

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

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JOHN R. HOWARD,

Plaintiff,

v.

Civil Action No.  
6:13-CV-0794 (DEP)

CAROLYN W. COLVIN, Acting Commissioner  
of Social Security,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

ANTONOWICZ LAW FIRM  
148 W. Dominick St.  
Rome, NY 13440

PETER W. ANTONOWICZ, ESQ.

FOR DEFENDANT

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

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, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on May 29, 2014, 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 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

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<sup>1</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 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, 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 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.



David E. Peebles  
U.S. Magistrate Judge

Dated: June 4, 2014  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
JOHN HOWARD,

Plaintiff,

vs.

13-CV-794

CAROLYN W. COLVIN, as Commissioner  
of the Social Security Administration,

Defendant.  
-----x

*Decision rendered on May 29, 2014*

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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BY: DAVID B. MYERS, ESQ.

*Eileen McDonough, RPR, CRR  
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1           THE COURT: Thank you. I'll have to let that be  
2 the last word.

3           I've reviewed carefully the Administrative  
4 Transcript, the arguments of the parties, both written and  
5 verbal. I have before me a request for review of an  
6 Administrative Determination pursuant to 42, United States  
7 Code, Section 405(g).

8           The claimant or plaintiff in this case was born in  
9 November of 1968. He was 42 years of age at the time of the  
10 Administrative Hearing in this case. He has a high school  
11 degree. He has worked in several positions, including in  
12 various food service positions as well as landscaping. He  
13 has apparently had two work-related type injuries, one in  
14 2007 involving a shoulder injury for which he received a  
15 20 percent scheduled permanent loss, and some sort of a groin  
16 injury, which it turns out has been treated and diagnosed as  
17 some sort of a nerve entrapment. He treats primarily with  
18 Dr. Francis Chabot, as well as Dr. Richard Chmielewski.

19           He also suffers from diagnosed mental impairments  
20 for which he treats with Licensed Clinical Social Worker  
21 Kathryn Muller. He has also seen many other specialists,  
22 including pain specialists and consultants, in an effort to  
23 control his pain. For medications he receives Gabapentin 600  
24 milligrams, Tramadol 50 milligrams, and Cymbalta  
25 50 milligrams.

1           He applied for disability insurance benefits in  
2 February of 2010 alleging anxiety, ADD, a shoulder injury,  
3 and the ilioinguinal nerve entrapment as disabilities and an  
4 onset date of November 20th, 2009. An Administrative Hearing  
5 was conducted on March 29, 2011 by Administrative Law Judge  
6 Edward Pitts. ALJ Pitts issued a decision on July 5, 2011,  
7 in which he applied the well-known five-step test for  
8 determining disability and concluded that the plaintiff was  
9 not disabled.

10           At step two he did find that plaintiff suffers from  
11 a severe impairment that restricts his ability to perform  
12 basic work functions. Although he rejected the claim that  
13 the lumbar condition and shoulder condition and psychological  
14 conditions were also severe, he found that the nerve  
15 entrapment did not meet or equal medically any of the listed  
16 presumptively disabling conditions set forth in the  
17 regulations.

18           He then concluded that after surveying the medical  
19 evidence, that plaintiff retains the ability to perform light  
20 work with the additional non-exertional restriction of  
21 unskilled work due to the difficulties in concentrating  
22 relating to his chronic groin pain. He then applied the  
23 grids, and particularly Rule 202.21, and found that the pain  
24 did not sufficiently erode the job based on which the grids  
25 were predicated, particularly since it was taking into

1 account the unskilled portion of the RFC finding, and  
2 concluded that there was no disability.

3 That determination became final when the Social  
4 Security Administration Appeals Council denied plaintiff's  
5 request for review.

6 This is a close case, and my role is to ensure that  
7 the proper legal principles were applied by the ALJ and that  
8 his decision is supported by substantial evidence. The  
9 question of whether I would arrive at the same conclusion  
10 based on the evidence before the Court is not the inquiry.  
11 The term substantial evidence has been defined as such  
12 relevant evidence as a reasonable mind might accept as  
13 adequate to support a conclusion.

