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

MARK B.,

Plaintiff,

v. Civil Action No. 3:19-CV-1062 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

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FOR DEFENDANT

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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) and 1383(c)(3), are cross-motions for judgment on the pleadings.[1] Oral argument was heard in connection with those motions on October 8, 2020, 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 GRANTED.

[1] 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.

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.

David E. Peebles
U.S. Magistrate Judge

Dated: October 14, 2020
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MARK B.,

Plaintiff,

vs. 3:19-CV-1062

Commissioner of Social Security,

Defendant.

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DECISION - October 8, 2020

HONORABLE DAVID E. PEEBLES

United States Magistrate Judge, Presiding

APPEARANCES (by telephone)

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THE COURT: All right. Thank you both. Let me begin by congratulating counsel for excellent presentations. I found this case to be fascinating. It's a very narrow issue that's been raised but a complicated one, nonetheless.

The plaintiff has commenced this proceeding pursuant to 42, United States Code, Sections 405(g) and 1383(c)(3) to challenge an adverse determination by the Commissioner of Social Security finding that he was not disabled at the relevant times and, therefore, ineligible for the benefits which he sought. The background is as follows.

The plaintiff was born in November of 1966. He is currently 53 years of age. Plaintiff was 49 years old at the alleged onset of his disability in October of 2015. Plaintiff stands approximately 5-foot-9 or 5-foot-10-inches in height and weighs at various times between 183 and 200 pounds.

Plaintiff lives in Norwich in a house with his wife, who he married in November of 2016, and two stepdaughters who were 17 and 18 years of age in June of 2018, and according to my calculations, they are now 19 and 20, respectively. Plaintiff also has two older sons. Plaintiff has a high school diploma and an Associate's Degree in Business Administration. He has a driver's license and does drive.

Plaintiff stopped working in October of 2015.

Prior to that time he worked as a supervisor in pharmaceutical manufacturing, as a machine operator, as a soldering assembler, and a warehouse coordinator.

Mentally, plaintiff suffers from anxiety. Although he has not undergone any significant psychiatric treatment, he does take medications as needed to address his anxiety. His conditions of concern in this case are physical and stem from both back and neck pain or degenerative disc disease at those levels. He experiences pain that radiates into his hips and legs. He also suffers from hypertension, although the hypertension apparently is being controlled adequately with medication.

Plaintiff's physical conditions stem from a fall from a ladder in 2005 and another incident in 2012 when a porch roof fell on him. He has not undergone any surgery or injections. He has done physical therapy.

There are several objective reports in the record addressing both his lumbar and cervical conditions. An X-ray from November 2011, at page 277, reveals no fracture or subluxation identified. Plaintiff underwent magnetic resonance imaging, or MRI, testing on April 18, 2016. The report appears at page 270 and 271. The impression was the disc and degenerative changes, which are specifically described, at T12-L1 and L2-L3, as well as L4-L5, and L5-S1.

Plaintiff underwent another spinal X-ray on

January 9, 2014, and the results appear at page 276 of the record. The result was mild degenerative changes. There was an X-ray taken of plaintiff's lumbar region on May 4, 2016; that's reported at 294. The impression from that X-ray was minimal degenerative spurring. On November 16, 2017, plaintiff underwent another lumbar MRI, the report appears at 299 and 300. The impression was multilevel degenerative disc disease, detailed above, and the focus is on L3-L4 and L4-L5.

Plaintiff underwent a limited spinal X-ray on November 8, 2017, the result appears at page 301. And again the impression is mild degenerative disc disease with no fracture or subluxation identified, and that appears at 301 and 302.

Plaintiff also underwent testing of his cervical region. There was an X-ray taken on January 9, 2014, that appears at 275, that identifies degenerative changes and straightened cervical lordosis. On April 1, 2016, plaintiff underwent cervical MRI testing, the result appears at 272 and 273, and reflects various bulges at certain levels, including C4-C5 and C3-C4. An X-ray was taken on April 25, 2016, the result appears at 274, and the impression is straightening of the cervical lordosis, and degenerative disc disease at C5-C6 and C6-C7. An X-ray taken on May 4, 2016, resulted in the impression of suggestion of possible disc disease at C3-C4 and C5-C6, and straightening. That result appears at

page 295.

On December 7, 2017, a limited X-ray was taken of plaintiff's cervical spine. The result appears at 297 and 298. The impression is straightening of cervical lordosis, and C5-C6 degenerative disc disease.

Plaintiff's health care providers include Nurse Practitioner Tiffany Rivenburgh at Bassett Healthcare, who is described as his primary care provider. He has also undergone chiropractic treatment with Russell James and has been seen at UHS Orthopedics by Nurse Practitioner Kristen Menard.

Plaintiff has been prescribed various medications, including Flexeril, Naproxen, Ibuprofen, Atenolol, Levothyroxine, Simvastatin, and Lisinopril.

In terms of daily activities, plaintiff cooks daily, shops weekly, showers daily, dresses, watches television, radio, socializes with family and friends, mows the lawn, he does it in five sections with breaks. He does dishes, does not do laundry. He vacuums, sweeps and goes for short walks. Plaintiff is a smoker. He smokes approximately one half of a pack of cigarettes per day. He also drinks alcohol daily, but does not use illegal drugs.

Procedurally, plaintiff applied for Title II and Title XVI benefits on March 19, 2016, alleging an onset date of October 13, 2015. He claimed disability based on

arthritis in his back and neck and numbness in his hands and feet. That appears at page 183 of the Administrative Transcript.

