

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

RONALD J. PALASCHAK,

Plaintiff,

**3:08-cv-1172
(GLS\VEB)**

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFF:

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**Gary L. Sharpe
District Court Judge**

MEMORANDUM-DECISION AND ORDER

I. Introduction

Plaintiff Ronald Palaschak challenges the Commissioner of Social Security's denial of Disability Insurance Benefits (DIB), under 42 U.S.C. §§ 405(g) and 1383(c)(3). (Compl., Dkt. No. 1.) In a Report and Recommendation Order (R&R) filed November 13, 2009, Magistrate Judge Victor E. Bianchini recommended that the Commissioner be granted judgment on the pleadings and that Palaschak's complaint be dismissed.¹ (Dkt. No. 16.) Pending are Palaschak's objections to the R&R. (Dkt. No. 17.) Upon careful consideration of the arguments, the relevant parts of the record, and the applicable law, the court adopts the R&R in its entirety.

II. Background²

On August 12, 2004, Palaschak filed an application for DIB under the Social Security Act. (See Pl. Br. at 3, Dkt. No. 7.) After his application was denied, Palaschak requested a hearing before an Administrative Law Judge (ALJ), which was held on October 12, 2007. (See *id.*) On March 27,

¹The Clerk is directed to append the R&R to this decision, and familiarity therewith is presumed. (See Dkt. No. 16.)

²The court incorporates the factual recitations of the parties and Judge Bianchini. (See Dkt. Nos. 7, 8, 16; see also Admin. Tr., Dkt. No. 9.)

2006, the ALJ issued a decision denying the requested benefits. (See *id.*) Upon review, the Social Security Administration Appeals Council remanded the case, directing the ALJ to obtain evidence from a vocational expert (VE). (See *id.*) Following a second administrative hearing on November 24, 2007, the ALJ issued a decision denying benefits. (See *id.* at 4.) That decision became the Commissioner's final decision upon the Appeals Council's denial of review. (See R&R at 2, Dkt. No. 16.)

Palaschak commenced the present action by filing a complaint on November 3, 2008, seeking judicial review of the Commissioner's determination. (See Dkt. No. 1.) After receiving the parties' briefs, Judge Bianchini issued an R&R recommending dismissal of Palaschak's complaint. (See generally R&R, Dkt. No. 16.) In response, Palaschak filed objections to Judge Bianchini's R&R. (See Dkt. No. 17.)

III. Standard of Review

By statute and rule, district courts are authorized to refer social security petitions to magistrate judges for proposed findings and recommendations regarding disposition. See 28 U.S.C. § 636(b)(1)(A), (B); N.D.N.Y. L.R. 40.1, 72.3(d); General Order No. 18. Before entering final judgment, this court routinely reviews all report and recommendation

orders in cases it has referred to a magistrate judge. If a party has objected to specific elements of the magistrate judge's findings and recommendations, this court reviews those findings and recommendations de novo. See *Almonte v. N.Y. State Div. of Parole*, No. 04-cv-484, 2006 WL 149049, at *6-7 (N.D.N.Y. Jan. 18, 2006). In those cases where no party has filed an objection, or only a vague or general objection has been filed, this court reviews the findings and recommendations of a magistrate judge for clear error. See *id.*

IV. Objections

Palaschak raises several specific objections to the R&R, which the court will review de novo. The remainder of the R&R will be reviewed for clear error.

A. Treating Physician Rule

First, Palaschak objects to Judge Bianchini's findings that the opinions of Drs. Desai and Cook were properly considered by the ALJ. (See Pl. Objections at 1-2, Dkt. No. 17.) This objection is meritless.

Under the "treating physician rule," the opinion of a treating physician is given controlling weight if it is based upon well-supported, medically acceptable clinical and laboratory diagnostic techniques and is not

inconsistent with other substantial evidence in the record. See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2); see also *Schaal v. Apfel*, 134 F.3d 496, 503 (2d Cir. 1998). Where controlling weight is not given to the treating physician's opinion, the ALJ must assess several factors to determine how much weight to give the opinion, including: (1) the length, nature, and extent of the treatment relationship; (2) the frequency of examination by the treating physician for the conditions in question; (3) the medical evidence and explanations provided in support of the opinion; (4) the consistency of the opinion with the record as a whole; (5) the qualifications of the treating physician; and (6) other relevant factors tending to support or contradict the opinion. See 20 C.F.R. §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6).

