

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK  
3 -----x

4 ANDREW GILMARTIN,

5

6 Plaintiff,

7

8 -against-

**MEMORANDUM AND ORDER**

9  
10 CAROLYN W. COLVIN, 15-cv-6062-FB

11 ACTING COMMISSIONER OF  
12 SOCIAL SECURITY,

13

14 Defendant.

15 -----x

16

17 *Appearances:*

18 *For the Plaintiff*

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21 Shoreham, New York 11786  
22

*For the Defendant*

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23 **BLOCK, Senior District Judge:**

24 Andrew Gilmartin (“Gilmartin,” “plaintiff,” or “claimant”) seeks review of the final  
25 decision of the Commissioner of Social Security (“Commissioner”) denying his application

1 for disability and disability insurance benefits under the Social Security Act (“SSA”).<sup>1</sup> Both  
2 parties move for judgment on the pleadings. For the reasons stated below, plaintiff’s motion  
3 is DENIED, and the Commissioner’s motion is GRANTED.

4 **I.**

5 A resident of Centerport, New York, Gilmartin is a 38-year-old high school graduate  
6 who previously managed a musical band’s tour and a supermarket’s delicatessen. He labored  
7 until June 13, 2012, when he allegedly became unable to work due to constant lower back pain  
8 radiating to his left lower extremity. He filed an application for disability and disability  
9 insurance benefits on April 9, 2013. Gilmartin’s claim was initially denied on May 31, 2013.  
10 At Gilmartin’s request, a hearing was held before an Administrative Law Judge (“ALJ”) on  
11 May 27, 2014.

12 On June 4, 2014, the ALJ held that Gilmartin was not disabled within the meaning of

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<sup>1</sup> Title II of the SSA provides for the payment of *disability insurance benefits* to those whose disability prevents them from pursuing gainful employment via the Social Security disability insurance (“SSDI”) program. 42 U.S.C. § 423. The SSA’s sixteenth title provides for the payment of *disability benefits* via the Supplemental Security Income (“SSI”) program. *Id.* § 1381. When a person files for disability, he or she typically seeks benefit under both programs, *see Heckler v. Day*, 467 U.S. 104, 106–07 (1984) (explaining programs), and the two often merge in practical analysis, *see* AR 12. Gilmartin applied for both benefits and insurance.

1 the SSA. Applying the SSA's five-step sequential evaluation process,<sup>2</sup> the ALJ determined  
2 that (1) Gilmartin had not engaged in substantial gainful activity since June 13, 2012, the  
3 alleged onset date, and (2) he suffered from one severe impairment: lumbar degenerative disc  
4 disease with radiculopathy. Nonetheless, the ALJ concluded that this impairment did not meet  
5 or medically equal the SSA's requisite level of severity, as set forth in 20 C.F.R. § 404,  
6 Subpart P, Appendix 1, so as to trigger his automatic classification as disabled.

7 The ALJ then determined that Gilmartin had the residual functional capacity ("RFC")  
8 to perform less than the full range of sedentary work, as defined in 20 C.F.R. § 404.1567(a).  
9 Namely, the ALJ found that Gilmartin could "occasionally lift ten pounds, sit approximately  
10 six hours, stand or walk for approximately two hours in an eight hour day with normal  
11 breaks," "occasionally climb ramps or stairs," and "occasionally balance and stoop." AR  
12 14–15. While Gilmartin was determined to have an "unlimited" ability to "push/pull with . .  
13 . [his] upper extremities," the ALJ concluded that he was "limited to [only] occasional  
14 push/pull with [his] lower extremities." *Id.* at 15. He could, however, "never climb ladders,  
15 ropes or scaffolds" and "never kneel, crouch or crawl." *Id.* In reaching this conclusion, the ALJ

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<sup>2</sup> SSA regulations establish a five-step process for evaluating disability claims. The Commissioner must find that a claimant is disabled if she determines "(1) that the claimant is not working, (2) that he has a 'severe impairment,' (3) that the impairment is not one that conclusively requires a determination of disability, . . . (4) that the claimant is not capable of continuing in his prior type of work, [and] (5) there is not another type of work the claimant can do." *Draegert v. Barnhart*, 311 F.3d 468, 472 (2d Cir. 2002) (citing 20 C.F.R. § 404.1520(b)-(f)). The burden of proof is on the claimant for the first four steps, but shifts to the Commissioner at the fifth step. See 20 C.F.R. § 404.1560(c)(2); *Shaw v. Chater*, 221 F.3d 126, 132 (2d Cir. 2000).

