

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

KRISTY MARIE K.,

Plaintiff,

v.

Civil Action No.
5:18-CV-50 (DEP)

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

OLINSKY LAW OFFICE
330 S. State Street
Suite 420
Syracuse, New York 13202

HOWARD D. OLINSKY, ESQ.
MELISSA A. DELGUERCIO, ESQ.

FOR DEFENDANT

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DAVID L. BROWN, ESQ.
Special Assistant U.S. Attorney

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 of Social Security, pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on September 26, 2018, 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 Acting 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

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.

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

2) The Acting 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.

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: September 28, 2018
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
KRISTY K.,

Plaintiff,

-v-

5:18-CV-50

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID E. PEEBLES
September 26, 2018
100 South Clinton Street, Syracuse, New York

For the Plaintiff:

OLINSKY LAW GROUP
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BY: **MELISSA A. DELGUERCIO, ESQ.**

For the Defendant:

SOCIAL SECURITY ADMINISTRATION
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BY: **DAVID L. BROWN, ESQ.**

Hannah F. Cavanaugh
Official United States Court Reporter
100 South Clinton Street
Syracuse, New York 13261-7367
(315) 234-8545

1 (Time noted: 1:55 p.m.)

2 THE COURT: I have before me a request for judicial
3 review of an adverse determination by the Acting Commissioner
4 pursuant to 42, United States Code, Sections 405(g) and
5 1383(c)(3).

6 The background is as follows: Plaintiff was born
7 March of 1986. She is currently 32 years of age. She was
8 30 years old at the time of the alleged onset of her disability
9 and at the time of the hearing in this matter. Plaintiff is not
10 married and has no children. She lives in Syracuse with a
11 roommate and the roommate's daughter.

12 Plaintiff is a high school graduate and while in high
13 school, she attended regular classes. That's at page 794. In
14 terms of work, plaintiff was a member of the United States Army
15 from January 2006 until January 2011 where she acted as a
16 military police officer. She was honorably discharged. She
17 also worked from February 2012 to August 2016 making dentures
18 and in shipping for Aspen Dental. It appears that she may also
19 have been employed in 2005 prior to entering the Army at a
20 factory in various positions. She possesses a driver's license.

21 Physically, plaintiff has lumbar back issues. She
22 has a mild case of degenerative disc disease. She has a minimal
23 disc bulge at L4-L5 and an annular tear at L3-L4, minimal bulges
24 also at C3-T1, and slight scoliosis of the thoracic spine. She
25 has a right shoulder condition. She underwent arthro anterior

1 labral repair and subacromial decompression in July of 2016 by
2 Dr. Bradley Raphael who practices with SOS. Apparently, she
3 attributes that to an injury she suffered in 2010 while in the
4 Army.

5 The plaintiff also has knee and ankle issues and uses
6 braces, but no assistive ambulatory device. She suffers from
7 migraines and receives treatments and she has a mild case of De
8 Quervain's disease in her right hand, also uses hand braces
9 bilaterally. The plaintiff, after undergoing her right shoulder
10 surgery, complained of residual pain and she has undergone
11 injections and attempted physical therapy.

12 Plaintiff also has been diagnosed as suffering from
13 posttraumatic stress disorder, or PTSD, depressive disorder, and
14 anxiety disorder. She has received treatment from the Veterans
15 Administration Medical Center from several sources, Nurse
16 Practitioner Tania Marschall; Dr. Deborah Diniro, a
17 psychologist; Dr. Harminder Grewal; and Nurse Practitioner
18 Natalia Myagkota. She has been prescribed various medications,
19 including Buspar, Sertraline, Trazodone, Hydroxyzine,
20 Diclofenac, Amitriptyline, and Ibuprofen. Plaintiff smokes a
21 half a pack of cigarettes per day. She also has suffered from
22 substance abuse disorder, including use of marijuana and abuse
23 of opioids.

24 As was indicated, plaintiff has been assessed a
25 disability by the Veterans Administration attributed to her

1 service and that is due to 20 percent for her lumbar condition,
2 70 percent for her posttraumatic stress disorder, and 10 percent
3 for her right shoulder strain.

4 In terms of daily activities, plaintiff cooks,
5 cleans, does laundry, shops, showers, dresses, watches
6 television, listens to the radio, socializes with friends and
7 family. That's at 799 and 796 of the Administrative Transcript.

8 Procedurally, plaintiff applied for Title II benefits
9 on April 28, 2016, and Title XVI SSI payments on May 25, 2016,
10 protectively alleging an onset date of May 25, 2016. In support
11 of her application, she alleges disability due to back pain,
12 right shoulder pain, PTSD, bilateral knee pain, and migraines.
13 That's at 165, 177, and 307 of the Administrative Transcript.

