees, forward flexion was six inches from the floor, and there were no neuro-reflex or motor deficits. *Id*. On both dates, sensation was normal and Patrick's test was negative bilaterally. *Id*. Similarly, on both dates, cervical spine alignment and posture were normal, sensation in the arms and legs were normal, muscle strength was full in all muscle groups, and deep tendon reflexes were present and equal at +2. *Id*. By February 2013, Plaintiff was stable with medication and denied any side effects. *Id*. at 568.

E. Evidence Submitted to the Appeals Council After the ALJ Issued Her Decision

The only additional evidence considered by the Appeals Council was a brief submitted by Plaintiff's representative on his behalf. *Id*. at 5, 279-81.

DISCUSSION

A. Standard of Review

Unsuccessful claimants for DIB under the Act may bring an action in federal district court seeking judicial review of the Commissioner's denial of their benefits "within sixty days after the mailing . . . of notice of such decision or within such further time as the Commissioner of Social Security may allow." 42 U.S.C. § 405(g). A district court, reviewing the final

determination of the Commissioner, must determine whether the correct legal standards were applied *and* whether substantial evidence supports the decision. *See Schaal v. Apfel*, 134 F. 3d 496, 501 (2d Cir. 1998). The former determination requires the court to ask whether "the claimant has had a full hearing under the [Commissioner's] regulations and in accordance with the beneficent purposes of the Act." *Echevarria v. Sec'y of Health & Human Servs.*, 685 F. 2d 751, 755 (2d Cir. 1982) (internal citations and quotation marks omitted). The latter determination requires the court to ask whether the decision is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

The district court is empowered "to 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). A remand by the court for further proceedings is appropriate when "the Commissioner has failed to provide a full and fair hearing, to make explicit findings, or to have correctly applied the . . . regulations." *Manago v. Barnhart*, 321 F. Supp. 2d 559, 568 (E.D.N.Y. 2004) (internal citations omitted). A remand to the Commissioner is also appropriate "[w]here there are gaps in the administrative record." *Rosa v. Callahan*, 168 F. 3d 72, 83 (2d Cir. 1999) (quoting *Sobolewski v. Apfel*, 985 F. Supp. 300, 314 (E.D.N.Y. 1997)). ALJs, unlike judges, have a duty to "affirmatively develop the record in light of the essentially non-adversarial nature of the benefits proceedings." *Tejada v. Apfel*, 167 F. 3d 770, 774 (2d Cir. 1999) (internal citations and quotation marks omitted).

B. Disability Claims

To receive DIB, claimants must be disabled within the meaning of the Act. *See* 42 U.S.C. §§ 423(a), (d). Claimants establish disability status by demonstrating an "inability to engage in

any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Additionally, the claimant's impairment must have been of such severity that he is unable to do his previous work or, considering his age, education, and work experience, he could not have engaged in any other kind of substantial gainful work that exists in the national economy. 42 U.S.C. § 423(d)(2)(A). The claimant bears the initial burden of proof as to his or her disability status and is required to demonstrate disability status by presenting medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, as well as any other evidence the Commissioner may require. *See* 42 U.S.C. § 423(d)(5)(A); *see also Carroll v. Sec'y of Health & Human Servs.*, 705 F. 2d 638, 642 (2d Cir. 1983) (internal citations omitted).

ALJs must adhere to a five-step analysis in determining whether a claimant is disabled under the Act, as set forth in 20 C.F.R. § 404.1520.

