UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JUAN GENAO,

Plaintiff,

-against-

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

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OPINION AND ORDER
15-cv-684 (DLI)

DORA L. IRIZARRY, Chief Judge:

On July 3, 2012, Plaintiff Juan C. Genao ("Plaintiff") filed an application for Social Security disability insurance benefits under the Social Security Act, alleging disability beginning November 30, 2011. (*See* Certified Administrative Record ("R."), Dkt. Entry No. 16 at 61, 101-02.) On August 28, 2012, Plaintiff's application was denied (*Id.* at 62-65), and he timely requested a hearing. (*Id.* at 69-70.) On July 25, 2013, Plaintiff appeared with his representative before Administrative Law Judge Seymour Rayner (the "ALJ"). (*Id.* at 29-60.) By decision dated August 22, 2013, the ALJ concluded that Plaintiff was not disabled within the meaning of the Act. *Id.* at 12-21 (the "Decision"). On December 10, 2014, the Decision became the Commissioner's final decision when the Appeals Council denied Plaintiff's request for review. (*Id.* at 1-5.)

On February 11, 2015, Plaintiff filed this appeal seeking judicial review of the denial of benefits, pursuant to 42 U.S.C. § 405(g). (*See* Complaint, Dkt. Entry No. 1.) The Commissioner moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, to affirm the denial of benefits. (*See* Mem. of Law in Supp. of Def.'s Mot. for J. on the Pleadings ("Defendant's Motion" or "Def. Mot."), Dkt. Entry No. 12.) Plaintiff cross-moved

for judgment on the pleadings, seeking reversal of the Commissioner's decision or, alternatively, remand to the Social Security Administration ("SSA") for further proceedings. (*See* Mem. of Law in Supp. of Pl.'s Cross-Mot. ("Pl. Cross-Mot."), Dkt. Entry No. 14.) For the reasons set forth below, the Commissioner's motion for judgment on the pleadings is granted and Plaintiff's motion for judgment on the pleadings is denied. The instant appeal is dismissed.

BACKGROUND[1]

A. Vocational and Non-Medical Evidence

Born in March 1972, Plaintiff was 39 years at the onset of his back injury.[2] (R. at 216.) The injury occurred on November 30, 2011, when Plaintiff was moving boxes inside a United Parcel Service ("UPS") truck. (R. at 142.) Plaintiff, after completing high school, had worked as a UPS truck driver for fifteen years prior to the injury. (*Id.* at 32, 36, 140-41.)

In a July 27, 2012 function report, Plaintiff reported that he lived with his wife and children. (R. at 129.) Plaintiff indicated that he did not fix his own meals and did not do household chores because he is unable to lift, push or pull heavy objects, and only went outside for therapy. (*Id.* at 131-32.) Plaintiff reported being able to take care of his personal hygiene, drive a car, use a computer, go shopping sometimes, and socialize with friends and family. (*Id.* at 132-34, 46-47, 49-50, 53-57.)

B. Medical Evidence Before the ALJ

1. Medical Treatment

X-rays of Plaintiff's lumbar spine taken December 2, 2011 revealed early degenerative joint disease with no acute fracture, dislocation, or lesion, no evidence of disc space narrowing,

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[1] Having thoroughly and carefully reviewed the administrative record, the Court finds the Commissioner's factual background accurately represents the relevant portions of the record. Accordingly, the background information that follows is taken substantially from the "Administrative Record" section of the Defendant's motion.

[2] As such, Plaintiff was a "younger person" as defined in 20 C.F.R. § 404.1563(c).

and properly aligned osseous structures. (R. at 201-02.)

From December 2, 2011, through June 28, 2012, Plaintiff was treated by chiropractor Dr. Dennis Long, as part of his Workers' Compensation claim. (R. at 266-372.) Dr. Long diagnosed displacement of intervertebral discs, thoracic or lumbosacral neuritis, and nonallopathic lesions of the thoracic and pelvic region. (*Id.*) He opined that Plaintiff was disabled temporarily and totally from his previous work. (*Id.*)

Plaintiff was evaluated by Dr. F. David Hannanian, a neurologist, on December 29, 2011. (R. at 216-18.) Plaintiff complained of back pain with decreased range of motion and pain radiating into his legs. Physical examination showed no motor weakness in his arms and legs and normal gait and coordination. (*Id.* at 217.) Deep tendon reflexes were bilaterally equal at +2, except for biceps and ankle jerk, which were +1 bilaterally. (*Id.*) There was decreased sensation to light touch and pinprick in the L5-S1 dermatomes. (*Id.*) The doctor noted spasm and tenderness in the lumbar paraspinal muscles with decreased range of motion of the lumbar spine by five to ten degrees. (*Id.*) Dr. Hannanian diagnosed paralumbar myofascitis and radiculitis, and ruled out lumbar disc herniation. (*Id.*) He prescribed Neurontin, Flexeril, and Naproxen, and recommended diagnostic testing, continued physical therapy and chiropractic treatment. (*Id.* at 217; *see Id.* at 199.) Prognosis was guarded. (*Id.* at 218.)

A magnetic resonance imaging ("MRI") of the lumbosacral spine conducted on January 4, 2012, revealed muscular spasm, disc bulges at L2-L3, L3-L4, L4-L5, and L5-S1, with neural foraminal narrowing and lateral recess stenosis at L4-5. (R. at 228.)

Plaintiff followed up with Dr. Hannanian on May 3, 2012, complaining of back pain, restricted movement, and tingling and numbness radiating to his legs. (R. at 220-21.) A physical examination revealed no motor weakness in his arms and legs, normal gait, normal sensation,

and symmetrical reflexes. (*Id.* at 220.) The doctor noted spasm and tenderness in the lumbar paraspinal muscles with decreased range of motion of the lumbar spine. (*Id.*) He diagnosed traumatic thoracic myofascitis, lumbar strain, and radiculitis, and ruled out lumbar disc herniation. (*Id.* at 221.) The doctor prescribed pain medication, recommended diagnostic testing, and continued physical therapy and chiropractic treatment. (*Id.*; *see Id.* at 198.) Prognosis was guarded. (*Id.* at 221.) A nerve conduction study (NCV) and electromyogram (EMG) of the arms and legs, conducted that same day, revealed evidence of bilateral L5-S1 radiculopathy. (*Id.* at 194-97, *repeated at Id.* at 222-25.)