14 A hearing was conducted by Administrative Law Judge
15 Jennifer Gale Smith on February 21, 2017, to address plaintiff's
16 applications after their initial denial. On May 10, 2017, ALJ
17 Smith issued a decision that was unfavorable to the plaintiff.
18 That became a final determination of the agency on November 14,
19 2017, when the Social Security Administration Appeals Council
20 denied plaintiff's request for review of that determination.

21 In her decision, ALJ Smith applied the familiar
22 five-step test for determining disability. At step one, she
23 concluded that plaintiff had not engaged in substantial gainful
24 activity since her alleged onset date, but noted that there was
25 some work activity within that time period.

1 At step two, it was noted that plaintiff suffers from
2 severe impairments that interfere with her ability to perform
3 basic work functions, including status post right shoulder
4 arthroscopic anterior labral repair and subacromial
5 decompression, mild degenerative disc disease of the lumbar
6 spine with minimal bulge at L4-L5, an annular tear at L3-L4,
7 minimal disc bulges from C3-T1, very slight scoliosis of the
8 thoracic spine with a minimal central disc protrusion at T4-5,
9 headaches, anxiety disorder, depressive disorder, PTSD,
10 substance abuse disorder, and mild De Quervain's of the right
11 hand.

12 At step three, ALJ Smith concluded that plaintiff's
13 impairments did not meet or medically equal any of the listed
14 presumptively disabling conditions set forth in the
15 Commissioner's regulations, specifically considering listings
16 1.02, 1.04, 12.04, 12.06, and 12.15.

17 After surveying the available medical evidence, the
18 ALJ concluded that the plaintiff retains the residual functional
19 capacity, or RFC, to perform light work subject to the
20 following: The claimant is right-hand dominant; the claimant
21 could not lift, reach or push and pull with right arm; the
22 claimant can frequently handle, finger, and feel with her right
23 hand; the claimant has no reaching limitations or other
24 manipulative limitations with her nondominant left arm and hand
25 and can push and pull with her left arm up to the weight limits

1 of light work; the claimant should work in a low stress job
2 defined as occasional decisionmaking, occasional judgment
3 required, and occasional changes in the work setting; the
4 claimant should work at goal oriented work rather than
5 production pace rate work; the claimant should work at a noise
6 environment of moderate or below as defined by the DOT; the
7 claimant should not have to drive as part of her job duties; and
8 the claimant would have a sit/stand option defined as the
9 claimant is able to stand up for 10 minutes at a time and then
10 needs to sit down for 10 to 15 minutes before standing again.

11 Applying that RFC, the Administrative Law Judge
12 concluded that plaintiff is not capable of performing her past
13 relevant work, either as performed by the plaintiff or generally
14 based on the testimony of a vocational expert.

15 At step five, after determining that the job base on
16 which the grids or medical vocational guidelines and the
17 regulations are predicated, it would be eroded by plaintiff's
18 various nonexertional limitations. And based on the testimony
19 of a vocational expert, the Administrative Law Judge concluded
20 that plaintiff is capable of performing the functions of an
21 information clerk, a furniture rental clerk, and a storage
22 facility rental clerk, all of which are light positions with an
23 SVP of 2 and, therefore, concluded that the plaintiff was not
24 disabled at the relevant times.

25 As you know, the scope of review in this case is

1 limited and extremely deferential. I must determine, A, whether
2 correct legal principles were applied and, B, whether the
3 outcome is supported by substantial evidence. First, in terms
4 of the treating source opinions of the Nurse Practitioner
5 co-signed by Dr. Grewal, as the ALJ indicated, it is not
6 entirely clear whether Dr. Grewal was signing only as a
7 supervising physician or whether the opinions set forth in that
8 medical source statement were the opinions of Dr. Grewal, but
9 the rejection was explained by the Administrative Law Judge
10 Smith in her decision at page 26. She treated the opinions as
11 those of the doctor and the Nurse Practitioner, but pointed out
12 that they are contrary to the opinions of Dr. Leong, Dr.
13 Raphael, another treating source, and Dr. Ganesh, who examined
14 the plaintiff.