1 relied on both “objective medical evidence,” consistent with the requirements of 20 C.F.R. §  
2 404.1529, and “opinion evidence,” in accordance with 20 C.F.R. § 404.1527.

3       The ALJ thereupon applied this RFC to the remaining steps. As to step four, the ALJ  
4 decided that the transferability of Gilmartin’s job skills was “not an issue in this case because  
5 the claimant’s past relevant work is unskilled,” AR 18, as authorized by 20 C.F.R. §  
6 404.1568(a). Moving to step five, the ALJ concluded that Gilmartin could perform work  
7 pursuant to the Medical Vocational Guidelines, 20 C.F.R. § 404, Subpart P, Appendix 2,  
8 relying in part on the testimony of one vocational expert. In particular, in light of Gilmartin’s  
9 age, education, past relevant work experience, and RFC, the ALJ pointed out that he could  
10 perform a number of jobs existing in significant numbers in the national economy. The ALJ  
11 gave three examples: order clerk, document prep worker, and scale operator.

12       The Appeals Council denied Gilmartin’s request for review on August 18, 2015. The  
13 ALJ’s decision thereby became the Commissioner’s final one. Gilmartin has sought timely  
14 review, expressly arguing that the ALJ violated the treating physician rule and implicitly  
15 contending that the ALJ did not properly weigh his own testimony.<sup>3</sup>

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## II.

17       “In reviewing a final decision of the Commissioner, a district court must determine

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<sup>3</sup> While Gilmartin never makes this second argument with any detail, he does fault the ALJ for not fully crediting his testimony regarding his limitations in the midst of discussing the treating physician rule. Pl.’s MSJ at 20. For the sake of comprehensiveness, this Order and Memorandum will address Gilmartin’s explicit and implicit reasons for reversal.

1 whether the correct legal standards were applied and whether substantial evidence supports  
2 the decision.” *Butts v. Barnhart*, 388 F.3d 377, 384 (2d Cir. 2004); *see also* 42 U.S.C. §  
3 405(g). Substantial evidence . . . means such relevant evidence as a reasonable mind might  
4 accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971),  
5 *cited in, e.g., Selian v. Astrue*, 708 F.3d 409, 417 (2d Cir. 2013). If contradictions appear in  
6 the record and an ALJ fails to reasonably explain why he or she opted for one interpretation  
7 over another, the Commissioner’s findings cannot stand. *See, e.g., Balsamo v. Chater*, 142  
8 F.3d 75, 81 (2d Cir. 1998) (“[T]he ALJ cannot arbitrarily substitute his [or her] own  
9 judgment for competent medical opinion . . .”); *cf. Selian*, 708 F.3d at 420 (“To the extent  
10 that record is unclear, the Commissioner has an affirmative duty to ‘fill any clear gaps in the  
11 administrative record’ before rejecting a treating physician’s diagnosis.”). “[T]he reviewing  
12 court is required to examine the entire record, including contradictory evidence and evidence  
13 from which conflicting inferences can be drawn.” *Mongeur v. Heckler*, 722 F.2d 1033, 1038  
14 (2d Cir. 1983).

15       **A. Treating Physician Rule**

16       Plaintiff first argues that the ALJ failed to correctly apply the treating physician rule  
17 when he did not give controlling weight to the opinion of Doctor Thomas Dowling  
18 (“Dowling”), his treating physician, that Gilmartin could only “sit less than 4 hours during an  
19 8-hour workday.” Pl.’s MSJ at 19; *see also* AR at 17–18. The treating physician rule dictates  
20 that “the opinion of a claimant’s treating physician as to the nature and severity of the

