

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

KATHY M. HILL,

Plaintiff,

v.

Civil Action No.
5:16-CV-0677 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

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STEVEN R. DOLSON, 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), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on March 9, 2017, 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.

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 Acting 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 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.



David E. Peebles
U.S. Magistrate Judge

Dated: March 31, 2017
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
KATHY HILL,

Plaintiff,

vs.

5:16-CV-677

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

Transcript of a **Decision** held during a Telephone Conference on March 9, 2017, at the James Hanley Federal Building, 100 South Clinton Street, Syracuse, New York, the 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 (In Chambers, Counsel present by telephone.)

2 THE COURT: All right. Thank you, I'll have to let
3 that be the last word.

4 I have before me a request for judicial review of
5 an adverse determination by the Acting Commissioner
6 concluding that the plaintiff was not disabled at the
7 relevant times and therefore ineligible for the benefits
8 sought. The request is pursuant to 42 United States Code
9 Section 405(g).

10 The background is as follows: The plaintiff was
11 born in June of 1962 and is currently 50 -- approaching 55
12 years old, she was 48 years old at the onset of her
13 disability and 50 at the time of the first hearing. She is
14 5 foot 5 inches tall, weighs 160 pounds, and right-hand
15 dominant. She lives with a boyfriend in Lafayette, New York.
16 She has a high school diploma and one year of --
17 approximately one year of college education. She drives and
18 has a CDL license.

19 She last worked in December of 2010. She left her
20 position, she claims, due to anxiety and depression and a hip
21 issue. She worked for Niagara Mohawk Power Company from 1986
22 to December 2010 in various positions, initially as a
23 stenographer and a clerk/typist, then a gas meter technician,
24 and lastly in a warehouse in a truck driving situation, from
25 2005 to 2010.

1 She contends that she is unable to work due to hip
2 and groin pain, numbness, and tingling in her arms and hands,
3 neck pain, knee pain, lower back pain, and headaches. She
4 also suffers from asthma or history of asthma, although it
5 seems to have resolved after she left the warehouse setting,
6 and carpal tunnel syndrome bilaterally.

7 The plaintiff underwent MRI testing in June of 2010
8 and was found that she suffered from mild to moderate
9 degenerative disk degeneration in C5-C6 level with some
10 spurring. An MRI was again administered in April of 2013,
11 which showed degenerative changes and stenosis with foraminal
12 narrowing at the C5-C6 level. An EMG study was performed on
13 March 27, 2013. It demonstrated bilateral radiculopathy at
14 C6 and C7. An MRI of the hip showed a mild labral tear which
15 has been addressed through nerve blocks. An MRI of the
16 lumbar spine was conducted, it's not clear when but it's
17 reported in a doctor's note of November 27, 2012, showing a
18 disk bulge at L4 and L5 that's also been addressed with nerve
19 blocks.

20 The plaintiff has a fairly wide range of daily
21 activities. She reports attending sporting events, watching
22 television, cleaning, walking on a treadmill, some cooking,
23 laundry, shopping two to three times a week, she can attend
24 to her personal hygiene, she can use the computer, she cares
25 for her two-and-a-half-year-old grandson, she has no hobbies

1 but she does read and socialize with friends. She, in
2 October of 2011 she indicated she planned to attend school
3 full time, that's at page 638, at the time she was attending
4 part time.

5 Procedurally, plaintiff applied for Title II
6 disability benefits on July 19, 2011, alleging an onset date
7 of December 6, 2010. A hearing was conducted by
8 Administrative Law Judge Marie Greener on December 4, 2012.
9 On February 5, 2013, ALJ Greener issued a decision finding
10 that the plaintiff was not disabled at the relevant times.
11 The Social Security Appeals Council remanded the matter on
12 May 13, 2014. A subsequent hearing was conducted on
13 September 4, 2014. ALJ Greener issued a second decision on
14 November 5, 2014, and that became a final determination of
15 the agency on May 23, 2016 when the Appeals Council denied
16 plaintiff's request for review.

17 In her decision, the second decision I should say,
18 ALJ Greener applied the well-known and noncontroversial
19 five-step test for determining disability.

20 At step 1 she found that the plaintiff had not
21 engaged in substantial gainful activity since the alleged
22 onset date.

23 At step 2, she found that the plaintiff does suffer
24 from severe impairments including lumbar spine disk bulge,
25 cervical spine herniated nucleus pulposus with radiculopathy,

1 chronic right hip tendinitis, and asthma.