Plaintiff next saw Dr. Hannanian on June 28, 2012, complaining of back pain, restricted movement, and tingling radiating to his legs. (R. at 192-93, 219.) A physical examination revealed no motor weakness in his arms and legs, normal gait, normal sensation, and symmetrical reflexes. (*Id.* at 219.) The doctor noted spasm and tenderness in the lumbar paraspinal muscles with decreased range of motion of the lumbar spine. (*Id.*) He diagnosed traumatic thoracic myofascitis, lumbar strain, and radiculitis, and ruled out lumbar disc herniation. (*Id.*) The doctor prescribed Voltaren. (*Id.* at 193.)

Dr. Hannanian wrote a letter the same day, June 28, 2012, in which he stated that Plaintiff should be excused from work for one month, and during that month he should not engage in heavy lifting, pushing, pulling, prolonged sitting, standing, and bending. (R. at 192.) Dr. Long signed a letter dated the following day, June 29, 2012, which was substantially similar to Dr. Hannanian's letter. (*Compare Id.* at 200, *with Id.* at 192.)

On July 16, 2012, Plaintiff had an initial evaluation with Dr. Nunzio Saulle, a physical medicine and rehabilitation specialist. (R. at 247-49, *repeated at Id.* at 394-96.) The doctor reviewed Plaintiff's medical history, including his description of his back injury. (*Id.* at 247.)

Dr. Saulle stated that Plaintiff had not gone to the emergency room, but had been receiving regular chiropractic treatment, and was now transitioning from chiropractic treatment to physical therapy with Dr. Saulle's office. (*Id.*) Plaintiff complained of intermittent back pain, sometimes radiating to his legs, and occasional neck pain. (*Id.*) The doctor reviewed Plaintiff's diagnostic testing. (*Id.*) A physical examination revealed: reduced range of motion of the neck, with no tenderness; reduced range of motion of the back, with tenderness in the lumbar paraspinal muscles; positive straight leg raising tests; full muscle strength; symmetrical reflexes; and normal sensation. (*Id.* at 248.) The doctor diagnosed lumbar disc bulges with radiculopathy and a cervical strain/sprain. (*Id.* at 249.) He recommended physical therapy and home exercise, and opined that Plaintiff was disabled from returning to his previous work for one month. (*Id.* at 229, 249.)

That same day, on July 16, 2012, Plaintiff underwent a physical therapy evaluation. (R. at 264.) He complained of lower back pain, and exhibited paraspinal tightness and pain moving his "trunk." (*Id.*) Muscle weakness also was noted. (*Id.*)

Plaintiff attended physical therapy from July 16 through October 15, 2012. (R. at 240-42, 250-63; *see Id.* at 382-93, 402-06, 409-17, 420-30.) Plaintiff complained of lower back pain, received massage therapy, hot/cold packs, treatment with a transcutaneous electrical nerve stimulation ("TENS") unit, and therapeutic exercise. (*Id.* at 240-42, 250-63.)

Plaintiff returned to Dr. Saulle on August 20, 2012, complaining of lower back pain that sometimes radiated to his legs. (R. at 245-46.) Plaintiff stated that his pain had "improved somewhat" since his last evaluation with the doctor, but that his standing and sitting tolerance are comparable to the prior evaluation. (*Id.* at 245.) A physical examination revealed: reduced range of motion of the neck, with no tenderness; reduced range of motion of the back, with

tenderness in the lumbar paraspinal muscles; full muscle strength; symmetrical reflexes; and normal gait and balance. (*Id.*) The doctor diagnosed lumbar disc bulges with radiculopathy and a cervical strain/sprain. (*Id.*) He recommended physical therapy and home exercise, prescribed pain medication, and opined that Plaintiff was temporarily disabled from returning to his previous work. (*Id.* 246.)

On August 30, 2012, Plaintiff was seen by Dr. Hannanian complaining of back pain, restricted movement, and tingling radiating to his legs. (R. at 226-27.) The doctor reviewed Plaintiff's MRI results. (*Id.* at 226.) A physical examination revealed no motor weakness in his arms and legs, normal gait, normal sensation, and symmetrical reflexes. (*Id.*) The doctor noted spasm and tenderness in the lumbar paraspinal muscles with decreased range of motion of the lumbar spine. (*Id.* at 226-27.) Plaintiff's range of motion had improved since his previous visit. (*Compare Id.* at 227, *with Id.* at 219.) The doctor diagnosed traumatic thoracic myofascitis, lumbar strain, and radiculitis, and lumbar disc bulges with neural foraminal narrowing. (*Id.* at 227.) The doctor prescribed Neurontin, Naproxen, and Flexeril, and recommended continuing with physical therapy and chiropractic treatments. (*Id.*) Prognosis was guarded. (*Id.)*

On September 17, 2012, Plaintiff returned to Dr. Saulle, complaining of lower back pain that occasionally radiated to his legs. (R. at 243-44, *repeated at Id.* at 418-19.) Plaintiff stated that his pain had continued to improve. (*Id.* at 243.) A physical examination revealed reduced range of motion of the back, with tenderness in the lumbar paraspinal muscles; full muscle strength; symmetrical reflexes; and normal gait and balance. (*Id.*) The doctor diagnosed lumbar disc bulges with radiculopathy and a cervical strain/sprain. (*Id.*) He recommended physical therapy and home exercise and opined that Plaintiff remained disabled from returning to his previous work. (*Id.*)

From November 17 to 28, 2012, Plaintiff was treated by chiropractor Dr. Joseph Campisi, as part of his Workers' Compensation claim. (R. at 374-78.) Plaintiff complained of pain and weakness in his back and legs, numbness/tingling in his legs, and stiffness in his back. (*Id.* at 375.) A physical examination revealed decreased thoracic/lumbar spine range of motion, pain/tenderness in the back, weakness in the lumbar paraspinals, decreased sensation at L5 dermatome bilaterally, muscle spasms in the back, and normal reflexes and gait. (*Id.* at 377.) Dr. Campisi diagnosed subluxation in the lumbar spine, sciatic neuritis, and muscle spasms. (*Id.* at 374.) He opined that Plaintiff was temporarily and totally disabled from his previous work. (*Id.* at 377-78.) He recommended chiropractic spinal adjustments, use of a cervical pillow, treatment with a TENS unit, ice pack, and lumbar support. (*Id.*)