The first step is determining whether the claimant is engaged in "substantial gainful activity." *See* 20 C.F.R. §§ 404.1520(a)(4)(i), (b). If the claimant is engaged in such activity, benefits are denied. If the claimant is not engaged in a "substantial gainful activity," the second step is evaluating whether the claimant has a "severe impairment" without reference to age, education, or work experience. *See* 20 C.F.R. §§ 404.1520(a)(4)(ii), (c). An impairment is "severe" when it significantly limits the claimant's physical or mental ability to conduct basic work activities. *See* 20 C.F.R. § 404.1520(c). If the claimant's impairment is not severe, benefits are denied. If the impairment is "severe," the third step is considering whether the identified impairment meets or is equivalent to an impairment listed in 20 C.F.R. § 404, Subpart P, Appendix 1 ("the Listings"). *See* 20 C.F.R. §§ 404.1520(a)(4)(iii), (d). If the ALJ determines that

the claimant's impairment meets or equals an impairment in the Listings, the analysis ends and the claimant is adjudicated disabled.

If the claimant does not have a listed impairment after the third step, the two remaining steps require the ALJ to make findings about the claimant's residual functional capacity ("RFC"). 20 C.F.R. § 404.1520(e). At the fourth step, the ALJ performs an analysis of the claimant's RFC in combination with the claimant's age, education, and work experience to determine if he or she can perform past relevant work. *See* 20 C.F.R. § 404.1520(a)(4)(iv), (f). If the claimant can still perform past relevant work, they are not considered disabled.

Finally, if the ALJ finds that the claimant cannot perform past relevant work, the fifth step requires the ALJ to assess whether the claimant could adjust to other work existing in the national economy, considering factors such as age, education, and work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the ALJ determines that the claimant can adjust and perform other existing work, he or she is not disabled. *See* 20 C.F.R. §§ 404.1520(a)(4)(v), (g). At the fifth and final step, the burden shifts to the Commissioner to demonstrate that the particular claimant could perform other work. *See Draegert v. Barnhart*, 311 F. 3d 468, 472 (2d Cir. 2002) (quoting *Carroll*, 705 F. 2d at 642).

C. The ALJ's Decision

On June 17, 2013, the ALJ issued a decision denying Plaintiff's claims. R. at 22-30. The ALJ followed the five-step process in making her determination that Plaintiff had the RFC to perform light work as defined in 20 C.F.R. § 404.1567(b), with additional limitations, and, therefore, was not disabled. *See Id*. at 25-28, 29. At the first step, the ALJ determined that Plaintiff had not engaged in substantial gainful activity since December 5, 2010, the alleged onset date of his disability. *Id*. at 24. At the second step, the ALJ found the following severe

impairments: left shoulder derangement with SLAP tear and tendinosis; status-post arthroscopic labral repair in January 2011 and status-post left shoulder manipulation and arthroscopy in August 2011; right pinky injury with triggering; status-post surgical releases in May, June, and August 2011; degenerative disc disease and herniated disc in the cervical spine; and history of disc bulge in the lumbosacral spine. *Id*. at 24. At the third step, the ALJ concluded that Plaintiff's impairment or combination of impairments did not meet or medically equal the severity of one of the impairments in the Listings. *Id*. at 25.

At the fourth step, the ALJ found that Plaintiff could perform light work as defined in 20 C.F.R. 404.1567(b), but with additional limitations:

> He [is] limited to lifting [ten] pounds, would need the opportunity to change position at [thirty] min. intervals, could only occasionally reach with his left arm, and could perform no repetitive movements with his right pinky.

Id. at 25. The ALJ wrote that she determined the RFC by considering the objective medical evidence in the record, opinion evidence, and reported symptoms to the extent those symptoms were reasonably consistent with the objective medical evidence. *Id*. at 25. While the ALJ determined that Plaintiff's injuries might have impacted his ability to lift and/or reach overhead with his left arm and perform repetitive motions with his right pinky, she rejected his claims that the injuries restricted his ability to sit, stand, and walk. *Id* at 27. The ALJ's conclusion was drawn from the fact that Plaintiff used a treadmill, denied back pain and/or stiffness, and had a normal gait. *Id*. In that same vein, the ALJ noted that in the function report from November 2011, Plaintiff did not report any problems walking. *Id*. Additionally, Plaintiff wrote that his sitting was impacted only insofar as having neck pain that necessitated switching positions. *Id*. Yet, at the hearing, Plaintiff claimed to be limited in sitting, walking, and standing to a maximum of thirty minutes, each. *Id*. The ALJ determined that nothing in the record could explain such a

supposed deterioration in Plaintiff's condition. *Id*. Furthermore, the ALJ questioned how substantial the changes to Plaintiff's left arm and right pinky were in light of his testimony that he regularly drove, transported his son, and engaged in childcare activities. *Id*. at 28.