2 At step 3 she concluded, however, that none of the
3 conditions found at step 2 met or medically equaled any of
4 the listed presumptively disabling conditions set forth in
5 the Commissioner's regulations.

6 At the next step, before going to step 4, the ALJ
7 surveyed medical evidence and concluded that plaintiff
8 retains the residual functional capacity, or RFC, to perform
9 a full range of sedentary work, that she, although she refers
10 to her as a he, can lift and carry up to 10 pounds
11 occasionally, less than 10 pounds frequently, sit for a total
12 of six hours in an eight-hour workday, and stand/walk for 15
13 minutes at one time, and a total of two hours in an
14 eight-hour workday. She needs to alternate between sitting
15 and standing, with sitting limited to 60 minutes at one time
16 after which she needs to stand for five minutes; however, she
17 does not have to leave her work area or station during the
18 change in position. Additionally, the claimant requires an
19 indoor environment with good air quality such as in an office
20 or retail establishment.

21 At step 4, with the benefit of the vocational
22 expert who testified at the second hearing, the ALJ concluded
23 that plaintiff cannot perform her past relevant work in any
24 of the positions that she held.

25 At step 5, again, in reliance upon testimony from

1 the vocational expert and a hypothetical that was posed that
2 approximated closely the RFC finding, ALJ Greener concluded
3 that plaintiff can perform available work in the national
4 economy including as a benefits clerk, an order clerk, and a
5 credit card control clerk, and therefore is not disabled.

6 As you know, my task is very limited and very
7 deferential. I must determine whether correct legal
8 principles were applied and substantial evidence supports the
9 determination.

10 I have some difficulties with the determination.
11 Obviously the medical source statements from the two treating
12 physicians, Dr. Sneider and Dr. Masten, are inconsistent with
13 the RFC in a couple of ways, predominantly with respect to
14 the sitting limitation, and also reaching, as counsel has
15 argued. Obviously those individuals' opinions are entitled
16 to controlling weight, unless they -- as long as they are
17 supported by medically acceptable clinical and laboratory
18 diagnostic techniques and are not inconsistent with other
19 substantial evidence. Conversely, they're not controlling if
20 they're contrary to other substantial evidence in the record,
21 including the opinions of other medical experts.

22 The sitting and reaching portions of those opinions
23 were rejected. I don't find that they are contrary to
24 substantial evidence in the record, and I don't find that the
25 reasoning stated by the administrative law judge comports

1 with the Second Circuit's decision in *Greek v. Colvin*
2 reported at 802 F.3d 370, and here are my specific problems.

3 First of all, Administrative Law Judge Greener
4 misstates the date of Dr. Sneider's first opinion. She
5 claims it was in November 2011; it's very clearly November of
6 2012, that the signature page clearly indicates that. I'm
7 looking for the precise -- that's at page 628, the opinion
8 was signed November 20, 2012. And in rejecting that opinion,
9 ALJ Greener relies on some very dated statements and
10 treatment notes, including a note from Dr. Scuderi that is
11 dated May 4, 2011 which is a year and a half prior, saying
12 that the claimant is very active with running, weight
13 lifting, and martial arts. I've reviewed the medical
14 evidence and it shows deterioration and there is reference in
15 there that she's no longer able to work out like she
16 originally was.

17 Similarly, in rejecting Dr. Sneider's November 2012
18 report, the ALJ relies on a February 18, 2011 note where
19 Dr. Sneider found that the claimant moved well with a
20 straight spine and negative straight leg raising. Again,
21 that's a year and a half prior to the date of the opinion.

22 The rejection of Dr. Masten whose opinion from
23 November 2012 is also inconsistent with the RFC finding in
24 the areas of sitting and reaching is not well explained and
25 not supported by substantial evidence.

1 And so in my view, this matter should be remanded
2 without a directed finding of disability so that a more clear
3 rationale can be given for why the opinions of Dr. Masten and
4 Dr. Sneider, which are internally basically consistent,
5 should be rejected.

6 I was not impressed, I did review Dr. Rabelo's
7 statement, I don't think that that provides substantial
8 evidence to the contrary, particularly -- and also the
9 consultative exam of Dr. Manyam which was not particularly
10 persuasive, and also occurred in November 2011, a year before
11 Dr. Sneider's opinion.

12 And so I will grant judgment on the pleadings to
13 the plaintiff without a directed finding of disability, and
14 hope you both have a good day. Thank you.

15 MR. DOLSEN: Thank you, Judge.

16 MS. ZURBRUGG: Thank you, your Honor.

17 (Proceedings Adjourned, 10:32 a.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 9th day of March, 2017.

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