On November 30, 2012, Dr. Campisi completed a report regarding his treatment of Plaintiff. (R. at 379-81.) Dr. Campisi stated that Plaintiff complained of back pain radiating into his legs and feet with numbness and tingling. (*Id.* at 379.) On physical examination, Plaintiff had decreased range of motion in the thoraco-lumbar spine with pain, tenderness on palpation in the mid to lower back and full muscle strength except for four-out-of-five strength in the hip flexion. (*Id.* at 379-80.) Plaintiff also had positive straight leg raising tests, symmetrical reflexes and decreased sensation at the L5 dermatome bilaterally. (*Id.*) Dr. Campisi discussed x-rays of Plaintiff's spine that revealed lateral flexion malposition at T10-11, decreased disc space at L4-S1, subluxation complex at L4-S1. (*Id.* at 380.) Dr. Campisi diagnosed vertebral subluxation complex in the thoracic and lumbosacral spine associated with lumbar radiculitis and paravertebral muscle spasms. (*Id.*) He recommended chiropractic spinal adjustments and supportive therapy. (*Id.*) The short-term prognosis of improving Plaintiff's activities of daily

living was good, but the chance of improving Plaintiff's functional capacity to pre-injury status was guarded. (*Id.* at 381.)

On January 4, 2013, Dr. Campisi wrote a letter stating that Plaintiff was being treated for injuries to his back and was unable to perform his normal work duties. (R. at 265.) Dr. Campisi also stated that Plaintiff had a total permanent disability beginning on December 1, 2011. (*Id.*)

2. Consultative Examination

Dr. Corey Hunter conducted a consultative orthopedic examination of Plaintiff on August 6, 2012. (R. at 203-06.) Plaintiff reported that his symptoms, including low back pain subsequent to five bulging discs in his low back and muscle spasms, were a result of a workplace accident in November 2011. (*Id.* at 203.) Dr. Hunter reported that Plaintiff had not seen a surgeon, had not been hospitalized, had not seen a pain management specialist, had not received any epidurals for pain, and was only under the care of a chiropractor and a physical therapist. (*Id.*) Plaintiff also stated that his only medications were Naproxen, an anti-inflammatory drug, and Cyclobenzaprine, a muscle relaxant. (*Id.*) He stated that he lived with his family, and was able to shower, bathe, dress himself, and watch television. (*Id.*) Plaintiff had no acute distress, normal gait and station, could heel and toe walk without difficulty, squat fully, and had intact hand and finger dexterity. (*Id.* at 204-05.) In addition, Plaintiff had full grip strength, full range of motion of the cervical, thoracic, and lumbar spines, with no spasms and no trigger points as well as full range of motion of the arms and legs, with full muscle strength, normal reflexes and sensation, and no muscle atrophy. (*Id.*) Straight leg raising tests were negative. (*Id.* at 204.) The doctor diagnosed chronic low back pain with radiculopathy and hypertension. (*Id.* at 205.) Prognosis was stable. Dr. Hunter opined that Plaintiff did not appear to have any physical limitations. (*Id.*)

C. Hearing Before the ALJ

At the July 25, 2013 hearing before the ALJ, Plaintiff testified that he can dress himself, but experiences some discomfort when putting on pants and shoes. (*Id.* at 46-47.) Plaintiff also noted that he has a bar in the shower that he has to hold when bathing. (*Id.* at 47-48.) Plaintiff reported that he wears a hard back brace every day for three to four hours. (*Id.* at 39-40.)

At the hearing, Plaintiff stated that after sustaining the injury to his back, he saw a neurologist and received chiropractic treatment and physical therapy. (R. at 41-45.) He did not visit the emergency room, and never was hospitalized. (*Id.* at 41.) Plaintiff testified that he has to take pain medicine every day. (*Id.* at 39.) Plaintiff provided conflicting information regarding the amount of time he is able to walk and sit, testifying, for example, that he could walk for thirty minutes at a time, but later stating that he could only walk one block. (*Compare Id.* at 59 *with Id.* at 35.) In addition, Plaintiff testified that he could sit for a half hour, but at another point stated that he could only sit for five-to-ten minutes. (*Compare Id.* at 59 *with Id.* at 33.) Plaintiff also reported traveling to the Dominican Republic by plane and to Boston by car. (*Id.* at 51-53.)

D. Evidence Submitted to Appeals Council After ALJ Issued his Decision

Plaintiff submitted several documents to the Appeals Council with his request for review of the Decision. (*See* R. at 1, 4-5.) Those documents related to the period at issue, and, as such, the Appeals Council formally added them to the administrative record. (*See Id.* at 1, 4-5, 382-439.) Some of the documents were duplicative of those already in the record. (*Id.* at 382-96, 403-06, 409-30.) The remainder are summarized below.

On June 21, 2012, Dr. Edward Welland conducted an independent medical examination of Plaintiff at the request of the Workers' Compensation Board. (R. at 431-39.) Dr. Welland noted that Plaintiff was taking Naproxen, and a muscle relaxant, Flexeril. (*Id.* at 432.) The

doctor stated that, as a neurologist, he was not qualified to evaluate treatment from a chiropractor. (*Id.*) He opined that Plaintiff did have neuromuscular deficiencies due to his back injury and that Plaintiff should continue with physical therapy for six weeks. (*Id.* at 433.) He further opined that there was no clinical correlation between the MRI findings and Plaintiff's symptomology. (*Id.*) Dr. Welland described the MRI findings as "incidental." (*Id.*)

Plaintiff continued physical therapy from October 15 through November 6, 2012. (R. at 397-406.) On October 15, 2012, Plaintiff returned to Dr. Saulle, complaining of intermittent lower back pain. (*Id.* at 407-08.) Plaintiff stated that his pain had continued to improve, and that his pain no longer radiated into his legs. (*Id.* at 407.) A physical examination revealed reduced range of motion of the back, with tenderness in the right lumbar paraspinal muscles, full muscle strength, symmetrical reflexes, and normal gait. The doctor diagnosed lumbar disc bulges with radiculopathy. (*Id.*) He recommended continuing with physical therapy and home exercise, and opined that Plaintiff remained disabled from returning to his previous work. (*Id.*)

DISCUSSION

A. Standard of Review

Unsuccessful claimants for disability benefits 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 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). 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) (citations omitted).

