

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
ROSALIND HERBERT,

Plaintiff,

vs.

5:11-cv-1107

MICHAEL J. ASTRUE,
As Commissioner of the
Social Security Administration,

Defendant.
-----x

Transcript of a Decision on the Record held on
February 12, 2013, at the James Hanley Federal
Building, 100 South Clinton Street, Syracuse,
New York, the HONORABLE THÉRÈSE WILEY DANCKS,
United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(VIA TELEPHONE)

For Plaintiff: PETER W. ANTONOWICZ, ESQ.
Attorney at Law
148 West Dominick Street
Rome, New York 13440

For Defendant: SOCIAL SECURITY ADMINISTRATION
Office of Regional General Counsel
Region II
26 Federal Plaza - Room 3904
New York, New York 10278
BY: KATRINA M. LEDERER, ESQ.

JODI L. HIBBARD, RPR, CRR, CSR
(315) 234-8547

1 (The following is an excerpt from the
2 proceedings held on 2/12/13.)

3 (In Chambers, Counsel present via telephone.)

4 THE COURT: I think I've got enough and I
5 haven't heard anything from either one of you that changes my
6 decision here so I'm prepared to issue a bench decision now
7 and I do have a court reporter here, and what I will do once
8 I get the transcript of the decision is attach it to my order
9 and that will go up on the docket when it's ready.

10 But I want you both to know that I have
11 thoroughly reviewed the record carefully, and in light of the
12 arguments of both of you today, and what you've presented in
13 your briefs, I've applied the requisite deferential standard
14 which requires me to determine whether proper legal
15 principles were applied, and whether the result is supported
16 by substantial evidence. Clearly the relevant inquiry is not
17 whether I would have arrived at the same determination had I
18 been presented with this record. And as I understand it
19 based upon the record and what we've heard today, the
20 disability date of onset is April 15th, 2008.

21 I'll turn first to the applicability of the
22 treating physician rule. Part and parcel to that argument is
23 that the ALJ did not properly determine plaintiff's residual
24 functional capacity or RFC. From the outset, I note that the
25 determination of the claimant's disability is a legal

1 determination reserved to the Commissioner. As I said, I've
2 done a thorough and searching review of the record and I find
3 that the substance of the treating physician rule was
4 followed by the ALJ who gave good reasons for giving limited
5 weight to the opinion of Dr. Robinson and other treating
6 physicians.

7 Here it is clear from the decision that the
8 ALJ reviewed the record in its entirety and addressed
9 inconsistencies between the treating physician's opinions and
10 the objective medical evidence, as well as the opinions of
11 the consultative physician. The ALJ found that
12 Dr. Robinson's opinion and the other provider's opinion was
13 inconsistent with the record as a whole, as the opinions were
14 not supported by the clinical signs found on physical exam,
15 diagnostic tests, or the treatment received by the plaintiff.

16 For example, treatment notes in 2008 show the
17 plaintiff ambulated well, had negative straight leg raising
18 test, had full strength in her lower extremities, she
19 reported her pain was only intermittent and rated it at a 3
20 out of 10. Her strength was within normal limits. She had
21 normal station and nearly full range of motion in the lumbar
22 region, motor and sensory exams were normal in her lower
23 extremities.

24 In November of 2008 her lumbar range of motion
25 was normal, she had normal strength and also bulk in her

1 lower extremities.

2 In December of 2008 she had normal gait,
3 normal heel-toe walk and no neurologic deficits showing. At
4 her exam at Hamilton Orthopedics in January 2009 also
5 revealed a full range of motion in her lumbar spine, negative
6 straight leg raising and no muscle weakness.

7 In May and September of 2009, while she had
8 some tenderness in her lower back, her exams were essentially
9 unremarkable. The MRIs of the lower spine in April of 2008
10 and January of 2010 did show a disk bulge at L4-5 but no
11 nerve impingement and the findings were basically unchanged
12 from 2008 to 2010 on those MRIs. An MRI of the cervical
13 spine in September of 2010 showed some degenerative changes
14 but it was mostly unremarkable. Exams in the lower back of
15 June of 2010 showed normal gait, normal range of motion,
16 normal muscle tone and showed no neurologic deficits in the
17 cervical spine. A comprehensive functional capacity exam
18 completed by Physical Therapist Peterson in July of 2009
19 revealed she could do sedentary work. This functional
20 capacity exam was adopted by treating source Dr. Vigliotti in
21 November of 2009. The consultative exam with Dr. Weiskopf
22 from September of 2008 showed that while she walked with a
23 slight limp, she was able to walk on her heels and toes
24 without difficulty. She had full cervical and lumbar range
25 of motion and a full range of motion of her extremities with

1 normal strength and no neurological deficits. He found no
2 limits on standing and sitting and mild limits to walking,
3 lifting, carrying, bending, and climbing. The ALJ found and
4 the record supports that this opinion was supported by the
5 clinical signs found on nearly all of the physical exams of
6 the plaintiff and the diagnostic test results.

