

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

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MICHAEL B. M.,

Plaintiff,

v.

Civil Action No.  
3:20-cv-0946 (DEP)

KILOLO KIJAKAZI, Acting Commissioner  
of Social Security,<sup>1</sup>

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LEGAL AID SOCIETY OF MID-NY  
221 South Warren Street, Suite 310  
Syracuse, New York 13202

ELIZABETH V. LOMBARDI, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
625 JFK Building  
15 New Sudbury St  
Boston, MA 02203

CHRISTOPHER L. POTTER, ESQ.

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<sup>1</sup> Plaintiff's complaint named Andrew M. Saul, in his official capacity as the Commissioner of Social Security, as the defendant. On July 12, 2021, Kilolo Kijakazi took office as the Acting Social Security Commissioner. She has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

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 (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>2</sup> Oral argument was conducted in connection with those motions on January 5, 2022, during a telephone conference held 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 did not result from the application of proper legal principles and is not 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, a transcript of which is attached and incorporated herein by

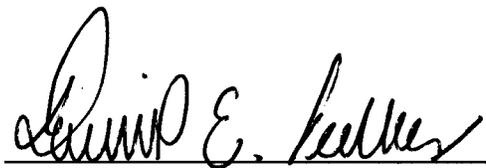
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<sup>2</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action 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.

reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.



David E. Peebles  
U.S. Magistrate Judge

Dated: January 10, 2022  
Syracuse, NY

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
MICHAEL BEN M.,

Plaintiff,

vs.

3:20-CV-946

KILOLO KIJAKAZI, COMMISSIONER OF  
SOCIAL SECURITY,

Defendant.  
-----x

Transcript of a **Decision** held during a  
Telephone Conference on January 5, 2022, the  
HONORABLE DAVID E. PEEBLES, United States Magistrate  
Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: LEGAL AID SOCIETY OF MID-NEW YORK  
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BY: ELIZABETH V. LOMBARDI, ESQ.

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(315) 234-8547*

1 (The Court and all counsel present by  
2 telephone.)

3 THE COURT: Let me begin by thanking both of you  
4 for excellent presentations. I've enjoyed working with you.

5 Plaintiff commenced this proceeding pursuant to 42  
6 United States Code Sections 405(g) and 1383(c)(3) to  
7 challenge an adverse determination of the Commissioner of  
8 Social Security finding that he is not entitled to the  
9 benefits for which he applied.

10 The background is as follows: Plaintiff was born  
11 in January of 1982 and is currently just short of 40 years of  
12 age, he was 35 years old at the alleged onset of his  
13 disability on March 1, 2017. Plaintiff stands approximately  
14 5 foot 6 inches in height and has weighed at various times  
15 between 205 and 222 pounds. Plaintiff lives in Binghamton  
16 with his -- the record is equivocal as to whether she is his  
17 wife or girlfriend, they have been together for some 15  
18 years. They live in some sort of shared house arrangement.  
19 Plaintiff moved from Iowa in 2018 to be near his father. At  
20 various times he has been homeless or living in a shelter.  
21 Plaintiff has a 10th grade education and while in school was  
22 in special education classes in Iowa based on a learning  
23 disability. Plaintiff has no driver's license, although he  
24 at one point did possess one.

25 Plaintiff stopped working in May of 2008. His past

1 work includes as a part-time dishwasher for a brief period of  
2 time, factory laborer, he worked part time in various  
3 fast-food settings including at Burger King and McDonald's.

4 Physically, plaintiff suffers from several  
5 impairments, including obesity, arthritis, bilateral shoulder  
6 pain based on a 2016 motor vehicle accident, he suffers from  
7 carpal tunnel syndrome, status post release on the right  
8 wrist, asthma, some bowel issues, right hip pain, right knee  
9 pain, lower back pain, migraines, seizures, and hypertension.

10 Mentally, plaintiff has been diagnosed with various  
11 conditions, including borderline personality disorder,  
12 paranoid schizophrenia, general anxiety disorder, bipolar  
13 disorder, intellectual disorder, and poly-substance abuse.  
14 It appears that he was sexually abused as a child and has had  
15 various difficulties over time in various relationships.

