

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

BAHAR M.,

Plaintiff,

v.

Civil Action No.
6:19-CV-1471 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LEGAL AID SOCIETY OF
OF MID-NEW YORK, INC.
221 S. Warren St., Suite 310
Syracuse, NY 13202

ELIZABETH V. KRUPER, ESQ.

FOR DEFENDANT

HON. ANTOINETTE BACON
Acting United States Attorney
for the Northern District of New York
P.O. Box 7198
100 S. Clinton Street
Syracuse, NY 13261-7198

LUIS PERE, 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 (“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 February 11, 2021, 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 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:

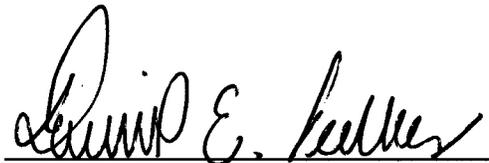
- 1) Plaintiff’s motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner’s determination that plaintiff was not

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.

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 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 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: February 18, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
BAHAR M.,

Plaintiff,

-v-

6:19-CV-1471

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID E. PEEBLES
February 11, 2021
100 South Clinton Street, Syracuse, New York

For the Plaintiff:
(Appearance by telephone)

LEGAL AID SOCIETY OF MID-NEW YORK, INC.
221 South Warren Street
Suite 310
Syracuse, New York 13202
BY: **ELIZABETH V. KRUPAR, ESQ.**

For the Defendant:
(Appearance by telephone)

SOCIAL SECURITY ADMINISTRATION
J.F.K. Federal Building, Room 625
15 New Sudbury Street
Boston, Massachusetts 02203
BY: **LUIS PERE, ESQ.**

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

1 (The Court and all counsel present by telephone.
2 Time noted: 11:24 a.m.)

3 THE COURT: Let me begin by thanking counsel for
4 excellent presentations. The issues raised in this case are
5 interesting and slightly different from some that the Court
6 faces in these types of challenges.

7 I have before me a challenge by the plaintiff to the
8 determination of the Commissioner of Social Security that
9 plaintiff was not disabled at the relevant times and therefore
10 ineligible for the benefits sought. The challenge is brought
11 pursuant to 42, United States Code, Sections 405(g) and 1383(c).

12 The background is as follows: Plaintiff was born in
13 July of 1967. She is currently 53 years of age. She stands
14 5'1" -- between 5'1" and 5'4" in height depending upon the point
15 in the Administrative Transcript that you refer to, and has
16 weighed at various times between 154 to 165 pounds. Plaintiff
17 is divorced and lives in an apartment in Utica, New York with a
18 daughter who is now 18 years of age.

19 Plaintiff attended regular classes while in school
20 and has four years of college education all in Iraq. Plaintiff
21 is currently attending Mohawk Valley Community College and
22 pursuing a criminal justice Associate's degree. She reports she
23 receives As and Bs. She attends class one hour per day Monday,
24 Wednesday, and Friday and three hours on Tuesdays and Thursdays.
25 Plaintiff is right-handed. She has a driver's license, but

1 testified that she only drives on a limited basis. It appears
2 that she has been involved in more than one motor vehicle
3 accident. Plaintiff is able to take public transportation.

4 Plaintiff last worked in June of 2014, although her
5 last significant work was in 2012. While working, she served as
6 an interpreter for the United States Army interpreting primarily
7 conversations and oral statements into English or from English
8 to Arabic. She also was a news television employee in Iraq.
9 After coming to the United States, she worked from 2010 to 2012
10 in Austin, Texas at a Goodwill location as a clothes sorter.
11 She has also been a substitute teacher.

12 Plaintiff suffers from several physical impairments
13 including migraines, neck pain, lower back pain, leg pain, a
14 foot issue, hypertension, carpal tunnel syndrome of the left
15 hand -- although she has refused surgery for that condition -- a
16 left shoulder issue which surgery has been postponed for, and a
17 loss of high frequency hearing based upon testing that occurred
18 in January of 2018.

19 Mentally, she suffers from major depressive disorder
20 without psychotic features, anxiety, and depression. She has no
21 hospitalization or significant mental health treatment.