As for the medical opinions, the ALJ divided Dr. Cushner's opinion into two parts, assigning different weight to each. Insofar as the assessment concerning the use of the left side, the ALJ gave that opinion "weight" because it was consistent with the treatment received. *Id*. at 28. In contrast, the ALJ gave "very little weight" to Dr. Cushner's assessment of Plaintiff's ability to sit, stand, and walk because it was unsupported by documentary or objective evidence. *Id*. The ALJ noted that Dr. Cushner's diagnosis of limited bilateral manipulative function was unsupported by the fact that Plaintiff only had an injury to the pinky on his non-dominant hand and, according to Plaintiff himself, he still could perform light actions with the injured hand. *Id*. The ALJ disregarded the opinions of Dr. Poltasch and Dr. Blanco because their opinions were generated while contemplating the New York State Workers' Compensation standards and had no bearing on evaluations under the Act. *Id*.

Ultimately, given the parameters of his RFC, the ALJ found that Plaintiff was unable to perform his past relevant work as a police officer or sergeant. *Id*. at 28. The ALJ noted that, if Plaintiff had the RFC to perform the full range of light work, a finding of "not disabled" would be directed by Medical-Vocational Rule 202.21, but Plaintiff had additional limitations for which she sought the opinion of the VE. *Id*. at 29. Relying upon the VE's testimony, the ALJ found three occupations (*i.e.*, "information clerk," "telephone seller," and "order seller") in the national and regional economies for an individual with Plaintiff's characteristics based upon the information contained in the *Dictionary of Occupational Titles*. *Id*. at 29.

At the fifth step, considering Plaintiff's age, education, work experience, RFC, and the VE's testimony, the ALJ concluded that "the claimant is capable of making a successful adjustment to other work that exists in numbers in the national economy." *Id*. at 29.

E. Analysis

The Commissioner moves for judgment on the pleadings, asking this Court to affirm the denial of Plaintiff's benefits on the grounds that the ALJ applied the correct legal standards to find that Plaintiff was not disabled and the factual findings were supported by substantial evidence. *See generally* Def. Mem. Plaintiff cross-moves for judgment on the pleadings, opposing the Commissioner's motion and seeking remand, arguing that: (1) the ALJ failed to properly evaluate the medical evidence; and (2) the ALJ improperly evaluated Plaintiff's credibility. *See* Pl. Mem. at 16-25. Upon review, the Court finds that the ALJ did not properly evaluate the medical evidence.

i. Unchallenged Findings

The ALJ's findings as to steps one, two, and three are unchallenged. *See generally* Def. Mem., Pl. Mem., Reply Mem. of Law in Further Supp. of Def.'s Mot. for J. on the Pleadings and in Opp. to Pl.'s Cross-Mot. for J. on the Pleadings ("Def. Reply Mem."), Dkt. Entry No. 19, Pl.'s Reply Mem. of Law in Further Opp. to Def.'s Mot. for J. on the Pleadings and in Further Supp. of Pl's Mot. for J. on the Pleadings ("Pl. Reply Mem."), Dkt. Entry No. 20. Upon a review of the record, the Court concludes that the ALJ's findings as to steps one through three are supported by substantial evidence.

ii. Failure to Weigh Treating Physician Opinions

Plaintiff asserts that the ALJ erred in weighing the opinions of Drs. Cushner, Poltasch, and Blanco. Pl. Mem. at 16-22. The Court agrees.