A hearing was conducted on June 29, 2018, by Administrative Law Judge Victor Horton, who addressed plaintiff's disability claim. ALJ Horton issued a decision on August 23, 2018, that became a final determination of the Agency on July 5, 2019, when the Social Security Administration Appeals Council denied plaintiff's application for review. This action was commenced on August 28, 2019, and is timely.

In his decision, ALJ Horton applied the familiar five-step sequential test for determining disability. He first noted that plaintiff's insured status ended on September 30, 2018.

He then found at step one that plaintiff had not engaged in substantial gainful activity since his alleged onset date.

At step two, ALJ Horton concluded that plaintiff does suffer from severe impairments that impose more than minimal limitations on his ability to perform basic work functions, including degenerative disc disease of the lumbar spine with disc protrusion and tear at the L5-S1 level, degenerative disc disease of the cervical spine with disc protrusion at the C4-C5 level, and chronic pain syndrome.

At step three, ALJ Horton concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the regulations, specifically considering listing 1.04.

At step four -- prior to going to step four, I should say that the Administrative Law Judge crafted a residual functional capacity finding, or RFC, determining that plaintiff does retain the ability to perform light work with various limitations that are set forth at page 15 of the Administrative Transcript, including, but not limited to, the claimant can frequently reach in all directions, including overhead, and the claimant can never lift overhead.

Applying that RFC finding at step four, with the assistance of vocational expert testimony, ALJ Horton concluded that plaintiff is capable of performing his past relevant work as a production supervisor, both as performed actually and as generally performed.

In the alternative, proceeding to step five, notwithstanding the step four finding, and again based on the testimony of the vocational expert, ALJ Horton concluded that plaintiff is capable of performing work available in the national economy as an injection molding machine attendant, a light work position with an SVP of 2, and therefore concluded that plaintiff was not disabled at the relevant time.

As you know, the Court's function is limited to

determining whether correct legal principles were applied and substantial evidence supports the resulting finding. Substantial evidence has been defined as such relevant evidence as a reasonable mind would find sufficient to support a conclusion.

In this case, plaintiff's contention is that the Administrative Law Judge failed to resolve a conflict between the Dictionary of Occupational Titles, or DOT, and the vocational expert testimony concerning the restriction on overhead lifting. Plaintiff does not in this case challenge the RFC finding. No question that if there is an apparent conflict between the DOT and the testimony of the vocational expert, the Administrative Law Judge must elicit a reasonable explanation for the conflict and resolve it before relying on the testimony of the vocational expert, and the reasoning must be set forth.

As the Social Security Ruling 00-4p makes that clear, and the Second Circuit has reiterated and reaffirmed that in *Lockwood versus Commissioner of Social Security Administration*, 914 F.3d 87, a decision from January 23, 2019, it is insufficient, as the Second Circuit made clear in *Lockwood*, to rely merely on a conclusory statement from a vocational expert that his or her testimony is consistent with the DOT.

The defendant argues that there is no conflict

here. Light work, which is a finding of the RFC limitations and which the two positions in question fall under, includes lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds, 20 CFR Section 404.1567(b). The Dictionary of Occupational Titles does not specify a direction for the required lifting under the light work definition. The Dictionary of Occupational Titles, or DOT, listings for the two positions in question, general supervisor and injection molding machine tender, speak to lifting. The general supervisor, DOT Section 183.167-018, specifies that it is light work with no direction specified and requires occasional reaching, meaning less than one-third of the time, without specifying direction. DOT Section 556.685-038, that relates to injection molding machine tender, also specifies light work and requires frequent reaching, meaning one-third to two-thirds of the time, that's again without specifying direction. Reaching, of course, under SSR 83-10 is a non-exertional limitation.

This case is very similar to what was confronted by the Second Circuit in *Lockwood*. That case involved a residual functional capacity finding that limited the plaintiff to no overhead reaching. The DOT for those three jobs that were in question in that case required reaching with no direction specified, and so a conflict existed.

I did have a problem with this case, and I went back and forth because I understand the Commissioner's argument that normally lifting is something that is done from the waist level down, that would be the normal understanding of lifting. There certainly isn't anything in the DOT that specifies. I did find, however, the selected characteristics of occupations defined in the revised Dictionary of Occupational Titles, 1993 edition, published by the United States Department of Labor Employment and Training Administration, it's called the SCODICOT, in Appendix C it addresses physical demands and defines lifting as, quote, "Raising or lowering an object from one level to another (includes upward pulling)." That definition did not necessarily seem to limit to lifting from the waist down.

I do believe that there is a conflict between certainly at step five and at step four, as generally performed the supervisory position, because the Dictionary of Occupational Titles characterizes those as light work and does not speak to lifting. However, I believe the error to be harmless. This is the case similar to *Jasinski*, which was cited by the Commissioner, *Jasinski versus Barnhart*, 341 F.3d 182 (Second Circuit 2003). The plaintiff gave testimony concerning the fact that lifting was not required in his position as a supervisor, the vocational expert heard that testimony, was aware of the hypothetical posed which limited

the no overhead lifting, and testified that plaintiff was capable of performing his past relevant work as actually performed. It was plaintiff's burden at step four to prove otherwise, and plaintiff did not carry that burden.

So, I do find error at step four and five, but I find it was harmless for the reasons that I just stated. I will, therefore, grant judgment on the pleadings to the defendant and order dismissal of plaintiff's complaint.

I found this case to be very interesting and, frankly, went back and forth on it, but in the end I think for the reasons stated that the case should be dismissed.

Thank you both for excellent presentations. Hope you stay safe.

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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.

Eileen McDonough

EILEEN MCDONOUGH, RPR, CRR
Federal Official Court Reporter