As to Dr. Cook, Palaschak claims that his opinions were “completely ignored, with no basis provided.” (Pl. Br. at 2, Dkt. No. 17.) However, as the R&R illustrates, the opposite is actually true. First, with regards to Palaschak’s mental impairments, Dr. Cook opined that Palaschak had depression, anxiety, and bipolar disorder. (Tr.³ at 269, 271-76, 280-300.) Fully consistent with and presumably based on these opinions, the ALJ determined that Palaschak had depressive, bipolar, and anxiety disorders

³“Tr.” refers to the page of the Administrative Transcript in this case. (See Dkt. No. 7.)

that constituted severe impairments. (Tr. at 16.) Second, after referring Palaschak to psychiatrist Dr. Desai for treatment of his mental impairments, Dr. Cook continued to treat Palaschak's physical symptoms. (Tr. at 176, 300-08, 335-37.) The ALJ discussed and credited Dr. Cook's "diagnoses of hypertension, GERD, renal listhiasis (kidney stones) and arthritis and prescribed treatment with medications" and concluded that "these medical conditions remained stable." (Tr. at 17.) Third, the record lacks any assessments by Dr. Cook of Palaschak's physical or mental limitations resulting from his impairments. Accordingly, Dr. Cook's treatment notes were the only available opinions he offered. Fourth, the ALJ engaged in an analysis of Palaschak's physical impairments despite Palaschak's statements that he was not seeking disability based on his physical impairments. Thus, while the ALJ did not expressly weigh Dr. Cook's opinions regarding Palaschak's mental impairments, the ALJ's decision on its face, when considered in light of the record as a whole, demonstrates that he both considered and relied on Dr. Cook's opinions without qualification.

As to Dr. Desai's opinions, the court reiterates Judge Bianchini's conclusion: "[c]learly, the ALJ was not discounting Dr. Desai's opinions

because ... they were retrospective, as [Palaschak] argues." (R&R at 10, Dkt. No. 16.) Rather, the ALJ undertook a lengthy analysis of Palaschak's treatment history with Dr. Desai. (Tr. at 22.) After reviewing Dr. Desai's treatment notes and medical assessments, (Tr. at 191-97, 232-38, 316-25), the ALJ concluded that Dr. Desai's opinions were "not consistent from one medical assessment to another." (Tr. at 22.) The ALJ then thoroughly explained the weight he gave to each assessment and the treatment notes, which the R&R quotes in full. (Tr. at 22-23; see also R&R at 10, Dkt. No. 16.) And having compared the ALJ's findings with the corresponding evidence, the court is unable to conclude that these weight allocations were incorrect.

Therefore, upon de novo review, the court adopts Judge Bianchini's conclusion that the weight the ALJ afforded the opinions of Drs. Cook and Desai was appropriate and was supported by substantial evidence.

B. Listed Impairment

Second, Palaschak objects to Judge Bianchini's ratification of the ALJ's finding that Palaschak's mental impairment did not meet or medically equal any of the impairments listed in § 12.04 of the Listing of Impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (See Pl. Objections at 3-4,

Dkt. No. 17.) This objection is equally without merit.

Pursuant to the regulations, upon determining that Palaschak had a medically determinable mental impairment, the ALJ rated the degree of functional limitation caused by the limitation under four broad functional areas and found that Palaschak did not have marked limitations in any of the areas. See 20 C.F.R. § 404.1520a(b)-(c); see also *Kohler v. Astrue*, 546 F.3d 260, 265-66 (2d Cir. 2008). In the first area, “activities of daily living,” Palaschak contends that he has “a marked restriction in activities of daily living.” (Pl. Objections at 4, Dkt. No. 17.) The ALJ itemized the daily activities Palaschak can perform, evaluated the relevant medical opinions, and concluded that Palaschak had “no more than mild restriction[s].” (Tr. at 18.) This conclusion, which is supported by substantial evidence, was correctly affirmed by Judge Bianchini. As to the second area, “social functioning,” Palaschak disagrees with the ALJ’s finding that he has mild difficulties in maintaining social functioning. However, the evidence in the record fully supports this finding. With regards to the third area, “concentration, persistence, or pace,” the ALJ found that Palaschak had “moderate difficulties.” (Tr. at 19.) In making this finding, the ALJ examined both the medical evidence on record and Palaschak’s testimony,

all of which supported his findings. Lastly, as to the fourth area, the record is devoid of any medically documented episodes of decompensation, which Palaschak does not refute. Accordingly, upon de novo review, the court adopts Judge Bianchini's conclusion that substantial evidence supported the ALJ's determination that Palaschak's mental impairment does not meet or medically equal an enumerated impairment.

C. **Vocational Expert Testimony**

Lastly, in objection to Judge Bianchini's recommendations, Palaschak contends that the questions and hypotheticals posed by the ALJ to the VE were flawed because they were based on an incorrect residual functional capacity (RFC) assessment. (See Pl. Objections at 4-5, Dkt. No. 17.) Palaschak additionally asserts that it was inappropriate for the ALJ to take the VE's testimony by telephone and that Judge Bianchini's categorization of this error as "harmless" was incorrect. (See *id.* at 5.) However, the first objection is without merit and the second, while noteworthy, must be rejected.