14 I've carefully reviewed the evidence and arguments  
15 at step two. I think the ALJ properly rejected the shoulder  
16 injury as a severe impairment. The claimant admitted at the  
17 hearing at page 55 of the Administrative Transcript that he  
18 was not receiving treatment for his shoulder injury.

19 Dr. David Kerschner, a chiropractor, indicated in his report  
20 that there was no restriction due to the accident and that  
21 after ten months of chiropractic treatment he should have  
22 been returned to his pre-accident condition. That's at 466.

23 The Dr. Johnson consultative exam in April of 2010  
24 showed some minimal restriction but no limitation in range of  
25 motion. That's at page 373.

1           Similarly, the ALJ properly rejected the  
2 psychological conditions that were cited by the plaintiff as  
3 being disabling or sufficiently severe to interfere with  
4 work-related activities. When plaintiff treated much  
5 earlier, he was released in July of 2005 with a Global  
6 Assessment of Functioning, or GAF, score of 65. That's at  
7 page 428 of the Administrative Transcript. It appears that  
8 he is doing well. And the medical records from that care  
9 provider indicate that they lost contact with the plaintiff.  
10 He only began treatment one month -- resumed treatment, I  
11 should say, one month before the hearing and began taking  
12 medication for his condition two days before the hearing.  
13 That's at page 57 of the Transcript.

14           So, plaintiff's burden to establish those two  
15 conditions as sufficiently severe in step two was not met.

16           In terms of the Residual Functional Capacity  
17 determination, which is pivotal, of course, I find that  
18 substantial evidence does support the RFC determination. A  
19 Functional Capacity Evaluation was conducted in February of  
20 2011 and that certainly can constitute a part of the body of  
21 evidence that is substantial and supports that determination.  
22 That's at page 528 et seq. of the record.

23           Clearly it's plaintiff's burden at this step to  
24 establish that he doesn't have the RFC that was noted by the  
25 ALJ. As I indicated, Dr. Chabot, his own treating physician,



1 in April 2011 indicated that plaintiff should go to work and  
2 can perform light work. That's at page 627.

3 Consultative examiner Dr. Johnson, her examination  
4 supports that plaintiff can lift 15 to 20 pounds, which is  
5 consistent with light weight. And she found no limitation at  
6 sitting, standing or walking. That's at pages 371 to 376 of  
7 the Administrative Transcript.

8 The record indicates that plaintiff was responding  
9 fairly well to his nerve injections at page 61, according to  
10 his testimony, and at page 307.

11 In terms of credibility, it was incumbent on the  
12 Administrative Law Judge to meet the regulations and consider  
13 the plaintiff's daily activities, the medications that he is  
14 on, the side effects, if any, of the medications. He went  
15 through the analysis. He focused on Dr. Lukose's statement,  
16 admittedly an isolated statement, of August 13, 2010 that  
17 plaintiff's pain did not seem to be commensurate with the  
18 physical findings. That's at page 468. He went through  
19 daily activities. There are many indicators that plaintiff  
20 was doing better. Page 307 of the record, for example.  
21 Page 308 shows that he was active. He reported to his care  
22 providers he could perform lawn work. He was planting  
23 flowers. He was riding his bicycle. At page 308 it also  
24 indicates that the severe testicular pain was essentially  
25 gone. This was in June of 2010. In October of 2010, at 306,

1 he indicates marked improvement. Dr. Chabot also noted  
2 improvement in the groin pain from nerve blocks at page 477.

3 I find that the Administrative Law Judge did make a  
4 proper credibility analysis and it was incumbent upon him to  
5 make that determination so long as it was supported by  
6 substantial evidence. It does not provide a basis to set  
7 aside the Commissioner's determination.

8 So, although there is clearly conflicting evidence  
9 in the record, it is nonetheless my finding that the  
10 determination resulted from proper legal principles being  
11 applied and is supported by substantial evidence. So I will  
12 grant judgment on the pleadings to the Commissioner and issue  
13 an order incorporating by reference this determination.

14 Thank you both for excellent presentations and  
15 arguments.

16 MR. MYERS: Thank you, Your Honor.

17 MR. ANTONOWICZ: Thank you, Your Honor.

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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.



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EILEEN MCDONOUGH, RPR, CRR  
Federal Official Court Reporter