B. Disability Claims

To receive disability benefits, 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). The claimant bears the initial burden of proof on 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. 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).

ALJs must adhere to a five-step inquiry to determine whether a claimant is disabled under the Social Security Act as set forth in 20 C.F.R. § 404.1520. If at any step the ALJ finds that the claimant is either disabled or not disabled, the inquiry ends there. First, the claimant is not disabled if he or she is working and performing "substantial gainful activity." 20 C.F.R. § 404.1520(b). Second, the ALJ considers whether the claimant has a "severe impairment," without reference to age, education and work experience. Impairments are "severe" when they significantly limit a claimant's physical or mental ability to conduct basic work activities. 20 C.F.R. § 404.1520(c). Third, the ALJ will find the claimant disabled if his or her impairment meets or equals an impairment listed in 20 C.F.R. § 404, Subpart P, Appendix 1 ("the Listings"). *See* 20 C.F.R. § 404.1520(d).

If the claimant does not have a listed impairment, the ALJ makes a finding about the claimant's residual functional capacity ("RFC") in steps four and five. 20 C.F.R. § 404.1520(e). In the fourth step, the claimant is not disabled if he or she is able to perform past relevant work. 20 C.F.R. § 404.1520(f). Finally, in the fifth step, the ALJ determines whether the claimant could adjust to other work existing in the national economy, considering factors such as age, education, and work experience. If so, the claimant is not disabled. 20 C.F.R. § 404.1520(g).

C. The Decision

On August 22, 2013, the ALJ issued a decision denying Plaintiff's claims. (R. at 12-25.) The ALJ followed the five-step procedure in determining that Plaintiff had the RFC to perform sedentary work as defined in 20 C.F.R. § 404.1567(a) and, therefore, was not disabled. (R. at 17,

21.) At the first step, the ALJ determined that Plaintiff had not engaged in substantial gainful activity since, November 30, 2011, the alleged onset date. (*Id.* at 17.) At the second step, the ALJ found the following severe impairment: disorder of the lumbar spine. (*Id.*) The ALJ noted that Plaintiff had hypertension, but no evidence in the record indicated that the condition required treatment, or had caused even a minimal limitation of function. (*Id.*) At the third step, the ALJ concluded that Plaintiff's impairment did not meet or equal an impairment included in the Listings. (*Id.*) The ALJ specifically looked at Listing 1.00 (musculoskeltal) and found Plaintiff did not meet any of the listed criteria. (*Id.*)

At the fourth step, the ALJ found that Plaintiff was unable to perform "his past relevant work as a delivery driver, which requires a medium to heavy level of exertion," but determined that Plaintiff had an RFC that enabled him to perform sedentary work as defined in 20 C.F.R. § 404.1567(a). (R. at 17-20.) In support of the RFC determination, the ALJ pointed to the "weight of the evidence" supporting an RFC to perform sedentary work and on "inherent contradictions" within Plaintiff's testimony. (*Id.* at 18-20.) Specifically, the ALJ found that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms," but "the [Plaintiff's] statements concerning the intensity, persistence and limiting effects of these symptoms [were] not entirely credible." (*Id.*)

At the fifth step, "considering [Plaintiff's] age, education, work experience, and residual functional capacity," the ALJ found that "there are jobs in the national economy that [Plaintiff] can perform" according to the applicable Medical-Vocational Guidelines at 20 C.F.R. § 404.1569. (R. at 21.)

D. Analysis

The Commissioner moves for judgment on the pleadings, seeking affirmance of the

denial of Plaintiff's benefits on the grounds that the ALJ applied the correct legal standards to determine that Plaintiff was not disabled and that the factual findings are supported by substantial evidence. (*See generally* Def. Mot.) Plaintiff cross-moves for judgment on the pleadings, contending that the ALJ failed to: (1) obtain a medical expert to evaluate whether Plaintiff satisfied Listings 1.08, 11.08, and 4.00; and (2) obtain a vocational expert to evaluate Plaintiff's RFC. (*See* Pl. Cross-Mot. at 2-3.) Alternatively, Plaintiff seeks remand for a new hearing with a vocational and medical expert to provide testimony. (*Id.* at 3.)

Upon review of the record, the Court finds that the ALJ applied the correct legal standards and his decision is supported by substantial evidence. Plaintiff's arguments to the contrary are meritless.

1. Evidence Submitted to the Appeals Council Would Not Alter the Decision.

As an initial matter, the Court recognizes that the administrative record before this Court includes evidence submitted by Plaintiff directly to the Appeals Council, even though such evidence was not initially before the ALJ. *See Perez v. Chater*, 77 F.3d 41, 45-46 (2d Cir.1996). The Court notes that the evidence submitted to the Appeals Council by Plaintiff does not alter the conclusion that Plaintiff is not disabled within the meaning of the Act. As discussed above (*see* Background § D, p. 9-10, *supra*), the additional information submitted consists of: (i) records from an independent medical examination conducted at the request of the Workers' Compensation Board, by Dr. Welland (R. at 431-39.); and (ii) records from an October 2012 examination conducted by Dr. Saulle (R. at 397-406.). As these records are consistent with Plaintiff's other medical files, in this Court's view, they would not have changed the ALJ's opinion. If anything, the new information detracts from Plaintiff's arguments as Dr. Saulle's

examination revealed that Plaintiff's back pain had continued to improve and was no longer radiating to his legs. (*Id.* at 407.)

2. Unchallenged Findings

The ALJ's findings as to steps one and two are unchallenged. (*See generally* Pl. Cross-Mot.) Upon review of the record, the Court concludes that the ALJ's findings at steps one and two are supported by substantial evidence.