22 Plaintiff's primary treatment provider, at least since March of
23 2014, is Dr. Najj El-Khoury. For her foot issues, she has seen
24 Dr. Lev Goldiner and Christopher Powers. She has seen
25 Physician's Assistant Heidi Roloson. She had a benign cyst

1 removed in May of 2016 by Dr. Dennis Blom. She has seen Dr.
2 Ahmed Shatla, a neurologist. Since June of 2013, she has seen
3 Dr. Deep Bharaj and Dr. John Sullivan.

4 Plaintiff's activities of daily living include the
5 ability to groom, dress, bathe, shop with her daughter, wash
6 dishes, do some cooking. She likes to read and watch
7 television.

8 Plaintiff has been prescribed various medications
9 including Cyclobenzaprine, Morphine, Naproxen, Paroxetine,
10 Topamax, Neurontin, Flexeril, Verapamil, Omeprazole, Paxil,
11 Cymbalta, and Imitrex. And I omitted when I -- oh, I did say
12 migraines. I'm sorry.

13 Procedurally, plaintiff applied for Title XVI
14 benefits in August of 2015 alleging an onset date of June 1,
15 2012, and claiming disability based on migraines, a left
16 shoulder injury, and a disc in the neck injury. A hearing was
17 conducted on September 14, 2017, by Administrative Law Judge
18 Roxanne Fuller. That came after two prior hearing dates, both
19 of which were adjourned in order to permit plaintiff to obtain
20 representation. ALJ Fuller issued a partially favorable
21 decision on November 28, 2017, finding that plaintiff was
22 disabled effective when she turned 50 on July -- in July of 2017
23 pursuant to Medical Vocational Guideline or Grid Rule 201.14.
24 On January 16, 2018, the Social Security Administration Appeals
25 Council issued a notice that it had reviewed, or was reviewing,

1 the determination. On May 3, 2018, the Appeals Council issued
2 an order of remand with directions to address several issues
3 that were found to be deficient in the Administrative Law
4 Judge's determination. A subsequent hearing was conducted on
5 October 11, 2018, by Administrative Law Judge Jennifer Gale
6 Smith. The ALJ issued a fully unfavorable decision on
7 November 26, 2018. That became a final determination of the
8 agency on October 17, 2019, when the Appeals Council denied
9 plaintiff's application for a review. This action was commenced
10 on November 25, 2019, and is timely.

11 In her decision, the Administrative Law Judge applied
12 the familiar five-step sequential test for determining
13 disability. She found initially that plaintiff had not engaged
14 in substantial gainful activity since the date of her
15 application on August 24, 2015.

16 At step two, she concluded that plaintiff suffers
17 from severe impairments that impose more than minimal
18 limitations on her ability to perform work functions, including
19 cervical spine disorder, lumbar spine disorder, bilateral
20 shoulder disorder, plantar fasciitis, left carpal tunnel
21 disorder, left knee disorder, migraine headaches, depressive
22 disorder, and anxiety disorder.

23 At step three, Administrative Law Judge Smith
24 concluded that plaintiff's conditions do not meet or medically
25 equal any of the listed presumptively disabling conditions set

1 forth in the Commissioner's regulations, specifically
2 considering listings 1.02, 1.04, 11.14, 12.04, and 12.06.

3 ALJ Smith next concluded that plaintiff retains the
4 residual functional capacity, or RFC, to perform sedentary work
5 with additional limitations addressing both her physical and her
6 mental impairments. When it comes to hearing, which was one of
7 the key issues raised by the plaintiff in this case, the
8 residual functional capacity provides, quote, the claimant can
9 tolerate no more than moderate levels of noise as defined in
10 Appendix D of the Selected Characteristics of Occupations, 1993
11 edition, closed quote.

12 At step four, the Administrative Law Judge concluded
13 that plaintiff is capable of performing her past relevant work
14 as an interpreter/translator pursuant to testimony given by the
15 vocational expert and, therefore, concluded that plaintiff was
16 not disabled and found no need to proceed to step five of the
17 sequential analysis.

18 The Court's function in this case is to determine
19 whether correct legal principles were applied and the resulting
20 determination is supported by substantial evidence, which is
21 defined as such relevant evidence as a reasonable mind would
22 accept to support a conclusion. The Second Circuit Court of
23 Appeals noted that this is a stringent test, it is highly
24 deferential. That was noted in many cases, including *Brault v.*
25 *Social Security Administration Commissioner*, 683 F.3d 443, from

1 2012.

