

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

TAMMIE ANN BEARDSLEY,

Plaintiff,

v.

Civil Action No.
5:15-CV-1500 (DEP)

CAROLYN W. COLVIN, Acting Commissioner
of Social Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

OLINSKY LAW GROUP
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HOWARD D. OLINSKY, ESQ.
PAUL B. EAGLIN, ESQ.

FOR DEFENDANT

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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, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on November 15, 2016, 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 Acting 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 reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Acting Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the

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.

Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Acting 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 Acting Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

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: November 18, 2016
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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TAMMIE ANN BEARDSLEY,

Plaintiff,

vs.

5:15-CV-1500

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.
-----x

Decision - November 15, 2016

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: I have before me a request for judicial
2 review of a determination by the Acting Commissioner of
3 Social Security pursuant to 42 United States Code Section
4 405(g) and 1383(c).

5 The background is as follows. The plaintiff was
6 born in May of 1969, is currently 47 years of age. She lives
7 in an apartment with her fiance, if I'm reading my notes
8 correctly, and a six-year-old son in Syracuse. She dropped
9 out of high school as a senior but did secure a GED. She
10 also has a two-year degree from Onondaga Community College.

11 She worked 15 years as a waitress/bartender at a
12 restaurant in Ithaca. She left that establishment in 2005
13 when the restaurant closed. She also has worked as a
14 temporary employee at the Cornell University bookstore as a
15 bagger and a cashier.

16 She's 5-foot 4-inches tall and weighs 230 pounds
17 and has been diagnosed as obese. She also has been diagnosed
18 as suffering from degenerative disc disease of the lumbar
19 spine, including at the L5-S1 level with notation that there
20 is stenosis and some nerve root impingement. On January 26,
21 2012 she underwent a left decompressive hemilaminectomy and
22 microdiscectomy by Dr. Stephen Robinson at Syracuse
23 Orthopedics at the L5-S1 level. Despite the surgery, her
24 pain has persisted, including in her back, hip and left foot.

25 She has treated at the New York Spine and Wellness

1 Center for pain and has undergone various treatment,
2 including some injections of blocks. She also has consulted
3 with Dr. Hassan Shukri, a neurologist. She has had two, in
4 2012, EMG nerve conductive studies, which did result in
5 abnormal findings, including multilevel denervation of the
6 left lower extremity.

7 She has also undergone Magnetic Resonance Imaging,
8 or MRI, testing, including in March 2013 which revealed a
9 disc protrusion. She has treated from August 2013 until
10 October of 2013 with Samuel Rameas, a foot specialist. She
11 has in addition to the nerve blocks been prescribed Cymbalta
12 and Oxycodone. She also undergoes treatment at the
13 Baldwinsville Family Medical Care Facility from
14 September 2012 to April 2014 for various conditions.

15 In terms of daily activities, she cares for her
16 son, takes her son to school, drives, can dress, cook, can
17 clean, do laundry, shop and watch television.

18 Procedurally the history of the case is as follows.
19 In January of 2013 plaintiff applied for Supplemental
20 Security Income, or SSI, payments alleging a disability onset
21 date of March 23, 2011. A hearing was conducted on May 22nd,
22 2014 by Administrative Law Judge John Ramos. ALJ Ramos
23 issued a decision on September 2, 2014. And that decision
24 became a final determination of the Agency on November 4,
25 2015 when the Social Security Appeals Council denied

1 plaintiff's request for review.

2 In his decision ALJ Ramos applied the familiar
3 five-step sequential test for determining disability.

4 He found at step one plaintiff had not engaged in
5 substantial gainful activity since her alleged onset date, or
6 since the date of her application, I should say, of
7 January 21 of 2013.

8 At step two he concluded that she suffered from
9 severe impairments, including degenerative disc disease of
10 the lumbosacral spine, depression and anxiety.

11 At step three he concluded that those conditions
12 were not either singly or in combination sufficient to meet
13 or medically equal any of the listed presumptively disabling
14 conditions, including listing 1.04 and 12.04/12.06.

15 After surveying the medical evidence, ALJ Ramos
16 concluded the plaintiff retains the residual functional
17 capacity, or RFC, to perform sedentary work, except she only
18 retains the ability to understand and follow simple
19 instructions and directions, perform simple tasks with
20 supervision and independently, maintain
21 attention/concentration for simple tasks, regularly attend to
22 a routine and maintain a schedule, relate to and interact
23 with others to the extent necessary to carry out simple
24 tasks, and handle reasonable levels of simple work-related
25 stress in that she can make decisions directly related to the

1 performance of simple work and handle usual work place
2 changes and interactions associated with simple work.