3. Listing-Level Impairments

It is Plaintiff's burden to establish that his impairments satisfy any of the criteria in the Listings. *See Sullivan v. Zebley*, 493 U.S. 521, 530 (1990) ("For a claimant to show that his impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify.") (emphasis in original). Here, Plaintiff argues his medical condition satisfies the criteria of Listings 1.08, 11.08, and 4.00, and the ALJ failed to consider the applicability of these Listings because no medical expert was retained to do so. (Pl. Cross-Mot. at 2.) However, Plaintiff does not cite to any evidence that he has met the criteria in the Listings, and does not explain why Plaintiff believes a medical expert was required to assess the issues he raises. As such, the Court finds Plaintiff's argument unavailing.

First, contrary to Plaintiff's assertion, the Record reflects that the ALJ did consider Listing 1.08. Specifically, the Decision states that "listed impairments under section 1.00 (musculoskeletal) were considered," and that "the requisite criteria for the relevant listings are absent from the medical record." (R. at 17.) A review of the medical record supports the ALJ's determination.

The criteria for Listing 1.08 are "soft tissue injury . . . of an upper or lower extremity,

trunk, . . . under continuing surgical management, as defined in 1.00M, directed toward the salvage or restoration of major function, and such major function was not restored or expected to be restored within 12 months of onset." 20 C.F.R. § Pt. 404, Subpt. P, App. 1, § 1.08.[3] There is no evidence in the Record that would support a finding that Plaintiff's medical condition satisfies Listing 1.08. To the extent the back injuries reflected in the record would constitute a soft tissue injury, Plaintiff has not undergone any surgical procedure "toward the salvage or restoration of major function." 20 C.F.R. § Pt. 404, Subpt. P, App. 1, § 1.08. Indeed, the record is lacking any documentation, such as "a copy of the operative notes and available pathology reports," that should have been submitted to substantiate a surgical procedure. *See* 20 C.F.R. § Pt. 404, Subpt. P, App. 1, § 1.00P. It is clear from the record that Plaintiff had never seen a surgeon, been hospitalized, seen a pain management specialist or received any epidurals for pain. (R. at 203.) Moreover, when Plaintiff described his medical treatment at the hearing, he never mentioned having surgery, indicating only that he had consulted with a neurologist and had received treatment from chiropractors and physical therapists. (R. at 41-45.) Therefore, the absence of any medical evidence that Plaintiff has undergone any surgery for his conditions supports the ALJ's finding that Plaintiff's condition did not satisfy Listing 1.08.

Second, the ALJ did not err by failing to consider Listing 11.08. In order to satisfy Listing 11.08, Plaintiff must have "[s]pinal cord or nerve root lesions, due to any cause with disorganization of motor function as defined in 11.04B." 20 C.F.R. § Pt 404, Subpt. P, App. 1, § 11.08. Listing 11.04B, in turn, describes disorganization of motor function as a condition "resulting in sustained disturbance of gross and dexterous movements, or gait and station,"

[3] "Under continuing surgical management" is defined as "surgical procedures and any other associated treatments related to the efforts directed toward the salvage or restoration of functional use of the affected part. It may include such factors as post-surgical procedures, surgical complications, infections, or other medical complications, related illnesses, or related treatments that delay the individua's attainment of maximum benefit from therapy." 20 C.F.R. § Pt. 404, Subpt. P, App. 1, § 1.00M.

taking "the form of paresis or paralysis, tremor or other involuntary movements." *Id.* at § 11.04B; *see Id.* at § 11.00C. Plaintiff contends that Listing 11.08 applies, stating that "the positive lower EMG study . . . supports a finding of meeting or equaling 11:08." (Pl. Cross-Mot. at 2.) Plaintiff appears to refer to the diagnoses made by a chiropractor, Dr. Long, who diagnosed Plaintiff with "nonallopathic lesions of the thoracic region." (*See* R. at 267-372.)

As an initial matter, the Commissioner disputes that nonallopathic lesions are the types of lesions referenced in Listing 11.08, arguing that the term "nonallopathic lesion" is used exclusively by chiropractors and has no medical meaning. (Reply Mem. of Law in Supp. of Def.'s Mot. for J. on the Pleadings, Dkt. Entry No. 15, at 3.) While the Commissioner appears to be correct,[4] the Court need not interpret the term "lesion" in order to find that the ALJ was not required to assess Listing 11.08 because there is no medical evidence in the Record suggesting Plaintiff meets the standard for "disorganization of motor function." Rather, the record contains assessments from medical doctors noting Plaintiff's normal gait and station. (*See e.g.*, R. at 204 ("The claimant appeared to be in no acute distress. Gait normal. Can walk on heels and toes without difficulty. Squat full. Station normal. Used no assistive device. Needed no help

[4] *Compare Villarreal v. Colvin*, 2015 WL 6759503, at *6 n.35 (S.D.N.Y. Nov. 5, 2015) (explaining that "'[n]onallopathic lesion' is a phrase commonly used in the United States and Canada instead of 'subluxation' as a diagnosis. It refers to a condition of the spinal column when one or more of the bones in the spine move out of position and create pressure on, or irritate spinal nerves") (citations omitted) *with Lloyd v. Colvin*, 2015 WL 5690817, at *4 n.8 (W.D. Va. Sept. 28, 2015) (defining the term "lesion" in the context of "spinal cord lesions" as "any pathological or traumatic discontinuity of tissue or loss of function of a part") (citation omitted). "Subluxation" is also one of the diagnoses of Plaintiff made by another chiropractor, Dr. Campisi. (R. at 374.)

