

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

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MICHAEL R. TWISS,

Plaintiff,

v.

Civil Action No.  
1:16-CV-1420 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF:

MARGOLIUS LAW OFFICE  
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Catskill, NY 12414

PETER M. MARGOLIUS, ESQ.

FOR DEFENDANT:

HON. GRANT JAQUITH  
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Syracuse, NY 13261-7198

ELIZABETH D. ROTHSTEIN, ESQ.  
Special Assistant U.S. Attorney

DAVID E. PEEBLES  
CHIEF 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 Acting Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g),

1383(c)(3), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on August 22, 2017, 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 Acting 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 GRANTED.
- 2) The Acting 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.

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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.

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: August 30, 2017  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
MICHAEL R. TWISS,

Plaintiff,

vs.

16-CV-1420

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

*Decision - August 22, 2017*

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. I have before me an  
2 application for judicial review of an adverse determination  
3 by the Acting Commissioner pursuant to 42, United States  
4 Code, Section 405(g) and 1383(c)(3). The background is as  
5 follows.

6 The plaintiff was born in September of 1960. He is  
7 currently 56, almost 57 years old. He was 54 years old at  
8 the time of the hearing in this matter, and 52 when he filed  
9 his application for benefits. He is ambidextrous but  
10 left-handed, describes himself as left-handed. He is  
11 separated and lives with his mother.

12 The evidence is somewhat equivocal regarding his  
13 level of education. He graduated from college -- I'm sorry,  
14 high school. At his hearing he testified that he took some  
15 college courses; however, when he was examined by  
16 Dr. Hartman, he indicated that he had five years of college  
17 education and had achieved a doctorate in theology. That is  
18 at page 257 of the Administrative Transcript. He claims to  
19 be a certified electrician. He has a driver's license.

20 In the past he has worked as a newspaper carrier, a  
21 groundskeeper, a greenskeeper, and a yardman on a railroad.  
22 He also cuts lawns and was doing that at the time of the  
23 hearing.

24 He suffers from multiple physical limitations,  
25 including asthma, low vision, and he has undergone cataract

1 surgery in both eyes. He underwent left cataract surgery in  
2 December 2014 and right cataract surgery in January 2015. He  
3 suffers from lumbar and cervical degenerative disc disease,  
4 arthritis, anxiety, mild obesity, and diabetes, which is  
5 controlled.

6 For his physical ailments his medications are  
7 limited primarily to Ibuprofen, Flexeril and Tylenol.

8 Mentally, according to Dr. Hartman, he suffers from  
9 major depressive disorder moderate, and anxiety disorder,  
10 although he has not undergone any significant mental health  
11 treatment.

12 In terms of daily activities, he watches  
13 television, cooks, cleans, does laundry, can do some  
14 shopping, takes care of his personal hygiene. He has one  
15 friend and he socializes with some family members. He can go  
16 out alone. He smokes a half a pack of cigarettes a day and  
17 occasionally marijuana.

18 Plaintiff applied for Supplemental Security Income  
19 benefits on February 8, 2013, alleging an onset disability  
20 date of January 1, 2009. A hearing was conducted on  
21 October 21, 2014 and continued on March 11, 2015 in order to  
22 obtain the testimony of a vocational expert.

23 The hearing was conducted by Administrative Law  
24 Judge Dale Black-Pennington. ALJ Black-Pennington issued a  
25 decision on May 20, 2015 finding that the plaintiff was not

1 disabled at the relevant times and, therefore, ineligible for  
2 the benefits sought. That became a final determination of  
3 the Agency on September 26, 2016 when the Social Security  
4 Administration Appeals Council denied plaintiff's application  
5 for review.

6 In her decision Judge Black-Pennington applied the  
7 five-step sequential test for determining disability.

8 At step one concluded that although plaintiff  
9 testified that he mows lawns, he was not engaged in  
10 substantial gainful activity and had not been since  
11 February 8, 2013.

12 At step two she concluded that the plaintiff  
13 suffers from asthma, low vision, lumbar and cervical  
14 degenerative disc disease, arthritis, anxiety, and cannabis  
15 abuse, and rejected certain other alleged impairments as not  
16 being sufficiently severe at step two to meet the test.