The Social Security Administration recognizes that treating physicians offer a "unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations" performed by other individuals. 20 C.F.R. § 404.1527(c)(2). That being the case, "If [the Social Security Administration] finds that a treating source's opinion on the issue(s) of the nature and severity of [a claimant's] impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques *and* is not inconsistent with the other substantial evidence in the record," it will be given controlling weight. *Id.* (emphasis added); *see also Selian v. Astrue*, 708 F.3d 409, 418 (2d Cir. 2013) (internal citations omitted).

In the event that the ALJ believes that the treating physician's opinion does not deserve controlling weight, he or she must consider: (1) the "[l]ength of the relationship and the frequency of examination;" (2) the "[n]ature and extent of the treatment relationship;" (3) the evidence supporting the opinion; (4) the consistency of the opinion "with the record as a whole;" (5) whether the physician is a specialist; and (6) other factors brought "to [the Social Security Administration's] attention, or of which [it] is aware, which tend to support or contradict the opinion." 20 C.F.R. §§ 404.1527(c)(2)(i)-(ii), (3)-(6); *see also Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004) (internal citations omitted). While specifically outlining the consideration of these factors is helpful to a reviewing court, "where the evidence of record permits us to glean the rationale of an ALJ's decision, we do not require that [she] have mentioned every item of testimony presented to [her] or have explained why [she] considered particular evidence unpersuasive or insufficient to lead [her] to a conclusion of disability." *Petrie v. Astrue*, 412 F. App'x 401, 407 (2d Cir. Mar. 8, 2011) (internal citations and quotation marks omitted). The ALJ *must*, however, "comprehensively set forth reasons for the weight assigned to a treating

physician's opinion." *Halloran*, 362 F.3d at 33; *see also* 20 C.F.R. § 404.1527(c)(2) (the Social Security Administration "will always give good reasons in [its] notice of determination or decision for the weight" given to treating physician opinions); *Schaal v. Apfel*, 134 F.3d 496, 505 (2d Cir. 1998). Under no circumstances can the ALJ "substitute [her] own expertise or view of the medical proof for the treating physician's opinion or for any competent medical opinion." *Greek v. Colvin*, 802 F.3d 370, 376 (2d Cir. 2015) (internal citations omitted).

a. Dr. Cushner

Turning first to Dr. Cushner's opinion, the ALJ gave it "very little weight" concerning the limitations on Plaintiff's ability to stand, sit, and walk. R. at 28. The reason for this, the ALJ writes, is that it is "unsupported by the documentary evidence" and there was no "objective data to support this portion of his assessment." *Id*. In addition, the ALJ observed that the "limited bilateral manipulative function" diagnosis proffered by Dr. Cushner conflicts with the reported injury only to one hand and Plaintiff's representation that he could still perform "light actions," but not "forceful" ones with that hand. *Id*. This represents the entirety of the ALJ's explanation as to the weight assigned to Dr. Cushner's opinion. *See Id*. at 22-30. None of these four explanations withstand review.

Charging that Dr. Cushner's opinion was "unsupported by the documentary evidence," it was incumbent upon the ALJ to elaborate on what, precisely, she relied upon in the record. "Under the treating physician rule, an ALJ may not reject a treating physician's opinion based solely on such conclusory assertions of inconsistency with the medical record." *Marchetti v. Colvin*, No. 13-CV-2581 (KAM), 2014 WL 7359198, at *13 (E.D.N.Y. Dec. 24, 2014); *see also Burgess v. Astrue*, 537 F.3d 117, 129 (2d Cir. 2008) (vacating and remanding in light of the ALJ's failure to proffer "good reasons" for discounting a treating physician's opinion). Similarly,

claiming that the rejection is based upon the absence of any "objective data" supporting the opinion is insufficient to discount a treating physician's opinion. As the Second Circuit has explained, "[a] treating physician's failure to include this type of support for the findings in his report does not mean that such support does not exist; he might not have provided this information in the report because he did not know that the ALJ would consider it critical to the disposition of the case." *Tavarez v. Barnhart*, 124 F. App'x 48, 50 (2d Cir. Mar. 2, 2005) (quoting *Rosa*, 168 F.3d at 80). The other two criticisms concerning the use of Plaintiff's hands have no discernable connection to Dr. Cushner's opinion vis-à-vis Plaintiff's ability to walk, stand, and sit.