Moreover, because Dr. Long is a chiropractor, the regulations to not permit Plaintiff to use his assessment as a medical opinion to establish an impairment, although it can be used to establish the severity of an established impairment. 20 C.F.R. § 404.1513(a), (d); *see Diaz v. Shalala*, 59 F.3d 307, 313 (2d Cir. 1995) ("Because the regulations do not classify chiropractors as either physicians or 'other acceptable medical sources,' chiropractors cannot provide *medical* opinions.") (emphasis in original); *Johnson v. Colvin*, 2015 WL 6738900, at *19 (E.D.N.Y. Nov. 4, 2015) ("In this circuit, in accordance with the regulations, ALJs are permitted to take a chiropractor's opinion into account, though they are not required to do so."); *see also Titles II & XVI:II & XVI: Considering Opinions & Other Evidence from Sources Who Are Not "Acceptable Med. Sources" in Disability Claims; Considering Decisions on Disability by Other Governmental & Nongovernmental Agencies*, SSR 06-03P (S.S.A. Aug. 9, 2006). The record does not appear to contain any notations by any medical doctor indicating that Plaintiff suffered from lesions.

changing for the exam or getting on and off exam table. Able to rise from chair without difficulty."); *see also Id.* at 216-17, 219-20, 226-27). Moreover, Plaintiff himself testified that he is able to complete, without assistance, a variety of activities that require full motor function, including bathing, dressing himself, getting out of bed and walking (*see Id*. at 46, 47, 55, 59). Because Plaintiff has presented no evidence that would suggest he satisfies the threshold for "disorganization of motor function," the ALJ's obligation to assess Listing 11.08 was not triggered.

Third, there is not sufficient evidence to support a cardiovascular impairment pursuant to Listing 4.00. (*See* Pl. Cross-Mot. at 2.) Plaintiff argues that the listing should have been considered by the ALJ in connection with his hypertension, which is a medical condition assessed under Listing 4.00. (*Id.*) Listing 4.00 describes a hypertension assessment as follows:

> Because hypertension (high blood pressure) generally causes disability through its effects on other body systems, we will evaluate it by reference to the specific body system(s) affected (heart, brain, kidneys, or eyes) when we consider its effects under the listings. We will also consider any limitations imposed by your hypertension when we assess your residual functional capacity.

20 C.F.R. § Pt 404, Subpt. P, App. 1, § 4.00H. In accordance with the listing description, the ALJ's evaluation of Plaintiff's hypertension included an assessment of any limitations the condition poses and found none: "The claimant also has hypertension, but there is no evidence that this condition requires treatment, or has caused even a minimal limitation of function." (R. at 17.) The ALJ's assessment is supported by the Record, which contains a handful of references to high blood pressure, but does not indicate any limitations caused by his condition. Therefore, because Plaintiff failed to provide any evidence that medically equals the severity under any of the Listing 4.00 impairments, the ALJ did not err by failing to explicitly consider Listing 4.00.

Finally, Plaintiff argues that the ALJ was required to call a medical expert to provide testimony as to whether the Plaintiff satisfied the criteria for the Listings. (Pl. Cross-Mot. at 2.)

For the reasons discussed above, the Court finds the medical evidence to be complete and there was no need for the ALJ to call a medical expert to supplement the medical evidence. *See Rosa v. Callahan*, 168 F.3d 72, 72 n.5 (2d Cir. 1999) ("[W]here there are no obvious gaps in the administrative record, and where the ALJ already possesses a 'complete medical history,' the ALJ is under no obligation to seek additional information in advance of rejecting a benefits claim.") (quoting *Perez v. Chater*, 77 F.3d 41, 48 (2d Cir. 1996)); *see* Discussion § D.4, pp. 25-26, *infra* (addressing HALLEX and POMS manuals).

4. RFC To Perform Sedentary Work

Plaintiff also asserts that his testimony "established a less than sedentary RFC, which the ALJ ignored." (Pl. Cross-Mot. at 3.) The Second Circuit recognizes that subjective allegations of pain may serve as a basis for establishing disability. *See Taylor v. Barnhart*, 83 F. App'x 347, 350 (2d Cir. 2003) (summary order) (quoting *Marcus v. Califano*, 615 F.2d 23, 27 (2d Cir.1979)). The ALJ must follow a two-step process when considering Plaintiff's symptoms. First, the ALJ must determine whether there is a medically determinable physical impairment that reasonably could be expected to produce the Plaintiff's pain. *See Genier v. Astrue*, 606 F.3d 46, 49 (2d Cir. 2010) (citing 20 C.F.R. § 404.1529(b)). Second, the ALJ is to evaluate the "'the extent to which [the claimant's] symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence" of record." *Genier*, 606 F.3d at 49 (quoting 20 C.F.R. § 404.1529(a)); *see Titles II & XVI: Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements*, SSR 96-7P (S.S.A. July 2, 1996). ("SSR 96-7P"). If Plaintiff's statements are not substantiated by medical evidence, then the ALJ must make a finding of credibility based on the entirety of the case record. SSR 96-7p.

Here, the ALJ found that there is evidence to support that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms," but found that Plaintiff's statements concerning the intensity, persistence and limiting effects of those symptoms were not entirely credible based on the ALJ's review of the entire record. (R. at 18.) As discussed more fully below (*see* Discussion § D.3.b., pp. 22-23, *infra*), the ALJ did not ignore the testimony of the Plaintiff, and properly assessed his credibility.

a. ALJ's RFC Determination

The ALJ found that Plaintiff had the RFC to perform sedentary work. (R. at 17.) Sedentary work is defined as:

> [L]ifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a); *see also Titles II & XVI: Determining Capability to Do Other Work-Implications of A Residual Functional Capacity for Less Than A Full Range of Sedentary Work*, SSR 96-9P (S.S.A. July 2, 1996). Sedentary work does not require the ability "to sit for six unbroken hours without standing up or shifting position during a work day." *Halloran v. Barnhart*, 362 F.3d 28, 33 (2d Cir. 2004).

Plaintiff has the burden of proving that he was unable to perform sedentary work. *See Poupore v. Astrue*, 566 F.3d 303, 306 (2d Cir. 2009) (explaining that at the fifth step, the Commissioner has the "limited burden" of showing "that there is work in the national economy that the claimant can do" and that the Commissioner "need not provide additional evidence of the claimant's residual functional capacity"). An ALJ is entitled to rely on the lack of findings regarding Plaintiff's physical limitations in assessing his capacity to perform sedentary work. *See Dumas v. Schweiker*, 712 F.2d 1545, 1553 (2d Cir.1983) ("The Secretary is entitled to rely

not only on what the record says, but also on what it does not say."); *accord Diaz v. Shalala*, 59 F.3d 307, 315 (2d Cir. 1995) ("[I]t was proper for the ALJ to rely on the absence of findings by any physician concerning plaintiff's alleged inability to sit for prolonged periods in deciding that she could resume her work as a sewing machine operator.")

