

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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ROSEMARIE CASTILLO,

Plaintiff,

v.

Civil Action No.  
1:15-CV-0522 (DEP)

CAROLYN W. COLVIN, Acting Commissioner  
of Social Security,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

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5th Floor, Suite 520  
Syracuse, NY 13202

HOWARD OLINSKY, ESQ.  
PAUL B. EAGLIN, ESQ.

FOR DEFENDANT

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Special Assistant U.S. Attorney

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

## ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on February 9, 2016, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: February 12, 2016  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
ROSEMARIE CASTILLO,

Plaintiff,

vs.

1:15-CV-522

CAROLYN W. COLVIN,  
Acting Commissioner of Social Security,

Defendant.

-----x

*Decision - February 9, 2016*

James Hanley Federal Building, Syracuse, New York

HONORABLE DAVID E. PEEBLES,

United States Magistrate-Judge, Presiding

A P P E A R A N C E S (by telephone)

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1           THE COURT: Thank you both for excellent arguments.  
2 This is an interesting case that raises some challenging  
3 issues.

4           I have before me a request for judicial review of  
5 an adverse determination by the Acting Commissioner pursuant  
6 to 42, United States Code, Section 405(g). By way of  
7 background, the plaintiff was born in December of 1957. By  
8 my math she is currently 58 years old. She is 4-foot  
9 10-inches in height and now weighs 190 pounds, although she  
10 weighed 140 pounds when she last worked.

11           She has a high school diploma and one year of  
12 college education. She has undergone training as a certified  
13 nursing assistant, or nurse's assistant, or CNA, and is  
14 certificated in that field. She is right-handed, drives, and  
15 lives in a cabin with a friend. Her past relevant work  
16 includes as a CNA in various settings. The last one  
17 apparently was in an oncology unit of a hospital where she  
18 worked for some three years, according to her statement to  
19 Dr. Rigberg. That's at page 248.

20           She stopped working in 2005. According to her  
21 hearing testimony, she was fired. I looked at her hearing  
22 testimony. I looked at the statement of Dr. Rigberg. I was  
23 not able to definitively find a statement by her that she was  
24 fired for lack of concentration. She certainly did testify  
25 that she is no longer able to concentrate sufficiently to

1 work in that capacity.

2 She smokes one pack per day of cigarettes. That's  
3 at 253 of the Administrative Transcript. Medically she  
4 suffers from several diagnosed conditions. She suffers from  
5 leg pain. She reports she also has restless leg syndrome, or  
6 RLS. She suffers from hand tremors and arm tremors of  
7 unknown etiology, back pain, left shoulder pain, depression  
8 and anxiety, and ADHD. She's been Effexor since 1995 and  
9 that seems to be well controlling her mental condition. She  
10 does suffer from anemia. In 2004 she underwent a gastric  
11 bypass surgery; in 2008 a panniculectomy; in 2009 a breast  
12 reduction; 2011 left rotator cuff shoulder surgery; and 2012  
13 an operation to repair a hernia. At various times she's been  
14 prescribed Effexor, Pramipexole, Alendronate, Adderall. She  
15 takes Ibuprofen for pain, Flexeril, and she took for  
16 approximately one week Gabapentin.

17 Procedurally, the plaintiff applied for disability  
18 insurance benefits and SSI payments in April of 2013,  
19 alleging an onset date of January 1, 2005. The hearing was  
20 conducted by Administrative Law Judge Katherine Edgell on  
21 July 25, 2014. ALJ Edgell issued a decision on October 30,  
22 2014, finding that the plaintiff was not disabled at the  
23 relevant times and, therefore, ineligible for benefits. That  
24 opinion became a final determination of the agency when on  
25 March 6, 2015 the Social Security Administration Appeals

1 Council denied plaintiff's application for review.

2           The Administrative Law Judge in her decision  
3 applied the well-established five-step progressive test for  
4 determining disability. At step one, after finding that the  
5 plaintiff was insured through March 31, 2007, concluded that  
6 she was not engaged in any substantial gainful activity since  
7 January 1, 2005.

8           The Administrative Law Judge concluded that  
9 plaintiff suffers from several severe conditions at step two,  
10 within the meaning of step two, including obesity, status  
11 post gastric bypass surgery, status post panniculectomy and  
12 breast reduction, cervical disc disease, tremors, affective  
13 and anxiety versus attention disorders. She concluded,  
14 however, that none of those either individually or  
15 collectively met or equaled the listed presumptively  
16 disabling conditions in the Commissioner's regulation. After  
17 surveying the medical evidence in the record, the ALJ  
18 concluded that plaintiff was capable of performing medium  
19 work, including the ability to frequently lift and/or carry  
20 25 pounds and occasionally lift and/or carry 50 pounds. She  
21 can sit, stand and/or walk for up to six hours in an  
22 eight-hour workday. She can do simple repetitive work with  
23 occasional interaction with others, but she cannot do work  
24 requiring frequent fine fingering due to tremors.

25           Applying that RFC with the aid of a vocational

1 expert testimony, the Administrative Law Judge concluded  
2 after finding that the plaintiff was not able to perform her  
3 past relevant work, that she is able to perform in two  
4 positions that exist in sufficient numbers in the economy to  
5 satisfy the requirements, including cleaner, laboratory  
6 equipment and produce weigher. She, therefore, concluded  
7 that plaintiff was not disabled.