In accordance with the regulations, the ALJ assessed Palaschak's maximum ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis, in light of his physical and mental

abilities, symptoms, pain, and other potentially interfering limitations. See 20 C.F.R. § 404.1545; see also SSR 96-8p, 1996 WL 3714184, at *2 (S.S.A. July 2, 1996); *Melville v. Apfel*, 198 F.3d 45, 52 (2d Cir. 1999); *Verginio v. Apfel*, No. 97-CV-456, 1998 WL 743706, at *3 (N.D.N.Y. Oct. 23, 1998). In evaluating Palaschak's functional limitations, the ALJ properly undertook a function-by-function analysis. See SSR 96-8p, 1996 WL 374184, at *1, 3; see also 20 C.F.R. §§ 404.1545(b)-(d), 416.945(b)-(d). And equally important, the ALJ evaluated the severity of Palaschak's symptoms based on the objective medical evidence and, as required by the regulations, based on other relevant factors, including daily activities, frequency and intensity, aggravating factors, medication, and other treatment. See 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); see also SSR 96-7p, 1996 WL 374186, at *4-5.

After conducting these inquiries and assessments, the ALJ found that Palaschak had the RFC to: lift and carry twenty pounds occasionally and ten pounds frequently; sit six hours out of an eight-hour workday, as long as he could change his posture every hour; stand and walk six hours per eight-hour workday, with hourly changes in posture; occasionally climb, stoop, knell, crouch, and crawl; understand and follow instructions and

directions; perform simple and some complex tasks independently but with supervision, while maintaining attention and concentration; attend to and maintain a schedule; learn new tasks; make appropriate decisions; and occasionally interact with coworkers and the public. (Tr. at 19.) Substantial evidence supports these findings, and therefore, the ALJ was entitled to rely on this RFC assessment in questioning the VE. And because the ALJ's hypotheticals encompassed the physical and mental limitations laid out in the RFC assessment, they were appropriate. In addition, the court, like Judge Bianchini, finds Palaschak's argument regarding the VE's inability to identify statistics from the dictionary of occupational titles unconvincing. (See R&R at 15, Dkt. No. 16.)

Finally, as to Palaschak's argument that the ALJ erred by allowing the VE to testify via telephone, the court agrees with Judge Bianchini's conclusion that although the decision to allow the VE to testify by phone was erroneous, it was nonetheless harmless. Without reexamining the historical and practical reasons for the Guidelines' preference that a VE testify in-person or by video teleconferencing in limited circumstances—reasons which the R&R fully and meticulously outlined, (see R&R at 16-23, Dkt. No. 16)—the court wishes to reassert Judge Bianchini's concern with

the Commissioner's practice of taking a VE's testimony telephonically, particularly where the claimant objects and the ALJ proceeds without any justifying explanation. Such a practice is in conflict with the spirit and the letter of the law, and should be discouraged absent extenuating circumstances.

However, this is not a case where the VE testified by telephone and the claimant's ability to effectively cross-examine the VE was thereby impeded or where the VE relied on evidence that was not provided to the claimant, see *Henry v. Astrue*, No. 07 Civ. 0957, 2008 WL 5330523, at *12 (S.D.N.Y. Dec. 17, 2008). Rather, the facts here do not support a finding of reversible error, since, as the R&R highlights, Palaschak's counsel was afforded a sufficient opportunity to cross-examine the VE and did so effectively. See, e.g., *Bates v. Astrue*, No. 07-074, 2008 WL 1736819, at *13 (D. Del. April 11, 2008). Accordingly, the court concludes that the ALJ's reliance on the VE's telephonic testimony constituted harmless error and thus adopts Judge Bianchini's recommendation over Palaschak's objection.

V. Conclusion

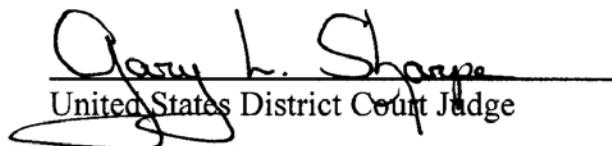
Having addressed Palaschak's specific objections de novo, and

otherwise finding no clear error in the R&R, the court accepts and adopts Judge Bianchini's R&R in its entirety.

WHEREFORE, for the foregoing reasons, it is hereby
ORDERED that the decision of the Commissioner is **AFFIRMED** and
Palaschak's complaint is **DISMISSED**; and it is further
ORDERED that the Clerk provide a copy of this Memorandum-
Decision and Order to the parties.

IT IS SO ORDERED.

March 26, 2010
Albany, New York



United States District Court Judge