Here, the ALJ correctly found that there is no medical evidence indicating that Plaintiff was unable to perform sedentary work during the relevant period (R. at 20), and substantial evidence in the record supports the ALJ's RFC assessment. Plaintiff stated that he can lift ten pounds, care for his personal hygiene, drive a car, use a computer, go shopping sometimes, and socialize with friends and family. (R. at 132-34; *see also Id.* at 46-47, 49-50, 53-57, 59-60.) Plaintiff reported occasional pain when completing certain tasks, such as dressing himself, but also he indicated he was able to complete routine activities without assistance. (*See Id.* at 46-48.) Although there were some discrepancies in Plaintiff's testimony regarding the amount of time he is able to sit and walk (*see* Background § C, p. 9, *supra*), at one point Plaintiff testified that he was able to stand for twenty minutes at a time, sit for thirty minutes at a time and walk for thirty minutes at a time. (*Id.* at 59.) Plaintiff also reported taking trips during which Plaintiff sat for three to four hours at a time. (*Id.* at 22-23.) These activities support the ALJ's findings that Plaintiff's RFC enabled him to perform sedentary work.

The medical evidence in the record also supports the ALJ's RFC assessment. On August, 8, 2012, when meeting with Dr. Hunter in consultation, Plaintiff reported his pain to be approximately 5/10. (R. at 203.) Plaintiff was found to have a normal gait, the ability to perform a full squat, the ability to rise from a chair without difficulty, and did not require assistance changing for the exam or getting on and off the exam table. (*Id.* at 204.) When meeting Dr. Saulle on October 15, 2012, Plaintiff reported his pain to be a "5/10 at its worst," denied "any

further radiating pain to the lower extremities," and stated that "his sitting tolerance has improved to about two or three hours." (*Id.* at 407.) While all of Plaintiff's follow up reports include a recommendation for Plaintiff to not return to his past work (*Id.* at 243-49, 407), this is entirely consistent with the ALJ's determination at step three (*Id.* at 20). Such a finding does not undermine the ALJ's RFC assessment that Plaintiff was capable of doing sedentary work, and the Court finds no medical evidence in the record directing a finding otherwise.

b. The ALJ's Credibility Assessment

Where, as here, "the ALJ rejects plaintiff's testimony after considering the objective medical evidence and any other factors deemed relevant, he must explain that decision with sufficient specificity to permit a reviewing court to decide whether there are legitimate reasons for the ALJ's disbelief." *Correale-Englehart v. Astrue*, 687 F. Supp.2d 396, 435 (S.D.N.Y. 2010). When the ALJ neglects to discuss at length his credibility determination with sufficient detail to permit the reviewing court to determine whether there are legitimate reasons for the ALJ's disbelief and whether his decision is supported by substantial evidence, remand is appropriate. *Id.* at 435-36, 438. SSR 96–7p sets forth seven factors that an ALJ must consider in determining the credibility of a claimant's statements about his or her symptoms and the effects of his or her impairments:

> (1) The individual's daily activities; (2) The location, duration, frequency, and intensity of the individual's pain or other symptoms; (3) Factors that precipitate and aggravate the symptoms; (4) The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms; (5) Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms; (6) Any measures other than treatment the individual uses or has used to relieve pain or other symptoms . . . ; and (7) Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

SSR 96-7P; *see* 20 CFR § 416.929(c); 20 C.F.R. § 404.1529.

Plaintiff does not contest directly the ALJ's finding that her testimony was "not entirely credible" (Tr. 18), but contends generally that the ALJ "ignored" Plaintiffs' testimony (Pl. Cross-Mot. at 3). Plaintiff's contention is meritless because Plaintiff's testimony comprised part of the evidence the ALJ relied upon in making his determination. In assessing the ALJ's analysis, the Court notes that the ALJ did not explicitly list the seven factors under consideration. However, as the Court concludes that the ALJ properly considered the required factors and that the ALJ's credibility determination is supported by substantial evidence in the record, the ALJ's failure to list all factors he evaluated does not require remand. *See Cichocki v. Astrue*, 534 F. App'x 71, 75-76 (2d Cir. 2013) (summary order) ("Although the ALJ did not explicitly recite the seven relevant factors, his credibility determination was supported by substantial evidence in the record. . . . Because the ALJ thoroughly explained his credibility determination and the record evidence permits us to glean the rationale of the ALJ's decision, the ALJ's failure to discuss those factors not relevant to his credibility determination does not require remand."); *see also Lao v. Colvin*, 2016 WL 2992125, at *16-17 (E.D.N.Y. May 23, 2016) (finding that case need not be remanded for failure to explicitly consider all seven factors where there was "ample support in the record for the ALJ's conclusion that the Plaintiff's statements regarding the intensity of his symptoms were not credible").

In this case, the ALJ credited Plaintiff's testimony to the extent that the medical impairments could be expected to cause the symptoms Plaintiff alleged, but found that Plaintiff's "statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible." (R. at 18.) In doing so, the ALJ specifically cited to credibility factors set forth at 20 C.F.R. § 404.1529 (*Id.*), and went on to conclude, among other things, that the Plaintiff is able to engage in a range of activities without pain, and was not regularly treating

with a physician (R. at 18-20). As discussed earlier, Plaintiff's own testimony at his hearing indicated that he is able to dress himself, bathe, drive a car and go shopping, which the ALJ took into account in assessing credibility. (*Id.* at 18; *see Id.* at 132-34; *see also Id.* at 46-47, 49-50, 53-57.) The ALJ also pointed to contradictions within Plaintiff's testimony concerning his physical limitations. Among these, Plaintiff's testimony varied when discussing how long he could stand and sit at one time. (*Compare Id.* at 59 *with Id.* at 33, 35; *see* Background § C, p. 9, *supra*.) The ALJ also took into account prescribed medications and medical treatments Plaintiff was receiving, noting that Plaintiff "had not received consistent ongoing treatment from a physician since his alleged onset date." (R. at 19.)