2 The plaintiff has raised four basic contentions in
3 support of her challenge to the Commissioner's determination,
4 the first is the failure to reference and accommodate her
5 hearing impairment, and woven into that or subsumed into that is
6 the contention that the vocational expert and the ALJ both used
7 incorrect DOT information and mischaracterized the nature of her
8 prior work as an interpreter/translator; secondly, the plaintiff
9 contends that the treating source rule was violated and that Dr.
10 El-Khoury's opinions were not properly weighed and given
11 controlling weight in this case; the third argument is that
12 plaintiff's subjective complaints were improperly evaluated,
13 what we previously referred to as the credibility analysis; and
14 fourth, she contends there was a conflict in the vocational
15 expert's testimony between the testimony and the Dictionary of
16 Occupational Titles that went unresolved and therefore requires
17 a remand.

18 Addressing the first argument, the hearing loss
19 argument, on January 11, 2018, a hearing test was conducted. It
20 was found that there was a moderate to profound high frequency
21 sensorineural loss. The results appear at 1124 to 1125 of the
22 Administrative Transcript. The notation also is that plaintiff
23 qualifies for bilateral hearing aids. The Administrative Law
24 Judge did not discuss or refer to the hearing result. As the
25 Commissioner argues, clearly there is no duty to discuss every

1 piece of evidence and it is also true that it is plaintiff's
2 burden to show limitations and it is -- it is not sufficient to
3 show a diagnosed impairment to carry that burden.

4 It is clear to the Court that the vocational expert
5 and the Administrative Law Judge did misclassify plaintiff's
6 prior job. From the testimony of what she did, it appears clear
7 that it should have been analyzed under DOT 137.267-010,
8 entitled interpreter. The description of that position states,
9 in relevant part, translates spoken passages from one language
10 into another. From the testimony, it's relatively clear that
11 this is exactly what the plaintiff did in her prior work in Iraq
12 for the United States Army. Significantly, that DOT section,
13 when it addresses hearing, states, constant-exists two-thirds or
14 more of the time.

15 So in plaintiff's position, one of the four elements
16 would appear to be the ability to hear and to be able to
17 translate spoken words. In the Court's view, I understand
18 defendant's argument that plaintiff initially did not claim
19 hearing loss as -- either initially or in her hearing as a basis
20 for disability, and I also agree that there are -- many, many
21 treatment notes from Dr. El-Khoury finding no hearing loss,
22 including one from July of 2018 which postdates the hearing
23 test. Nonetheless, in my view, the Administrative Law Judge
24 should have discussed this and should have explained why there
25 was no limitation in the residual functional capacity and

1 present it to a vocational expert as to whether this would
2 impair the plaintiff's ability to perform her past relevant
3 work.

4 I understand the argument that the limitation to
5 moderate levels of noise addresses this, but I don't accept it.
6 I don't see how moderate levels of noise is sufficient to
7 address a hearing loss and a potential inability to perform the
8 past relevant work as a interpreter, so I do find error at the
9 step four determination that plaintiff is capable of performing
10 her past relevant work, and the failure to address and discuss
11 the hearing loss reflected in the January 2018 testing, and so I
12 am going to vacate the Commissioner's determination and order a
13 remand to address this specific issue, including whether
14 additional testing and/or a consultative expert opinion should
15 be elicited.

16 And I will add that although I don't foreclose the
17 submission of the Equal Access to Justice Act petition for fees,
18 I would in all likelihood find that the Commissioner's position
19 in this case was substantially justified. I found it to be a
20 very close case and I went back and forth, candidly, with regard
21 to this issue, but in the end, I think it is so central -- the
22 ability to hear is so central to the job that the plaintiff
23 performed and it was the -- was pivotal to the finding of no
24 disability that I think the hearing test should have been
25 discussed and potentially a limitation in the residual

1 functional capacity should have resulted, so I will grant
2 judgment on the pleadings to the plaintiff. I don't find any
3 persuasive evidence of disability and so the remand will be
4 without a directed finding of disability.

5 As previously stated, thank you both for excellent
6 presentations and I hope you stay safe in this challenging
7 environment.

8 MS. KRUPER: Thank you, your Honor.

9 MR. PERE: Thank you, your Honor.

10 (Time noted: 11:41 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR, Official U.S. 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 16th day of February, 2021.

s/ Hannah F. Cavanaugh

HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR
Official U.S. Court Reporter