

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KEVIN R.,

Plaintiff,

-v-

6:21-CV-881

COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

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DAVID N. HURD
United States District Judge

ORDER ON REPORT & RECOMMENDATION

On August 4, 2021, plaintiff Kevin R.¹ (“plaintiff”) filed this action seeking review of the final decision of defendant Commissioner of Social Security (“Commissioner” or “defendant”) denying his application for Disability Insurance Benefits (“DIB”) under the Social Security Act (the “Act”).

The Commissioner filed a certified copy of the Administrative Record, Dkt. No. 10, and both parties briefed the matter in accordance with General Order 18, which provides that an appeal taken from the Commissioner’s decision denying benefits will be treated as if the parties have filed cross-motions for a judgment on the pleadings, Dkt. Nos. 13, 18.

On November 9, 2022, shortly after hearing oral argument on the parties’ cross-motions, U.S. Magistrate Judge David E. Peebles advised in a thorough, thirty-seven-page Report & Recommendation (“R&R”) that (1) the Commissioner’s motion should be granted, (2) plaintiff’s motion be denied, (3) the Commissioner’s final decision be affirmed, and (4) plaintiff’s complaint be dismissed. Dkt. No. 21. Plaintiff has filed objections, Dkt. No. 24, which have now been fully briefed, Dkt. No. 25.

¹ In accordance with a May 1, 2018 memorandum issued by the Judicial Conference’s Committee on Court Administration and Case Management and adopted as local practice in this District, only the first name and last initial of plaintiff will be mentioned in this opinion.

Upon *de novo* review, plaintiff's objections must be overruled. As the Commissioner explains in her opposition brief, plaintiff failed to show that the ALJ erred at step two by finding that his fibromyalgia was not a medically determinable impairment. Notably, Judge Peebles explicitly considered this issue as part of his R&R.²

Plaintiff's other objections are focused less on the findings and determinations made in the R&R and more on the underlying arguments presented to the Magistrate Judge in the first instance. A review of these renewed and re-framed arguments confirms that there is no good reason to second-guess the R&R's conclusions on these points. Accordingly, the R&R is accepted and will be adopted in all respects. *See* 28 U.S.C. § 636(b)(1)(C).

Therefore, it is

ORDERED that

1. The Report & Recommendation is ACCEPTED;
2. The Commissioner's motion for a judgment on the pleadings is GRANTED;
3. Plaintiff's motion for a judgment on the pleadings is DENIED;
4. The Commissioner's final decision is AFFIRMED; and

² To the extent plaintiff argues that remand is necessary to further develop the record regarding a possible diagnosis of fibromyalgia, it bears noting that neither the Act nor the Regulations obligate an ALJ to re-contact medical providers. As the Commissioner notes, this particular issue was not squarely presented to Judge Peebles. But even assuming otherwise, plaintiff has not shown reversible error under the circumstances.

5. Plaintiff's complaint is DISMISSED.

The Clerk of the Court is directed to enter a judgment accordingly and close the file.

IT IS SO ORDERED.

Dated: January 17, 2023
Utica, New York.



David N. Hurd
U.S. District Judge