3 Applying that RFC finding after concluding that
4 plaintiff did not have any meaningful past relevant work, at
5 step five ALJ Ramos applied the medical vocational
6 guidelines, or the grids. Concluded that under grid rules
7 201.21 and 201.27 a finding of no disability would be
8 directed. He concluded that the non-exertional limitations,
9 including her mental limitations, or limitations imposed by
10 her mental conditions, I should say, had little or no effect
11 on the job base on which the grids were predicated and,
12 therefore, concluded that she is not disabled.

13 As you know, my task is limited. The scope of
14 review is deferential and requires me to determine whether;
15 A, proper legal principles were applied; and, B, the
16 determination is supported by substantial evidence.

17 Step two is a fairly de minimis step. It requires
18 a determination of whether an impairment is sufficiently
19 severe to limit the physical or mental ability of a claimant
20 to do basic work activities. Basic work activities is
21 defined in 20 CFR Section 416.921 to include walking and
22 standing, as well as sitting, lifting, pushing, pulling,
23 reaching, carrying or handling. In my view plaintiff's
24 well-documented foot condition and foot pain was sufficiently
25 severe to meet the minimal test under step two and should

1 have been included in the ALJ's recitation of severe
2 conditions.

3 And I don't find that that error is harmless
4 because, as the plaintiff has pointed out, even sedentary
5 work involves a certain amount of walking and standing, and
6 the failure to include the foot pain at step two deprives the
7 Court of making any kind of meaningful review of the
8 determination as to whether or not the standing and walking
9 requirements of sedentary work could be met by the plaintiff
10 given her foot condition.

11 I've reviewed the treating source argument based on
12 Dr. Robinson's statements. I don't find any error there.
13 These statements speak only in succinct terms to disability,
14 which is a matter reserved to the Commissioner, and there is
15 no context provided. After the surgery and certainly after
16 February 23, 2012 there are no similar notations. So I do
17 not find any error in that regard.

18 With respect to the RFC, but for the foot pain and
19 pain which I'll get to in a moment, it could be argued, and
20 the Commissioner has in fact argued, that the RFC finding is
21 supported by Dr. Ganesh. There is case law that suggests
22 that Dr. Ganesh's findings of moderate limitation of walking
23 and climbing and so forth is not inconsistent with light
24 work, and by definition, therefore, sedentary work. I don't
25 find any error there.

1 I also don't find any error in not considering
2 obesity. It's clear that ALJ Ramos was cognizant of
3 plaintiff's obesity but did not find anything in any of the
4 treating or consultative source's reports that would suggest
5 that the obesity further limited the plaintiff's ability to
6 perform work functions.

7 I do have a problem also with the credibility
8 determination of the Commissioner. The ALJ did note the
9 correct two step process for determining credibility. He
10 then at page 24 recited plaintiff's claims, and in two brief
11 paragraphs without any meaningful discussion discounted the
12 plaintiff's allegations concerning her symptoms. In my view
13 those two paragraphs do not provide sufficient guidance to
14 allow for meaningful judicial review.

15 The step five determination, again it's clear that
16 plaintiff suffers from well-documented pain, back pain, hip
17 pain and predominantly foot pain. She's received treatment
18 for it from various sources, including the New York Spine and
19 Wellness Center. Pain, as you know, is a non-exertional
20 limitation that can erode the job base on which the grids are
21 predicated.

22 In my view, based on the combination of factors,
23 resort to the grids was not appropriate. In any event,
24 because of the credibility issue and the step two issue, I
25 find that the Commissioner's determination is not supported

1 by substantial evidence.

2 I know the plaintiff seeks remand with a directed
3 finding of disability. I do not find such persuasive
4 evidence of disability as to make a directed finding and a
5 remand for calculation of benefits only. Instead, I will
6 grant judgment on the pleadings to the plaintiff, vacate the
7 Commissioner's determination, and remand the matter for
8 further consideration and a better explanation as to the
9 issues that I just addressed.

10 Thank you both for excellent presentations and I
11 hope you have a good day and a happy Thanksgiving.

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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, RPR, CRR
Federal Official Court Reporter