1 impairment is given ‘controlling weight’ so long as it ‘is well-supported by medically  
2 acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other  
3 substantial evidence in [the] case record.’” *Burgess v. Astrue*, 537 F.3d 117, 128 (2d Cir.  
4 2008) (quoting 20 C.F.R. § 404.1527(c)(2)). For purposes of this rule, “medical opinions”  
5 include “statements from physicians and psychologists and other acceptable medical sources,”  
6 20 C.F.R. § 404.1527(a)(2), and can take a variety of forms, *cf. Philpot v. Colvin*, No.  
7 12-CV-291 (MAD/VEB), 2014 WL 1312147, at \*19 (N.D.N.Y. Mar. 31, 2014) (noting that  
8 the relevant treating physician’s opinion had been embodied in a checklist); *Gray v. Astrue*,  
9 No. 09-CV-00584, 2011 WL 2516496, at \*5 (W.D.N.Y. June 23, 2011) (same); *Tommasetti*  
10 *v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (same). If the ALJ does not give a treating  
11 physician’s opinion controlling weight, he or she must provide “‘good reasons’ for the weight  
12 given to that opinion.” *Halloran v. Barnhart*, 362 F.3d 28, 32–33 (2d Cir. 2004). The ALJ  
13 must apply this same standard to the opinion evidence of non-examining sources. 20 C.F.R.  
14 § 416.927(e)(2)(ii); *see also Wells v. Comm’r*, 338 F. App’x 64, 67 (2d Cir. 2009) (citing  
15 regulatory predecessor).

16 As his decision explains, the ALJ gave little weight to the conclusion reached by  
17 Dowling regrading Gilmartin’s sitting limitations because Dowling failed to “explain the basis  
18 for a sitting limitation” in the face of the following medical evidence: (1) an examination by  
19 Doctor Raphael Davis (“Davis”), which “failed to yield abnormal neurological findings”; (2)  
20 two independent medical examinations by Doctor Anthony Spataro (“Spataro”), who

1 ultimately “concluded that the claimant could perform sedentary work on a limited basis” such  
2 as “a desk job”; (3) a series of MRI scans which indicated no severe spinal cord damage; and  
3 (4) Dowling’s various factual observations regarding plaintiff’s physical condition, including  
4 Gilmartin’s absence of any sensory deficits and “gross weakness” in his lower extremities and  
5 his otherwise normal reflexes. AR 16–18, 164–221, 299.

6 The ALJ extracted yet more support from other objective records: (1) testimony by  
7 Gilmartin’s physical therapist indicating that he was “making steady progress,” and (2)  
8 Dowling’s and Davis’ decision to pursue and persist in a conservative treatment regimen  
9 centered on admittedly effective medication rather than surgical intervention. *Id.* at 17, 37,  
10 285–99, 117–31. But the ALJ did not just rely on such records. As he opined, the daily  
11 activities which Gilmartin admitted to undertaking were also “not consistent with his  
12 allegation of being unable to work in any capacity.” *Id.* at 17; *see also id.* at 32–34. From  
13 using a computer for social interaction to walking and driving every day, his “daily activities  
14 tend[ed] to show that he is capable of performing a wide range of sedentary work.” *Id.* While  
15 the ALJ rejected part of Dowling’s opinion, he did so in reliance on all this foregoing, albeit  
16 conflicting, evidence.

17 As such, the ALJ’s decision to give limited weight to Dowling’s single conclusion was  
18 supported by “specified reason[s],” mined from an extensive record, *Otts v. Comm’r*, 249 F.  
19 App’x 887, 889 (2d Cir. 2007), and “contradictory medical evidence,” *Eiden v. Sec’y of*  
20 *Health, Educ. & Welfare*, 616 F.2d 63, 64 (2d Cir. 1980) (relying on *Alvarado v. Califano*,  
21 605 F.2d 34, 35 (2d Cir. 1979)) *see also, e.g., Stevens v. Barnhart*, 473 F. Supp. 2d 357, 362