15 It is also inconsistent with plaintiff's report of
16 activities. At one point in the record, she stated to a
17 treating source that she had moved and was lifting in connection
18 with the move. Many of the statements set forth in the very
19 restrictive opinions of Dr. Grewal/Nurse Practitioner -- and I
20 can't say her name -- I can't pronounce her name -- are based on
21 plaintiff's subjective complaints. But Dr. Raphael in January
22 of 2017, at page 831 and 832, returned plaintiff to work after
23 surgery with a 20-pound lift limitation. Dr. Ganesh did not
24 find significant limitations, certainly with regard to the left
25 extremity, and it's clear that any limitations associated with

1 the right were based on the fact that the examination occurred
2 one month after plaintiff's surgery at a point in time when she
3 had not fully recovered and was still sporting a sling.

4 In my view, the rejection of Dr. Grewal's opinions
5 are supported by substantial evidence and well explained to a
6 point where a meaningful judicial review could be allowed. And
7 the Wiggins case that is supported and relied upon by the
8 plaintiff, I think is materially distinguishable because in this
9 case, as I indicated, there is a considerable body of evidence
10 that is contrary to the opinions set forth in Dr. Grewal's
11 opinions and the ALJ was within her right to rely on Mr. Leong,
12 Dr. Raphael, a treating source, and Dr. Ganesh.

13 Turning to the VA disability, I acknowledge the
14 requirement of Atwater, the seeming requirement of the Second
15 Circuit that the finding of the agency be considered. I'm not
16 sure how you -- if you consider it and give it no weight, has it
17 been given weight as opposed to giving it one percent weight or
18 two percent weight, the -- I know that the Commissioner has
19 relied upon a decision in *Machia* from one of my good friends and
20 colleagues, Magistrate Judge John Conroy from the District of
21 Vermont. I don't take as restrictive of a view with deference
22 as Magistrate Judge Conroy did. It's clear that the
23 Administrative Law Judge did consider the VA's finding, but she
24 also had available to her all of the records from Veterans
25 Administration that went into that determination.

1 As I indicated in oral argument, the determination is
2 based 70 percent on plaintiff's PTSD and yet the plaintiff does
3 not seriously challenge the mental component of plaintiff's RFC
4 and does not -- and it's clear from the notes that plaintiff was
5 not receiving considerable treatment and was not forthcoming in
6 her discussion of her PTSD with her care providers at the
7 Veterans Administration.

8 I also note that although this regulation does not
9 apply, effective March 27, 2017, 20 CFR Section 404.1504 was
10 amended and, I think, is more consistent with both case law and
11 the way these other agency determinations should be treated.
12 The new regulation provides as follows: Other governmental
13 agencies and nongovernmental agencies - such as the Department
14 of Veteran Affairs, the Department of Defense, the Department of
15 Labor, the Office of Personnel Management, State agencies, and
16 private insurers - make disability, blindness, employability,
17 Medicaid, Workers' Compensation, and other benefits decisions
18 for their own programs using their own rules. Because a
19 decision by any other governmental agency or a nongovernmental
20 entity about whether you are disabled, blind, employable, or
21 entitled to any benefits is based on its rules, it is not
22 binding on us and is not our decision about whether you are
23 disabled or blind under the rules. Therefore, in claims filed
24 on or after March 27, 2017 -- which, of course, this is not --
25 we will not provide any analysis in our determination or

1 decision about a decision made by any other governmental agency
2 or a nongovernmental entity about whether you are disabled,
3 blind, employable, or entitled to any benefits. However, we
4 will consider all of the supporting evidence underlying the
5 other governmental agency or nongovernmental entity's decision
6 that we receive as evidence in your claim in accordance with
7 Section 404.1513(a) (1) through (4).

8 And that's essentially what happened here, the
9 Administrative Law Judge had available to her the VA records on
10 which that determination was based, so if there was error, I
11 find it was harmless error. And the case that I would point out
12 in support of that is *Glessing v. Colvin*. It can be found at
13 2015 WL 7313401.

14 So in sum, I think the Administrative Law Judge did
15 consider, pursuant to *Atwater*, the VA's determination and
16 rejected it, giving it any weight for the reasons that we've
17 really already discussed. In sum, I find the RFC determination
18 in this case is supported by substantial evidence and,
19 therefore, based on the vocational expert's testimony, the step
20 five determination was proper and I believe that the final
21 determination is supported by substantial evidence. So I will
22 award judgment on the pleadings to the defendant and affirm the
23 Commissioner's determination.

24 Thank you both for excellent presentations. I've
25 enjoyed working with you. Thank you.

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MR. DELGUERCIO: Thank you, Judge.

MR. BROWN: Thank you, Judge.

(Time noted: 2:12 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, Official 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 27th day of September, 2018.

X Hannah F. Cavanaugh

HANNAH F. CAVANAUGH

Official U.S. Court Reporter