7 The ALJ also noted that the opinion was not
8 supported by plaintiff's reported activities. The record
9 shows she was able to cook, clean, do laundry, and shop. She
10 was able to take care of her personal hygiene, she could
11 drive, she could take care of her pet, she could do crafts.
12 References in physical therapy notes during the relevant time
13 period showed she reported doing lots of traveling, she was
14 cleaning floors and doing a lot of bending over.

15 In short, the ALJ's decision shows he reviewed
16 and considered all of the medical evidence in determining
17 plaintiff's RFC. The decision sets forth a thorough summary
18 of her treatment history and activities. The record also
19 shows that the ALJ considered treatment notes of various
20 treating sources. And, in light of the foregoing and
21 considering the entire record and the ALJ's opinion as noted,
22 I find that the ALJ applied the substance of the treating
23 physician rule. The ALJ set forth good reasons for giving
24 limited weight to the opinions of treating physicians
25 including Dr. Robinson, and for giving considerable weight to

1 Dr. Weiskopf's opinion which was consistent with the
2 plaintiff's objective physical exams and diagnostic findings
3 in the record. Therefore, the determination of plaintiff's
4 RFC is supported by substantial evidence and the correct
5 legal standards were applied.

6 I want to briefly address the issue of whether
7 the opinion of a vocational expert should have been obtained.
8 At step 5 there's only a limited burden shift to the
9 Commissioner who need only show that there is work in the
10 national economy that the claimant can do. The Commissioner
11 need not provide additional evidence of claimant's residual
12 functional capacity. Work exists in the national economy
13 when it exists in significant numbers either in the region
14 where the claimant lives or in several other regions in the
15 country.

16 In making this determination, the ALJ may
17 apply the grids or consult a vocational expert. If the
18 plaintiff's characteristics match the criteria of a
19 particular grid, the rule directs a conclusion as to whether
20 or not he or she is disabled.

21 In this case I find the ALJ correctly relied
22 on the medical vocational rules based upon the RFC and the
23 plaintiff's vocational profile. The evidence does not
24 support a showing that plaintiff suffered from nonexertional
25 impairment that significantly limited the range of work

1 permitted by her exertional limitations and therefore the ALJ
2 was not required to elicit the testimony from a vocational
3 expert to determine if jobs exist in the economy that she
4 could perform.

5 I want to look now to the plaintiff's
6 credibility and the ALJ's assessment of it. The plaintiff
7 claimed in his brief that the ALJ failed to properly assess
8 her credibility. With regard to the ALJ's determination that
9 the plaintiff's testimony regarding her limitations during
10 the relevant time period was not credible, I find that it is
11 properly explained and supported by the record. The record
12 contradicts her claims concerning her limitations for the
13 relevant time period. The ALJ considered her complaints in
14 the objective medical records in the various treatment notes.
15 The treatment notes considered discuss her complaints of
16 pain, the location of her pain, the intensity of it and the
17 type of medication she was on, and the treatment modalities
18 used to alleviate the pain. He pointed out that the
19 objective medical evidence in the record did not support
20 plaintiff's claims that she was unable to do basic work
21 activities.

22 Plaintiff's reports to her providers during
23 the relevant time period showed she could drive her daughter
24 an hour to school, shop, prepare meals, do some housework,
25 help her mother, ride a recumbent bike. She could dress,

1 bathe, and groom herself, she could do some laundry and take
2 care of her personal care. Thus I find that the
3 determination of plaintiff's credibility for the relevant
4 time period by the ALJ was sufficiently explained and
5 properly supported in the record.

6 All in all, then, I find that the
7 determination of the ALJ is supported by substantial evidence
8 and the correct legal standards were applied. And so I grant
9 defendant's motion for judgment on the pleadings and will
10 enter a judgment dismissing plaintiff's complaint in this
11 action.

12 As I said at the outset, a copy of the
13 transcript of my decision will be attached to the order,
14 should any appeal be filed. That is my decision and as I
15 said, it will get up on the docket as soon as we can get it
16 there. I very much appreciate your time here this morning,
17 and if neither of you have any questions at this point, this
18 will conclude the hearing. Anything from the plaintiff?

19 MR. ANTONOWICZ: No, your Honor, thank you for
20 your patience.

21 THE COURT: All right. And anything from the
22 defendant?

23 MR. LEDERER: No, your Honor.

24 THE COURT: All right. Thank very much again
25 for your time, have a good day.

(Proceedings Adjourned, 10:36 a.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, JODI L. HIBBARD, RPR, CRR, CSR,
Official Court Reporter in and for the United States
District Court, Northern District of New York, DO
HEREBY CERTIFY that I attended the foregoing
proceedings, took stenographic notes of the same,
and that the foregoing is a true and correct
transcript thereof.

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