Given that the ALJ's decision to discount Plaintiff's testimony on these few points was supported by the entirety of medical evidence, the Court finds that the ALJ did not err in his credibility assessment.

5. Vocational Expert

Plaintiff challenges the ALJ's finding at the fifth step of the analysis, arguing that the ALJ was required to call a vocational expert. (Pl. Cross-Mot. at 3.) At the fifth step of the five-step analysis, the Commissioner has the burden to show that there are other jobs in the national economy that the Plaintiff is capable of performing. *See Draegert v. Barnhart*, 311 F.3d 468, 472 (2d Cir. 2002) (citing *Carroll v. Secretary of Health and Human Services*, 705 F.2d 638, 642 (2d Cir. 1983). To meet this burden, the Commissioner may utilize the Medical Vocational Guidelines, otherwise known as "the Grids," which account for the Plaintiff's RFC, age, education, and work experience. *Rosa v. Callahan*, 168 F.3d 72, 78 (2d Cir.1999); 20 C.F.R. § Pt. 404 Subpt. P, App. 2. However, "exclusive reliance on the grids is inappropriate where the guidelines fail to describe the full extent of a claimant's physical limitations" such as "where the claimant's exertional impairments are compounded by significant nonexertional impairments

that limit the range of sedentary work that the claimant can perform. In these circumstances, the Commissioner must introduce the testimony of a vocational expert (or other similar evidence) that jobs exist in the economy which claimant can obtain and perform." *Rosa*, 168 F.3d 78 (citations and internal quotation marks omitted).

At the fifth step, the ALJ assessed the Grids and determined that Plaintiff was "not disabled" based his RFC for the full range of sedentary work, considering his age, education and work experience. (R. at 21.) Because there is no evidence in the record of any nonexertional limitations or any other reason why the Grids would be ineffective at describing Plaintiff's limitations, the ALJ was not required to look outside of the Grids. Although Plaintiff suffers from pain, which can be a nonexertional limitation, Plaintiff has presented no evidence that his pain is of a nature that "so narrows [Plaintiff's] possible range of work as to deprive him of a meaningful employment opportunity." *Bapp v. Bowen*, 802 F.2d 601, 606 (2d Cir. 1986). Moreover, any argument that a vocational expert was necessary to evaluate Plaintiff's exertional capabilities is foreclosed by the ALJ's determination that Plaintiff was physically capable of performing sedentary work, which is supported by the medical evidence in the record.

6. Applicability of HALLEX and POMS

Finally, Plaintiff argues that the SSA's Hearings, Appeals, and Litigation Law Manual ("HALLEX") and Program Operations Manual System ("POMS") "mandates" that the ALJ call a medical expert and/or vocational expert. The relevant HALLEX[5] provision as to medical experts provides:

The ALJ must obtain an ME opinion, either in testimony at a hearing or in

[5] It should be noted that is not clear that HALLEX is binding on an ALJ. *See Peck v. Astrue*, 2010 WL 3125950, at *10 (E.D.N.Y. Aug. 6, 2010) ("While the Second Circuit has not reached the issue, other circuits have held that 'HALLEX has no legal force and is not binding.'") (quoting *Bunnel v. Bamhart*, 336 F.3d 1112, 1115 (9th Cir. 2003)). Nonetheless, the Court has assessed the applicable provisions.

> responses to written interrogatories in the following circumstances: [i] The Appeals Council or Federal court ordered an ME opinion. [ii] There is a question about the accuracy of medical test results reported, requiring evaluation of background medical test data. . . . [or iii] The ALJ is considering finding that the claimant's impairment(s) medically equals a listing.

When to Obtain Medical Expert Opinion, HALLEX I-2-5-34. None of these situations applies because, as the Court set forth above (*see* Discussion § D.2, pp. 14-18, *supra*), Plaintiff presented no evidence to substantiate that any of the listings might apply to Plaintiff's condition.

As to vocational experts, the relevant HALLEX provision provides that "[t]he ALJ must obtain a [Vocational Expert's] opinion when directed by the Appeals Council or a court. The ALJ must also obtain a [Vocational Expert] opinion if an Acquiescence Ruling . . . requires VE evidence." *When to Obtain Vocational Expert Opinion*, HALLEX I-2-5-50(B) ("HALLEX I-2-5-50(B)").[6] None of those situations applies here.

Plaintiff does not indicate what provision of POMS he believes might be applicable, but that is of no moment as "the POMS guidelines 'ha[ve] no legal force, and [they] do[ ] not bind the [Commissioner].'" *Tejada v. Apfel*, 167 F.3d 770, 775 (2d Cir. 1999) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981)).

[6] Acquiescence Rulings ("ARs") are explanations of how the SSA intends to apply a holding by a United States Court of Appeals that conflicts with SSA's nationwide policies. *See Acquiesce Ruling Definition*, Social Security Administration, https://www.ssa.gov/regulations/def-ar.htm. The ARs are applied to other cases in the same circuit, but do not apply in other circuits. *Id.* The only two ARs that apply to this issue govern the Third Circuit and Eighth Circuit, respectively. HALLEX I-2-5-50(B); *see Sykes v. Apfel; Using the Grid Rules As A Framework for Decisionmaking When an Individual's Occupational Base Is Eroded by A Nonexertional Limitation-Titles II & XVI of the Soc. Sec. Act*, AR 01-1(3) (S.S.A. Jan. 25, 2001); *Brock v. Astrue, 674 F.3d 1062 (8th Cir. 2012): Requiring Vocational Specialist (VS) or Vocational Expert (VE) Evidence When an Individual Has A Severe Mental Impairment(s)-Titles II & XVI of the Soc. Sec. Act*, Docket No. SSA-2014-0008, 2014 WL 2178029, at *1 (S.S.A. May 22, 2014).

CONCLUSION

For the foregoing reasons, the Commissioner's motion for judgment on the pleadings is granted. Plaintiff's cross-motion for judgment on the pleadings is denied. This appeal is dismissed.

SO ORDERED.

Dated: Brooklyn, New York
September 30, 2016

/s/
DORA L. IRIZARRY
Chief Judge