Relatedly, there is no indication that the ALJ actually did, in fact, consider the various factors before disregarding Dr. Cushner's opinion. There is no mention of the evidence supporting the opinion, the consistency of the opinion with "the record as a whole," or whether Dr. Cushner is or is not a specialist. *See generally* R. at 22-30. Even more surprising is that the ALJ does not mention, anywhere, that Dr. Cushner apparently had been treating Plaintiff before the injury giving rise to his claim for DIB and, after that injury, saw him regularly every thirty days for almost two years before the first hearing date. *Compare Id*. at 22-30, *with Id*. at 311, 592, 599. While the ALJ might very well be correct that Dr. Cushner's opinion concerning Plaintiff's ability to walk, stand, and sit in light of the testimony and various reports, the ALJ must still consider the various factors *and* tender lucid, reasoned explanations for her conclusions based upon the evidence before her. On remand, the ALJ is to reassess the opinions of Dr. Cushner. In the event that she still disagrees with the treating physician's opinion, the ALJ is to consider specifically the factors and outline her reasoning in accordance with the Regulations.

b. Dr. Poltasch and Dr. Blanco

In contrast to the opinion offered by Dr. Cushner, the ALJ simply rejected the opinions of Dr. Poltasch and Dr. Blanco out of hand because those opinions, offered in the context of New York State Workers' Compensation, "were made for a different agency and based on different rules, and therefore intrude on an issue reserved to the Social Security Administration." R. at 28. Plaintiff argues that the ALJ "is not free to ignore medical opinion evidence such as that offered by Drs. Polatsch and Blanco." Pl. Mem. at 20. The Commissioner counter that assessments rendered in connection with New York State Workers' Compensation are not binding on the Commissioner. Def. Reply Mem. at 5. The Commissioner argues that "the ALJ was charged [with] analyz[ing] the opinions of record in accordance with the regulations, and draw[ing] her own conclusions as to whether they were probative." *Id*. Ironically, it is the very argument advanced by the Commissioner that explains why the ALJ erred in disregarding the opinions of Dr. Poltasch and Dr. Blanco.

Over forty years ago, the Second Circuit clearly held that "[w]hile the determination of another governmental agency that a social security disability benefits claimant is disabled is not binding on the Secretary, it is entitled to *some weight* and *should be considered*." *Cutler v. Weinberger*, 516 F.2d 1282, 1286 (2d Cir. 1975) (internal citations omitted) (emphasis added). Currently, 20 C.F.R. § 404.1527(2)(d)(1) explains that, while the Social Security Administration makes the final determination as to statutory definition of disability, it "review[s] all of the medical findings and other evidence that support a medical source's statement that you are disabled." Even the opinion cited by the Commissioner declares that the "rules provide that adjudicators must always carefully consider medical source opinions about any issue, including opinions about issues that are reserved to the Commissioner." Titles II & XVI: Med. Source Ops.

on Issues Reserved to the Comm'r, SSR 96-5P, 1996 WL 374183, at *2 (Soc. Sec. Admin. Jul. 2, 1996). Indeed, "[t]he adjudicator is required to evaluate all evidence in the case record that may have a bearing on the determination or decision of disability, including opinions from medical sources about issues reserved to the Commissioner." *Id*. at *3.

