

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

RONALD FREDERICK DENSLOW, JR.,

Plaintiff,

v.

Civil Action No.
6:16-CV-0974 (DEP)

NANCY A. BERRYHILL, Acting Commissioner
of Social Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF:

PETER M. HOBAICA, LLC
2045 Genesee Street
Utica, NY 13501

B. BROOKS BENSON, ESQ.

FOR DEFENDANT:

HON. GRANT JAQUITH
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Northern District of New York
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Syracuse, NY 13261-7198

DANIELLA M. CALENZO, ESQ.
Special Assistant U.S. Attorney

¹ Carolyn Colvin, the former Acting Commissioner of Security, who was the originally-named defendant, was recently replaced by Nancy A. Berryhill, who currently serves in that position. Because Carolyn Colvin was sued only in her official capacity, Nancy A. Berryhill has been automatically substituted for Carolyn Colvin as the named defendant. See Fed. R. Civ. 25(d).

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.² Oral argument was conducted in connection with those motions on July 25, 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

² 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.

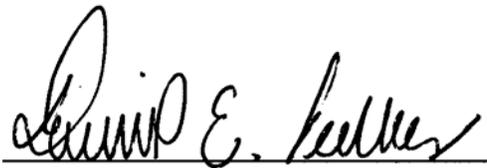
ORDERED, as follows:

(1) 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 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: July 27, 2017
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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RONALD FREDERICK DENSLOW, JR.,

Plaintiff,

vs.

6:16-CV-974

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

-----x
Transcript of a **Decision** held during a
Digitally-Recorded Telephone Conference on July 25,
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)

For Plaintiff: OFFICE OF PETER M. HOBAICA, LLC
Attorneys at Law
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BY: B. BROOKS BENSON, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION
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Jodi L. Hibbard, RPR, CSR, CRR
Official United States Court Reporter
(315) 234-8547

1 (In Chambers, Counsel present by telephone.)

2 THE COURT: All right. This is an interesting
3 case. I've reviewed very carefully the parties' submissions,
4 the record, in particular the many reports of Dr. Davis as
5 well as the other individuals that have examined plaintiff.

6 So I have before me a request for judicial review
7 of an adverse determination pursuant to 42 United States Code
8 Section 405(g).

9 The background is as follows: The plaintiff was
10 born in February 1964, he is currently 53 years old. At the
11 outset -- onset of his alleged disability he was 47 and he
12 was 50 years old at the time of the administrative hearing in
13 this matter. He is 5 foot 9 inches in height and weighs
14 262 pounds. He is right-hand dominant. Plaintiff is
15 divorced and has two adult children. He is a high school
16 graduate and he drives. In the past, the plaintiff has
17 worked as a security guard. There is some ambiguity as to
18 when but it looks like between 2002 and either 2012 or 2013.
19 At the end he was working as a part-time security guard. He
20 has also worked as a mechanic and assembler and a wrecker
21 dismantling snowmobiles. That was in 2006-2007. He's worked
22 as a farmworker on his grandparents' farm prior to 2002. He
23 also was a logging equipment mechanic from 2006-2007.

24 He has suffered from mental and cognitive concerns
25 since age 9 when he was struck on the head with a beer

1 bottle, he lost consciousness and saw stars. He was
2 diagnosed as having a concussion. He slipped on the ice
3 subsequently several times hitting his head. He slipped on a
4 barn concrete floor and hit his head at age 22. He had a
5 snowmobile accident suffering head, neck -- and neck trauma
6 and at age 35 he fell 19 feet off a ladder and was briefly
7 unconscious.

8 The plaintiff has obviously undergone significant
9 neuropsychological testing and assessments by Dr. Toby Davis.
10 Dr. Davis has issued reports from August 23, 2011 and
11 September 20, 2011 that are fairly similar, both assigned a
12 GAF score of 50. They note significant deficits in several
13 areas and that he suffers from depression, anxiety, and
14 memory loss. He was also subject of a report by Dr. Davis in
15 May of 2013 and as I indicated during oral argument, in that
16 report, it shows significant slippage and that when comparing
17 his global neuropsychological performance from 9/20/2011 to
18 5/30/2013, according to Dr. Davis, Mr. Denslow has slipped
19 from average to mildly impaired and he provides specifics at
20 pages 503 and 504 of the administrative transcript. He
21 assigns a GAF score of 44 which is under the DSM-IV, of
22 course GAF has been eliminated in DSM-5. Under DSM-IV, a GAF
23 score of 44 represents serious symptoms or any serious
24 impairment in social, occupational, or school functioning,
25 e.g., no friends, unable to keep a job, close paren.