16 Plaintiff has received treatment, including from  
17 Broadlawn Medical Center in Iowa, from 2000 until  
18 November 2014 and then again resuming in October 2016 until  
19 he moved in 2018. His primary care physician in Binghamton  
20 is Dr. James Hollandt who he began seeing in July of 2018.  
21 He also receives mental health treatment from Tioga Mental  
22 Health Clinic where he began treatment in April of 2018. He  
23 sees a couple of licensed clinical social workers and  
24 licensed master social worker. His psychiatrist, who he sees  
25 one time per month, is Dr. Ejiro Agboro-Idahosa.

1           Plaintiff's activities of daily living include his  
2           ability to perform basic hygiene, groom, cook, clean, manage  
3           finances, he socializes with family and friends, he enjoys  
4           music, watching television, he uses medical transportation  
5           service as required. Plaintiff has a history of  
6           incarceration as well as poly-substance and tobacco abuse,  
7           marijuana, and methamphetamines. He claims to be sober for  
8           the past two years.

9           Procedurally, plaintiff applied for Title II and  
10          Title XVI benefits on March 29, 2018 alleging an onset date  
11          of March 1, 2017, and claiming disability in his function  
12          report based on paranoid schizophrenia, bipolar disorder,  
13          attention deficit disorder, multiple personality disorder,  
14          codependency, anxiety, and a learning disability. A hearing  
15          was conducted by Administrative Law Judge Melissa Hammock on  
16          September 6, 2019 to address plaintiff's application for  
17          benefits on October 9, 2019. Administrative Law Judge  
18          Hammock issued an unfavorable decision which became a final  
19          determination of the agency on June 22, 2020, when the Social  
20          Security Administration Appeals Council denied plaintiff's  
21          request for review. This action was commenced on August 18,  
22          2020, and is timely.

23          In her decision, ALJ Hammock applied the familiar  
24          five-step sequential test for determining disability. She  
25          first noted that plaintiff's last date of insured status was

1 March 30, 2012.

2 At step one she found that plaintiff had not  
3 engaged in substantial gainful activity since March 1, 2017.

4 At step two she concluded that plaintiff does  
5 suffer from severe impairments that impose more than minimal  
6 limitations on his ability to perform basic work functions,  
7 including paranoid schizophrenia, generalized anxiety  
8 disorder, bipolar disorder, borderline personality disorder,  
9 intellectual disorder, and poly-substance abuse.

10 At step three, the administrative law judge  
11 concluded that plaintiff's conditions do not meet or  
12 medically equal any of the listed presumptively disabling  
13 conditions, specifically considering Listings 12.03, 12.04,  
14 12.05, 12.06, and 12.08, all of which deal with plaintiff's  
15 mental health conditions.

16 After reviewing the medical and other evidence, ALJ  
17 Hammock concluded that plaintiff retains some residual  
18 functional capacity, or RFC, to perform work at a full range  
19 of exertional levels but with nonexertional limitations  
20 including, he can perform simple routine tasks and make  
21 simple work-related decisions in an environment with no  
22 production rate pace and no more than occasional changes in  
23 the work routine. He can have occasional superficial  
24 interaction with supervisors and coworkers and he can have no  
25 interaction with the public.

1           At step four, ALJ Hammock noted that plaintiff does  
2 not have any significant past relevant work and then  
3 proceeded to step five where, based on the testimony of a  
4 vocational expert, plaintiff was found to be capable of  
5 performing available work in the national economy citing as  
6 representative positions industrial sweeper, laundry laborer,  
7 and cleaner II.

8           As you know, the court's function in this case is  
9 limited to determining whether correct legal principles were  
10 applied and the resulting determination is supported by  
11 substantial evidence, which is defined as such relevant  
12 evidence as a reasonable person would find sufficient to  
13 support a conclusion.

14           In this case, plaintiff makes three basic  
15 arguments. She contends first at step two that plaintiff's  
16 seizures and obesity should have been included in the finding  
17 of severe impairments. The second argument focuses on the  
18 weighing of medical opinions and specifically the weight  
19 accorded to opinions of Dr. Agboro-Idahosa and Dr. Ferrin.  
20 The third argument addresses an alleged conflict between the  
21 testimony of the vocational expert and the *Dictionary of*  
22 *Occupational Titles*, and the failure to resolve and explain  
23 the resolution of that conflict.