17 At step three she concluded that plaintiff's  
18 conditions did not meet or medically equal any of the listed  
19 presumptively disabling conditions set forth in the  
20 Commissioner's regulations. She considered listings 1.04,  
21 2.02, 2.04, 3.03, 12.06 and 12.09.

22 After surveying the medical evidence, ALJ  
23 Black-Pennington concluded that plaintiff retains the  
24 residual functional capacity, or RFC, to perform light work  
25 except that he is able to make simple work related decisions

1 and have superficial and transactional contact with  
2 co-workers and the general public. The claimant is able to  
3 occasionally manage change to the workplace environment or  
4 tasks. He should avoid heavy machinery, unprotected heights,  
5 vibrations and/or driving and motorized vehicles. The  
6 claimant should avoid known respiratory irritants and  
7 requires the use of reading glasses.

8 Applying that residual functional capacity, the ALJ  
9 Black-Pennington concluded that plaintiff was not capable of  
10 performing any of his past relevant work.

11 She then proceeded to step five and noted that if  
12 the Medical-Vocational guidelines set forth in the  
13 regulations, or the Grids, were applied, a finding of no  
14 disability would be dictated by Rule 202.13. She concluded,  
15 however, that plaintiff's inability to perform a full range  
16 of light work impaired the job base on which the Grids were  
17 located, requiring the testimony of a vocational expert.

18 After hearing that testimony, she concluded that  
19 plaintiff retained the RFC to perform as a photocopy machine  
20 operator, a cashier II, and a mail clerk, and that there were  
21 sufficient jobs in the national economy to support a finding  
22 of no disability.

23 As you know, my task is limited. The scope of  
24 review that I must apply is deferential. I must determine  
25 whether correct legal principles were applied by the ALJ and

1 the determination is supported by substantial evidence.

2 I agree with the Commissioner, I don't find that  
3 the RFC is at odds with the opinions of Dr. Hartman and the  
4 record as a whole. The three occupations identified in step  
5 five require minimum contact with supervisors, in any event.

6 L. Hoffman, I agree the opinion may be somewhat  
7 contradictory, but it was for the ALJ to determine how to  
8 rank the opinion of Dr. Hartman and L. Hoffman, and she did  
9 indicate in her opinion that she gave, while she gave great  
10 weight at the outset at page 29 to L. Hoffman, she gave  
11 little weight, at page 33, to the limitation about ability to  
12 respond to criticisms from supervisors and accept  
13 instructions, and that was his prerogative and well  
14 explained.

15 So I note also that it is plaintiff's burden to  
16 establish his limitations through the RFC stage, and I don't  
17 find that that burden was carried.

18 With regard to credibility, I've reviewed carefully  
19 SSR 96-7p on the Administrative Law Judge's credibility  
20 determination. While the plaintiff was not insured from July  
21 of 2013 to October of 2014, there is no indication that he  
22 didn't avail himself of -- couldn't avail himself of free or  
23 low cost medical care. In any event, if you look globally at  
24 his records, including the time that he was insured, he had  
25 extremely modest treatment, did not request any kind of

1 narcotic prescriptions, pain medication or modality, was not  
2 referred to a pain specialist.

3           The record suggests that he attended an initial  
4 session of physical therapy and it was indicated that he was  
5 going to continue physical therapy, but there is no records  
6 to show that he did, in fact, continue on with the physical  
7 therapy.

8           Again, the burden is on the plaintiff to establish  
9 disability, and the ALJ properly considered the record as a  
10 whole, including plaintiff's daily activities, and concluded  
11 that his claims concerning his limitations were not entirely  
12 credible.

13           So I find that the Commissioner's determination is  
14 supported by substantial evidence and I will grant judgment  
15 on the pleadings to the defendant, affirm the Commissioner's  
16 finding, and dismiss plaintiff's complaint.

17           Thank you both for excellent presentations.

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

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



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EILEEN MCDONOUGH, RPR, CRR  
Federal Official Court Reporter