1 Plaintiff was also examined by Dr. Sushma, S-u-s-h-m-a,
2 Manda, M-a-n-d-a, neurologist, and Dr. G-l-a-d-y, Jacob, a
3 memory specialist. He has also seen regular care providers
4 at Slocum Dixon.

5 Physically the plaintiff has been diagnosed with
6 obesity. He also suffers from asthma, headaches,
7 hypertension, status post shoulder surgery, low back
8 arthritis, foot and leg issues, and he sees primarily a
9 physician's assistant Andrew Milone, M-i-l-o-n-e, in
10 Boonville, New York, and I also missed post-concussion
11 syndrome and sleep apnea.

12 As daily activities, he socializes with friends,
13 fishes, watches NASCAR, attends stock car races, cuts the
14 lawn, maintains his house with minor repairs, cooks, does
15 laundry, shops, some child care, and goes to church.

16 Procedurally, plaintiff applied for Disability
17 Insurance or Title II benefits on August 25, 2011, alleging
18 an onset date of August 2, 2010. At his first hearing, he
19 did not appear and his case was dismissed. The Social
20 Security Administration Appeals Council remanded the matter
21 for a new hearing on September 10, 2013. A hearing was
22 conducted on February 24, 2014 by Administrative Law Judge F.
23 Patrick Flanagan. Judge Flanagan issued his decision on
24 July 25, 2014, and it was adverse, he found that plaintiff
25 was not disabled at the relevant times and therefore

1 ineligible for the requested benefits. The Social Security
2 Administration Appeals Council denied plaintiff's request for
3 review of that determination on November 27, 2015, making the
4 administrative law judge's opinion a final determination of
5 the agency.

6 In his decision, ALJ Flanagan applied the
7 well-known five-step sequential test for determining
8 disability, finding at step one that plaintiff was not
9 engaged in substantial gainful activity since his alleged
10 onset date even though he was employed on a part-time basis
11 as a security guard. He did find that significant in showing
12 the absence of any physical limitations.

13 At step two, plaintiff's depression was diagnosed
14 or found to be severe. The other physical conditions alleged
15 were rejected principally upon the consultative -- on the
16 basis of the consultative report of Dr. Ganesh.

17 At step three, the administrative law judge found
18 that plaintiff cannot meet or medically equal any of the
19 listed presumptively disabling conditions and he considered
20 12.02 which relates to organic mental disorders, 12.06 which
21 relates to anxiety-related disorders, but he considered
22 12.04, I'm sorry, and he found that plaintiff could not meet
23 the B criteria of 12.04, finding that plaintiff was mildly
24 limited in activities of daily living, moderately limited in
25 social functioning, and moderately limited in concentration,

1 persistence, and pace with no episodes of extended duration
2 of decompensation. He found that the C criteria were not
3 met.

4 After applying a credibility analysis and
5 concluding that plaintiff's subjective claims were not fully
6 credible, the ALJ determined that the plaintiff retains the
7 residual functional capacity or RFC to perform all work, work
8 at all exertional levels with the following mental
9 limitations: He remains capable of understanding,
10 remembering, and carrying out simple one-two-step tasks, can
11 accept instructions from supervisors, and relate
12 cooperatively with coworkers but only superficial contact
13 with the public, occasional decision making, no
14 confrontation, negotiation, or responsibility for safety of
15 others or fast-paced production line tasks.

16 Applying that RFC, the ALJ concluded plaintiff
17 cannot perform his past relevant work as a security guard, a
18 dairy farm worker, a wrecking mechanic, and a logging
19 equipment mechanic.

20 He then consulted with a vocational expert who
21 opined that, despite his limitations, plaintiff is capable of
22 performing as a cleaner/housekeeper, a laundry laborer, and a
23 cleaner, either industrial or commercial.

24 As you know, my task is limited, scope of review is
25 highly deferential. I must determine whether the

1 Commissioner applied the correct legal principles and his
2 determination is supported by -- I'm sorry, her determination
3 is supported by substantial evidence.