Courts in this District have held that, while an opinion of disability rendered for a different agency cannot bind the Commissioner, an ALJ, nevertheless, is compelled to consider the physician's statements, address the evidence in the treating physician's record, and explain his or her conclusions. *See Smith v. Colvin*, No. 14-CV-5868 (ADS), 2016 WL 5395841, at *18 (E.D.N.Y. Sept. 27, 2016) (interal citations omitted; *DiCarlo v. Colvin*, No. 15-CV-258 (ADS), 2016 WL 4734633, at *16 (E.D.N.Y. Sept. 9, 2016); *see also Davies v. Astrue*, No. 08-CV-1115 (GLS), 2010 WL 2777063, at *4 (N.D.N.Y. Jun. 17, 2010), *adopted by* 2010 WL 2777947 (N.D.N.Y. Jul. 14, 2010) ("Thus, it is clear from the ALJ's decision, that she did not ignore the evidence submitted by [the treating physician], despite the fact that any opinions regarding [p]laintiff's ability to work were created in a Workers' Compensation context.") (internal citation omitted).

Ultimately, the problem encountered by the Commissioner is not that the ALJ improperly discharged her duties. The problem is that the decision suggests the ALJ completely abdicated her duty by impulsively dismissing the opinions for their ultimate conclusions in a single sentence. R. at 28. Although the ALJ need not consider ultimate conclusions of Dr. Poltasch and Dr. Blanco based on New York State Workers' Compensation standards, she cannot indiscriminately discount their assessments. Such a cursory dismissal of these treating physicians' assessments cannot be countenanced by the Regulations, the precedent, or the Court. As with Dr. Cushner, the ALJ's treatment of these treating physicians' opinions require remand.

On remand, the ALJ is to reevaluate the substantive underpinnings and evidence cited in the records of Dr. Poltasch and Dr. Blanco. In assigning and justifying the weight of those opinions, the ALJ must outline her reasoning in accordance with the Regulations.

iii. Plaintiff's Remaining Argument

Plaintiff's remaining argument is that the ALJ did not properly evaluate his credibility. *See* Pl. Mem. at 22-25. However, because the Court has found that remand is appropriate to address legal error in the ALJ's assessment of the treating physicians' opinions, it need not and does not consider the remaining argument. "Where there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles." *Johnson v. Bowen*, 817 F.3d 983, 986 (2d Cir. 1987); *see also Rosa*, 168 F.3d at 82 n.7 ("Because we have concluded that the ALJ was incorrect in her assessment of the medical evidence, we cannot accept her conclusion regarding . . . credibility); *Rivera v. Comm'r of Soc. Sec.*, 728 F. Supp. 2d 297, 331 (S.D.N.Y. 2010) ("Because I find legal error requiring remand, I need not consider whether the ALJ's decision was otherwise supported by substantial evidence.") (internal citations omitted). Furthermore, the reassessment of the treating physicians' opinions on remand will necessarily result in a reassessment of the RFC and Plaintiff's credibility. *See, e.g.*, *Wilson v. Colvin*, 107 F. Supp. 3d 387, 407 n.34 (S.D.N.Y. 2015) (since the ALJ failed to develop the record, the Commissioner must "necessarily" reassess a claimant's RFC and credibility on remand); *Ulloa v. Colvin*, No. 13-CV-110079, 2015 WL 110079, at *15 (S.D.N.Y. Jan. 7, 2015).

CONCLUSION

For the reasons set forth above, the Commissioner's motion for judgment on the pleadings is denied; Plaintiff's cross-motion for judgment on the pleadings is granted, the decision of the Commissioner is reversed, and this matter is remanded to the Commissioner pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Opinion.

If Plaintiff's benefits remain denied, the Commissioner is directed to render a final decision within sixty (60) days of Plaintiff's appeal, if any. *See Butts v. Barnhart*, 388 F.3d 377, 387 (2d Cir. 2004) (suggesting procedural time limits to ensure speedy disposition of Social Security cases upon remand by district courts).

SO ORDERED.

Dated: Brooklyn, New York
September 30, 2016

/s/
DORA L. IRIZARRY
Chief Judge