24           As you know, as an overarching consideration, it is  
25 plaintiff's burden through step four to prove that his

1 conditions create and cause limitations that preclude him  
2 from performing available work. Additionally, the issue is  
3 not what the court would do when faced with the record that  
4 was developed before the agency, but rather, whether the  
5 resulting determination, again, was supported by substantial  
6 evidence and resulted from the application of proper legal  
7 principles.

8 First addressing the step two argument, the  
9 governing regulations provide that an impairment or  
10 combination of impairments is not severe if it does not  
11 specifically limit a claimant's physical and mental ability  
12 to do basic work activities. 20 C.F.R. Section 404.1521.  
13 The regulation goes on to describe what is meant by the  
14 phrase basic work activities, defining that term to include  
15 the abilities and aptitudes necessary to do most jobs. The  
16 second step requirement, as the plaintiff has argued, is  
17 clearly de minimus and intended only to screen out the truly  
18 weakest of cases. *Dixon v. Shalala*, 54 F.3d 1019 at 1030,  
19 Second Circuit 1995. Significantly, and importantly,  
20 however, the mere presence of a disease or impairment or  
21 establishing that a person has been diagnosed or treated for  
22 a disease or impairment is not by itself sufficient to  
23 establish a condition as severe. *Coleman v. Shalala*, 895  
24 F.Supp. 50 at 53, Southern District of New York 1995.

25 The focus of the argument in this case is upon

1 obesity and seizures. The administrative law judge explained  
2 the rejection of plaintiff's physical conditions, including  
3 obesity and seizures, as not being severe, pages 13 and 14 of  
4 the administrative transcript. It was noted, for example,  
5 with regard to obesity that there was no indication from  
6 plaintiff's respiratory exam, which was normal, that the  
7 obesity did not appear to affect that, nor did it affect his  
8 mobility or breathing in any notable way. I note,  
9 significantly, that with regard to obesity, plaintiff did not  
10 mention his obesity at either the hearing or in his function  
11 report as a reason why he's not capable of performing basic  
12 work activities. And there's no proof in the record that  
13 plaintiff has pointed to that shouldered the burden of  
14 establishing any such limitation.

15 With regard to seizures, plaintiff was not taking  
16 anti -- has not taken antiseizure medications regularly.  
17 There's no evidence of any observation of any seizures, no  
18 encephalogram or objective confirmation of seizures, and at  
19 433, the plaintiff told the consultative examiner,  
20 Dr. Magurno, that his most recent seizure was in 2015. I  
21 think that, despite the modest test at step two, the  
22 rejection of those physical conditions as being severe is  
23 supported by substantial evidence and was proper.

24 Turning next to the medical opinions of record, the  
25 date on which this case, or the application in this case was

1 filed means that the new regulations regarding the weighing  
2 of medical opinions applies. Under the new regulations, an  
3 ALJ does not have to give any specific evidentiary weight,  
4 including controlling weight, to any medical opinions,  
5 including those from claimant's medical sources. 20 C.F.R.  
6 Sections 404.1520c(a) and 416.920c(a). Instead, an ALJ must  
7 weigh those opinions using the relevant factors including,  
8 significantly, supportability and consistency. The ALJ must  
9 articulate how persuasive he or she found each medical  
10 opinion and must explain how he or she considered the  
11 supportability and consistency of those medical opinions.  
12 The ALJ may also, but is not required to, explain the  
13 consideration of other relevant factors as appropriate in  
14 each case, including the source's relationship with the  
15 claimant, including the length of the treatment relationship,  
16 frequency of examinations, purpose of the treating  
17 relationship, the extent of the treating relationship, and  
18 whether it was merely an examining relationship, the  
19 specialization, if any, of the source and other factors that  
20 tend to support or contradict the medical opinion.