8           My task, as you know, is fairly limited. I must  
9 determine whether correct legal principles were applied by  
10 the Administrative Law Judge and whether her decision is  
11 supported by substantial evidence. Substantial evidence is a  
12 term that is fairly broad. It is defined as such relevant  
13 evidence as a reasonable mind might accept as adequate to  
14 support a conclusion.

15           The first argument raised or one of the principal  
16 arguments raised was the argument that Dr. Lin should have  
17 been recontacted. Unquestionably, if there are gaps,  
18 significant gaps in a record, there's a duty of the  
19 Administrative Law Judge, even when the claimant is  
20 represented by counsel, to develop the record. In this case,  
21 however, although I agree with plaintiff that it might be  
22 interesting to find out what Dr. Lin meant and to have him  
23 elaborate on the opinion referenced at page 245 of the  
24 Administrative Transcript, the fact is there is no gap in the  
25 record as plaintiff conceded. The lack of a medical source



1 statement from a treating source alone is not fatal.

2           The agency ordered both a psychiatric and a  
3 physical consultative exam of the plaintiff. The plaintiff  
4 was found not to have any appreciable physical limitations.  
5 She exhibited hand and finger dexterity that were intact and  
6 grip strength 5/5 bilaterally. As I indicated before,  
7 Dr. Lin's notes support the ALJ's determination, pages 298 to  
8 305. There is no reference to any significant tremors. I do  
9 agree that there is some indication that the plaintiff does  
10 experience some tremors of unknown etiology. MRI testing  
11 failed to reveal any neurological source of those tremors.  
12 Dr. Ylagan certainly references the tremors but the ALJ did  
13 account for the tremors to a degree by limiting the plaintiff  
14 in the area of fine fingering. So I don't find that there  
15 was a failure of the duty to develop the record.

16           In terms of Dr. Rigberg, clearly the Administrative  
17 Law Judge by her own account provided or gave great weight to  
18 the findings of Dr. Rigberg. Dr. Rigberg's opinions contain  
19 certain limitations, that if you were to take them as gospel  
20 without looking beyond Dr. Rigberg, you might say that the  
21 RFC findings should have included more of the limitations  
22 spelled out by Dr. Rigberg. But first of all, it's noted  
23 that unskilled jobs require only the ability to understand  
24 and carry out and remember simple instructions. Social  
25 Security ruling 85-15 sets that out. And the ALJ went beyond

1 Dr. Rigberg's opinions and noted the lack of medical  
2 treatment, the extent of plaintiff's daily activities, and  
3 Dr. Lin's opinions, including at pages 298 and 305 of the  
4 Administrative Transcript, in limiting the limitations --  
5 that's awkward, but limiting the limitations to those that  
6 were included in the RFC finding.

7           So I don't find error in not including verbatim the  
8 limitations spelled out in Dr. Rigberg's opinion. The RFC is  
9 supported by both Dr. Rigberg and Dr. Mescon's consultative  
10 reports, as well as the medical evidence in the record,  
11 including Dr. Lin's treatment notes and his statement  
12 concerning no disability. And although that speaks to an  
13 issue that is reserved to the Commissioner, certainly a  
14 treating source saying that the plaintiff is not disabled is  
15 entitled to at least some weight.

16           The credibility analysis I don't find any fault  
17 with. The plaintiff, really the only statements that I think  
18 you could argue were discounted were plaintiff's statements  
19 that her mind goes blank, at pages 35 and 36 of the  
20 Administrative Transcript, and she cannot concentrate, at  
21 page 44. But there is no indication, for example, that I  
22 recognize that not getting treatment can be explained by  
23 inability to afford treatment, and certainly the plaintiff  
24 did say at one point in the hearing, that I think it was at  
25 page 36, that she cannot afford psychiatric treatment, but

1 there is no indication in Dr. Lin's notes anywhere that he  
2 recommended that she undergo psychiatric and psychological  
3 treatment. It appears that the prescription of Effexor had  
4 sufficed to address her mental limitations.

5 Step five, the determination I find is proper. The  
6 hypothetical posed to the vocational expert tracked the RFC  
7 finding, which I conclude is supported by substantial  
8 evidence; and therefore, supports the step five  
9 determination.

10 So, in sum, although I agree with plaintiff that it  
11 would be nice if it could have been explained in greater  
12 detail, I recognize the volume that these Administrative Law  
13 Judges deal with and we get twenty-page decisions instead of  
14 fifty-page decisions, which we would probably get if they  
15 went through and discussed every piece of evidence in the  
16 detail that would be helpful to us, frankly, as judicial  
17 officers.

18 So, in sum, I find that the decision is supported  
19 by substantial evidence, correct legal principles were  
20 applied, and I'll grant defendant's motion for judgment on  
21 the pleadings, affirming the decision of the ALJ and  
22 Commissioner, and dismissing plaintiff's complaint.

23 Thank you both for excellent, excellent  
24 presentations.

25 MR. EAGLIN: Thank you, Your Honor.

1 MR. KAISER: Thank you, Your Honor.

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4 C E R T I F I C A T I O N

5  
6 I, EILEEN MCDONOUGH, RPR, CRR, Federal Official  
7 Realtime Court Reporter, in and for the United States  
8 District Court for the Northern District of New York,  
9 do hereby certify that pursuant to Section 753, Title 28,  
10 United States Code, that the foregoing is a true and correct  
11 transcript of the stenographically reported proceedings held  
12 in the above-entitled matter and that the transcript page  
13 format is in conformance with the regulations of the  
14 Judicial Conference of the United States.

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19 EILEEN MCDONOUGH, RPR, CRR  
20 Federal Official Court Reporter  
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