1 (N.D.N.Y. 2007) (“[T]he less consistent an opinion is with the record as a whole, the less  
2 weight it is to be given.”). Conflicts undeniably existed, as the record reveals and the parties  
3 seemingly acknowledge. Def.’s MSJ at 13; *see also* Pl.’s MSJ at 20. But an ALJ, when armed  
4 with credible evidence, may resolve “[g]enuine conflicts in the medical evidence” by rejecting  
5 a treating physician’s questionable assertion. *Veino v. Barnhart*, 312 F.3d 578, 588 (2d Cir.  
6 2002); *see also, e.g.*, *Rutherford v. Schweiker*, 685 F.2d 60, 62 (2d Cir. 1982) (“On an appeal  
7 such as this, we are faced with a simple reality which appellants often overlook, namely, that  
8 factual issues need not have been resolved by the Secretary in accordance with what we  
9 conceive to be the preponderance of the evidence.”). By explaining how and why Dowling’s  
10 opinion was contradicted by the record’s other substantial evidence, the ALJ avoided any  
11 reliance on “his own intuition,” *Sanchez v. Colvin*, No. 14 CV 1008, 2015 WL 4390246, at  
12 \*15 (E.D.N.Y. July 14, 2015), or “sheer speculation,” *Selian*, 708 F.3d at 421, and provided  
13 the “good reason” sufficient to justify his ultimate decision. *See, e.g., Halloran*, 362 F.3d at  
14 32 (“[T]he opinion of the treating physician is not afforded controlling weight where . . .  
15 [these] opinions . . . are not consistent with other substantial evidence in the record, such as  
16 the opinions of other medical experts.”); *Berry v. Schweiker*, 675 F.2d 464, 468 (2d Cir. 1982)  
17 (upholding the ALJ’s determination “[where] portions of the ALJ’s decision and the evidence  
18 before him indicate[d] that his conclusion was supported by substantial evidence”).

19       **B. Credibility**

20       By implication, plaintiff next argues that the ALJ erred by finding that his statements  
21 concerning the intensity, persistence, and limiting effect of his impairments were not entirely

1 credible. No ALJ may reject such subjective statements “*solely* because the available medical  
2 evidence does not substantiate” them. 20 C.F.R. § 416.929(c)(2) (emphasis added); *see also*  
3 *Hilsdorf v. Comm’r*, 724 F. Supp. 2d 330, 350 (E.D.N.Y. 2010) (quoting regulation).  
4 However, an ALJ must “consider whether there are any inconsistencies in the evidence and  
5 the extent to which there are any conflicts between [claimant’s] statements and the rest of the  
6 evidence.” 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4); *see also Puente v. Comm’r*, 130 F.  
7 Supp. 3d 881, 894 (S.D.N.Y. 2015) (quoting regulations). Based on such a review, he or she  
8 may then “properly choose not to credit . . . [an applicant’s] claims regarding . . .  
9 impairments” if “the other evidence in the record . . . contradict[s] them.” *Brooks v. Comm’r*,  
10 No. 15 Civ. 4707 (GWG), 2016 WL 4940208, at \*9 (S.D.N.Y. Sept. 15, 2016); *see also, e.g.*,  
11 *Genier v. Astrue*, 606 F.3d 46, 49 (2d Cir. 2010) (ALJ “is not required to accept the claimant’s  
12 subjective complaints without question[.]”); *Carroll v. Sec’y of Health & Human Servs.*, 705  
13 F.2d 638, 642 (2d Cir. 1983) (“It is the function of the Secretary, not ourselves, to resolve  
14 evidentiary conflicts and to appraise the credibility of witnesses, including the claimant.”).

15 As already noted, the record here provides ample support for the ALJ’s decision to  
16 reject the claimant’s assessments of his own disability. *See AR 15–18* The ALJ hence did no  
17 less than what the law allows and requires, utilizing credible medical findings and testimonial  
18 evidence so as to “arrive at an independent judgment . . . regarding the true extent of the pain  
19 alleged by the claimant,” *Marcus v. Califano*, 615 F.2d 23, 27 (2d Cir. 1979); *accord Genier*,  
20 606 F.3d at 49, that was not “patently unreasonable.” *Pietrunti v. Director, Office of Workers’*  
21 *Comp. Programs*, 119 F.3d 1035, 1042 (2d Cir. 1997). Consequently, substantial evidence

1 supports the ALJ's interpretation of Gilmartin's testimony, and his decision cannot be deemed  
2 so unreasonable as to be reversed. *See Genier*, 606 F.3d at 49 ("Even where the administrative  
3 record may also adequately support contrary findings on particular issues, the ALJ's factual  
4 findings 'must be given conclusive effect' so long as they are supported by substantial  
5 evidence." (quoting *Schauer v. Schweiker*, 675 F.2d 55, 57 (2d Cir. 1982))).

6 **III.**

7 For the aforementioned reasons, plaintiff's motion is DENIED, and the Commissioner's  
8 motion is GRANTED.

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11 **SO ORDERED**

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15 Brooklyn, New York  
16 February 7, 2017

/S/ Frederic Block  
FREDERIC BLOCK  
Senior United States District Judge