21 The focus of this argument is on, first, the  
22 treatment of Dr. Agboro-Idahosa's opinion from June 24, 2019.  
23 That opinion, of course, is extremely limiting. The  
24 administrative law judge cited and recounted the various -- I  
25 should say the opinion is, appears at 456 to 462 of the

1 record and is repeated at 986 to 992 with the exception of  
2 the last page. The opinion of Dr. Agboro-Idahosa offers  
3 opinions in each of the, I'll call them the B domains, and  
4 lists various degrees, from none to extreme or inability to  
5 function, and that is defined as approximately more than  
6 20 percent of the workday or workweek. In understanding,  
7 remembering, or applying information, the plaintiff is rated  
8 as extreme in six of the subcategories and marked or serious  
9 in two others. In interacting with others, he is rated as  
10 extreme in two and marked or serious in three. In  
11 concentrating, persistence, or maintaining pace, extreme in  
12 two and five in marked or serious. In adapting and managing  
13 self, four in extreme and five in marked or serious.  
14 Dr. Agboro-Idahosa also opines that plaintiff would likely be  
15 absent more than four days per month and late to work more  
16 than four days per month.

17 That opinion was discussed at page 22 to 23 of the  
18 administrative transcript by the administrative law judge who  
19 found it to be very limiting and inconsistent with work but  
20 found it overly restrictive and not persuasive. The reasons  
21 cited are fourfold and include that his noted mental status  
22 exam findings of record do not support it, but shows that the  
23 claimant retained unimpaired attention, concentration,  
24 memory, insight, and judgment despite the fluctuating  
25 symptoms; two, Dr. Agboro-Idahosa did not provide direct

1 citations to his objective notes; three, he appeared to  
2 primarily rely on claimant's own subjective reports; and  
3 four, was not provided on a function-by-function format. The  
4 last of those the Commissioner concedes is not a valid reason  
5 for rejection of the opinion.

6 The opinions of Dr. Agboro Idahosa are consistent  
7 and supported by, at least in part, by the consultative  
8 examination of Dr. Slowik, that's reported at 426 to 430, who  
9 finds moderate limitations in several categories, a marked  
10 limitation in plaintiff's ability to understand, remember,  
11 and apply complex directions and instructions and regulate  
12 emotions, marked to -- moderately to marked limitations in  
13 the ability to interact adequately with supervisors,  
14 coworkers, and the public and sustained concentration. It is  
15 also consistent with the opinions of plaintiff's treating  
16 primary care provider, Dr. Hollandt.

17 Dr. Agboro-Idahosa is a psychiatrist, a  
18 professional in that field. He has treated plaintiff since  
19 September 2018, has great longitudinal knowledge of the  
20 plaintiff. And although it is true that the treating source  
21 rule was abrogated under the new regulations, there are cases  
22 that suggest and I think the relevant factors that I read  
23 equally suggest that the fact of a treating relationship is  
24 still an important consideration. As was noted in *Shawn H.*  
25 *v. Commissioner of Social Security*, Civil Action Number --

1 well, 20 -- I'm sorry, 2-, 2:19-CV-113, it was reported at  
2 2020 U.S. Dist. LEXIS 123589, it was noted by my good friend  
3 and colleague Magistrate Judge John Conroy that under the new  
4 regulations, they still recognize the foundational nature of  
5 the observations of treating sources, and consistency with  
6 those observations is a factor in determining the value of  
7 any treating source's opinion.

8           It's a mental health case, and although the  
9 administrative law judge cites this as a reason, it is  
10 entirely appropriate, and particularly in mental health  
11 cases, for a professional psychiatrist to rely on a  
12 plaintiff's accounts of symptoms. And in a complex mental  
13 health case, which this clearly is, the perspective of a  
14 treating psychiatrist is important. And although this case  
15 was decided under the old regulations, I think it still has  
16 vitality, *Prior v. Commissioner of Social Security*, 2020 WL  
17 1445963, Western District of New York, March 25, 2020. I  
18 believe it was error to discount Dr. Agboro-Idahosa's  
19 opinions, and the error was harmful.