4 In this case, at step two, plaintiff argues that
5 the administrative law judge should have concluded that
6 plaintiff suffers from additional severe conditions including
7 traumatic brain injury, post-concussion syndrome, cognitive
8 disorder, mood disorder, and personality change. As you
9 know, the test at step two is fairly de minimus but plaintiff
10 retains the burden. The burden is to show that the
11 condition, and it is important that it is not the condition
12 that counts but the resulting limitations from the condition.
13 The condition must significantly limit the ability to do
14 basic work activities.

15 In this case, I'm -- I, even if I were to agree
16 with the plaintiff, the error would be harmless because the
17 administrative law judge did find a severe impairment and
18 proceeded to step three.

19 Of course, the crucial question is whether at the
20 RFC level and steps four and five, the administrative law
21 judge considered the effect of all of plaintiff's
22 impairments, severe and nonsevere.

23 In terms of the physical components of the RFC,
24 Dr. Ganesh's consultative exam report adequately provides
25 substantial evidence for any exertional requirements of the

1 RFC. In terms of the listings, plaintiff has raised an
2 argument that Listings 12.02, 12.06, 12.08 should have been
3 considered, but each of those requires a satisfaction of the
4 B criteria and the ALJ concluded that the B criteria could
5 not be met when he considered 12.04.

6 The plaintiff also could not meet the C criteria,
7 and those also must be shown with respect to those listings,
8 so I don't find any error. Even if the ALJ were to conclude
9 that those additional mental conditions at step two were
10 severe, I don't find any error at step three.

11 The RFC is I think where the rubber meets the road
12 here and this is definitely a close case. There is a duty to
13 develop the record. The question is are there any gaps in
14 the record. The record was left open to obtain medical
15 source statements from Dr. Davis and it was not done. I'm
16 not sure that there was a gap here that the administrative
17 law judge should have filled but it certainly would have been
18 helpful to meaningful judicial review to have a consultative
19 exam report or a medical source statement that would
20 demonstrate, given his cognitive limitations, what plaintiff,
21 what limitations he had in performing work-related functions.

22 Let me skip down to credibility, then we'll circle
23 back. I think the ALJ properly, in determining credibility,
24 applied the required two-step analysis. He considered
25 plaintiff's evidence of robust daily activities, the clear

1 evidence of exaggeration to health care providers to obtain
2 Disability Insurance benefits as a revenue stream. At page
3 610 he told Dr. Seigers on March 13th, 2013 he was there to
4 get disability. At page 614 again he asked for disability.
5 The doctor stated that he could not identify any disability.
6 At page 619 he stated his intention was, to Dr. Raja,
7 R-a-j-a, to get financial help through disability benefits,
8 and the record is replete with references to that. 487, 488,
9 489, Dr. Davis is told the same thing, that plaintiff
10 believes he is disabled. And of course there is the question
11 of the declining of neurocognitive rehabilitation.

12 But overall, considering the record, I agree with
13 plaintiff's counsel that there is apparently a mistaken
14 belief by the administrative law judge at page 26 that
15 plaintiff's, according to Dr. Davis, plaintiff's condition
16 was static and did not deteriorate from 2011 to 2013. That's
17 clearly wrong, according to Dr. Davis' May 2013 report which
18 shows slippage in specific areas and the GAF of 44 as I
19 indicated previously, and so I think this is a case that
20 should be remanded. I don't find, I don't find clear
21 evidence of disability, I think the jury is out as to whether
22 Mr. Denslow can meet the requirements of demonstrating
23 disability, but I don't think Administrative Law Judge
24 Flanagan, with due respect to him, provided a very clear
25 explanation of his rejection of Dr. Davis' conclusions, and I

1 think that the matter ought to be remanded.

2 So I will grant judgment on the pleadings to the
3 plaintiff and remand the matter to the Commissioner for
4 further consideration without a directed finding of
5 disability. Thank you both for excellent presentations, hope
6 you have a good day.

7 MS. CALENZO: Thank you, your Honor.

8 MR. BENSON: Thank you very much, your Honor.

9 (Proceedings Adjourned, 2:40 p.m.)

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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 have listened to and
transcribed the foregoing proceedings and that the
foregoing is a true and correct transcript thereof
to the best of my ability.

s/Jodi L. Hibbard

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