20           And turning to Dr. Ferrin. Dr. Ferrin, a  
21 nonexamining consultant, issued an opinion on June 6, 2018  
22 that is found at Exhibits 1A and 2A of the administrative  
23 transcript. He addressed the so-called B criteria under the  
24 listings and found only moderate limitations in the ability  
25 to understand, remember, or apply information, interacting

1 with others; concentration, persistence, and maintaining  
2 pace, mild; and adapting and managing one's self, moderate.  
3 In his later mental residual functional capacity finding, he  
4 concluded that plaintiff retains the ability to perform  
5 basically simple work, he is able to understand and remember  
6 simple and detailed instructions. The claimant can adapt to  
7 changes in a routine work setting and can use appropriate  
8 judgment to make work-related decisions. He found that  
9 plaintiff was moderately limited in the ability to understand  
10 and remember detailed instructions, the ability to carry out  
11 detailed instructions, the ability to maintain attention and  
12 concentration for extended periods, the ability to perform  
13 activities within a schedule, the ability to complete a  
14 workday and workweek without interruption, the ability to  
15 interact appropriately with the general public, the ability  
16 to accept instructions and respond appropriately and the  
17 ability to respond appropriately to changes in the work  
18 setting.

19 The administrative law judge discussed the opinions  
20 of Dr. Ferrin at page 24 and found them implicitly, I would  
21 say that there was clearly no specific statement to this  
22 effect, but very implicit in his decision is that he found  
23 Dr. Ferrin's opinion persuasive. The plaintiff argues that  
24 Dr. Ferrin's opinion should not be relied on because it was  
25 based on review of only partial records.

1           First, let me say I do agree with the Commissioner  
2           that under the right circumstances, the opinion of a  
3           consultative examiner can trump the opinion of a treating  
4           source if it meets the consistency and supportability test  
5           under the new regulations. The Second Circuit as much as  
6           said that in *Camille v. Colvin*, 652 F.App'x 25 from the  
7           Second Circuit 2016. However, I also agree that Dr. Ferrin  
8           very clearly did not have the benefit of a complete record,  
9           and although that does not necessarily disqualify the opinion  
10          as being relied upon, if there is significant subsequent  
11          treatment, particularly if the condition has worsened, then  
12          relying upon that opinion that is only based on partial  
13          records does not satisfy the substantial evidence test.

14                 Here, the -- I'm not sure the administrative law  
15          judge's discussion of Dr. Ferrin's opinion is sufficient to  
16          permit meaningful review. It is also clearly inconsistent  
17          with Dr. Agboro-Idahosa, Dr. Hollandt, and Dr. Slowik. And  
18          although it is proper, again, to rely on a nonexamining  
19          consultant's opinion, it is particularly weak evidence.  
20          *Abate v. Commissioner of Social Security*, 2020 WL 2112322  
21          from the Eastern District of New York, May 4, 2020, another  
22          case that was cited under the former regulations but I think  
23          equally applicable under the new.

24                 Significantly, the only records from the Tioga  
25          County Department of Mental Hygiene that were reviewed was

1 the April 2018 intake, did not have the benefit of subsequent  
2 treatment records.

3 In my view it was an error, if he did find the  
4 opinion persuasive, to rely on that opinion to formulate his  
5 residual functional capacity. So I do find error in the  
6 weighing of medical opinions. I find that those errors are  
7 harmful because those opinions that were rejected are  
8 inconsistent with the residual functional capacity and  
9 accordingly, the vocational expert's hypothetical and  
10 testimony, and it does therefore affect the step five  
11 determination.

12 I note because of this finding, I will not address  
13 the DOT conflict issue.

14 The plaintiff has asked that the decision be  
15 vacated with a directed finding of disability; I don't find  
16 such persuasive evidence of disability that meets the rigid  
17 test for taking that step. Instead, I am going to vacate the  
18 determination of the Commissioner and remand the matter for  
19 further proceedings consistent with this opinion. So I will  
20 grant judgment on the pleadings to plaintiff on that basis.  
21 Thank you both for excellent presentations, please stay safe.

22 MS. LOMBARDI: Thank you, your Honor.

23 MR. POTTER: Thank you, your Honor.

24 MS. LOMBARDI: Stay safe, everyone.

25 (Proceedings Adjourned, 12:01 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, 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.

Dated this 7th day of January, 2022.

/S/ JODI L. HIBBARD  
JODI L. HIBBARD, RPR, CRR, CSR  
Official U.S. Court Reporter