

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

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BENJALEE WRIGHT,

Plaintiff,

v.

Civil Action No.  
8:15-CV-1175 (DEP)

CAROLYN W. COLVIN, Acting Commissioner  
of Social Security,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

SCHNEIDER LAW FIRM  
57 Court Street  
Plattsburgh, New York 12901

MARK A. SCHNEIDER, ESQ.

FOR DEFENDANT

HON. RICHARD S. HARTUNIAN  
United States Attorney  
P.O. Box 7198  
100 S. Clinton Street  
Syracuse, NY 13261-7198

CATHERINE L. ZURGRUGG, 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 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 August 30, 2016, 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

ORDERED, as follows:

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

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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. 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.

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.

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 6, 2016  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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BENJALEE WRIGHT,

vs.

15-CV-1175

CAROLYN W. COLVIN, Acting Commissioner of Social Security.  
-----x

Transcript of DECISION held on August 30, 2016,  
at the James Hanley U.S. Courthouse, 100 South Clinton Street,  
Syracuse, New York, the HONORABLE DAVID E. PEEBLES, Presiding.

A P P E A R A N C E S

For Plaintiff:  
(Via Telephone)

MARK A. SCHNEIDER, ESQ.  
57 Court Street  
Plattsburgh, New York 12901

For Defendant:  
(Via Telephone)

SOCIAL SECURITY ADMINISTRATION  
Office of Regional General Counsel  
Region II  
26 Federal Plaza - Room 3904  
New York, New York 10278  
BY: CATHARINE ZURBRUGG, ESQ.

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1 (In chambers, via telephone:)

2 THE COURT: I have before me a request for judicial  
3 review of an adverse determination pursuant to 42, United  
4 States Code, Section 405(g).

5 The background of this matter is as follows; the  
6 plaintiff was born in January of 1962 and is now 54 years  
7 old. Was 52 years old at the time of the hearing. He's  
8 married and lives with his wife. His children are grown. He  
9 has a high school degree and two years of college education.

10 He last worked in or about August of 2014 when, as  
11 counsel indicated, he attempted for three weeks to work with  
12 Mountain Lake Services assisting disabled individuals. He,  
13 also, worked in the steel and construction industry from 1998  
14 until April 24 of 2014 in various capacities. He drives.

15 He suffers from a chronic lumbar condition. His  
16 primary physician is Dr. Zbigniew Wolczynski. He has, also,  
17 treated with Dr. Joseph Arguelles, a neurosurgeon who saw him  
18 in April of 2014 and October of 2014.

19 He has undergone MRI testing on July 31, 2007,  
20 February 20, 2014, and May 12, 2015, revealing multilateral  
21 degenerative disk disease, lateral and central stenosis and  
22 slight progression from the first to the second and the  
23 second to the third.

24 He also underwent EMG testing by Dr. Honorio Dispo  
25 on May 27, 2014, which revealed normal findings and no

1 evidence of radiculopathy or peripheral polyneuropathies.

2 He has been prescribed various medication for pain:  
3 Tramadol, Oxycontin, hydrocodone. He has, also, been treated  
4 for anxiety -- general anxiety disorder with panic attacks  
5 and major depressive disorder and a history of marijuana  
6 abuse. He's been prescribed Xanax, among other things.

7 The procedural history is as follows: Plaintiff  
8 applied for Title II disability benefits on August 12th,  
9 2014, alleging an onset date of December 11, 2013.

10 A hearing was conducted by Administrative Law Judge  
11 Carl E. Stephan January 8th, 2015. ALJ Stephan issued a  
12 decision on April 23, 2015, and that became a final  
13 determination of the agency on September 18, 2015, when the  
14 Social Security Administration Appeals Council denied  
15 plaintiff's request for review.

16 In his decision, ALJ Stephan applied the  
17 now-familiar five-step sequential test for determining  
18 disability.

19 At step one, he determined plaintiff had not  
20 engaged in substantial gainful activity since December 11,  
21 2013, although he did note the inconsistencies and vagueness  
22 concerning plaintiff's work in 2014.

23 At step two, he determined that the plaintiff  
24 suffers from severe impairments, including lumbar spondylosis  
25 with radiculopathy, asthma, anxiety and depression. He noted

1 a history of cardiological problems which appear to have been  
2 controlled and not interfere with his ability to perform  
3 work-related functions. He, also, rejected hypertension,  
4 GERD with Barrett's esophagus, kidney stones and heart  
5 disorder as sufficiently severe to meet the requirements of  
6 step two.

7 At step three, he concluded that plaintiff's  
8 conditions did not individually or collectively meet or equal  
9 any of the listed presumptively disabling impairments in the  
10 regulations considering the 1.00 listings, musculoskeletal;  
11 the 3.00, respiratory; he also considered 12.04, 12.06 and  
12 12.08 but concluded that plaintiff could not meet either the  
13 B or the C criteria associated with those.

14 He then surveyed the medical evidence and concluded  
15 that plaintiff retains the capacity to perform light work  
16 with exceptions as follows: He can occasionally climb stairs  
17 and ramps, balance, stoop, kneel, crouch, crawl and operate  
18 foot controls but should not climb ladders or scaffolds and  
19 no exposure to concentrated respiratory irritants.

20 He is able to understand, remember and carry out  
21 simple functions, perform simple work and make judgments on  
22 simple work-related decisions. Under supervision, he can  
23 occasionally, understand, remember and carry out more complex  
24 instructions, perform more complex tasks and make judgments  
25 on more complex work-related decisions.

1           He is capable of interacting with coworkers,  
2 supervisors and the public on a frequent but not constant  
3 basis and is capable of tolerating frequent changes in the  
4 work setting.

5           Applying that RFC determination, the administrative  
6 law judge concluded that plaintiff is unable to perform his  
7 past relevant work because of its exertional requirements.  
8 He determined that, if plaintiff was able to perform a full  
9 range of light work under the grids and, particularly, grid  
10 Rule 202.14, a finding of no disability would be directed.

11           He concluded, however, that there was a sufficient  
12 erosion of the job base on which the grids were predicated,  
13 that vocational expert testimony was required and, based on  
14 that testimony, concluded that plaintiff could perform the  
15 requirements as a parking lot, cashier, hospital TV rental  
16 clerk, a laboratory sample carrier and cleaner/housekeeping  
17 and, therefore, concluded that that plaintiff was not  
18 disabled.

19           As you know, my task is limited. The scope of  
20 review for the Court is deferential. I must determine if  
21 correct legal principals were applied and substantial  
22 evidence supports the determination.

23           I reviewed very carefully the records of  
24 Dr. Arguelles and Dr. Wolczynski in view of plaintiff's  
25 arguments that they were not properly treated -- considered



1 as treating sources. Clearly, the law and the regulations  
2 require that that the opinions of a treating source  
3 concerning functional limitations must be deemed controlling  
4 and, if they are rejected, the ALJ has to explain the  
5 rejection and the weight given to those determinations.

6 I could not find any basis to conclude that either  
7 of those two physicians' opinions were rejected when it  
8 comes to functional limitations. In fact, Dr. Wolczynski and  
9 Dr. Arguelles' opinions were given weight by the  
10 administrative law judge.

11 Dr. Wassef, I understand the arguments about his  
12 lack of expertise, perhaps, as an orthopedist or a  
13 neurosurgeon. But it is true that a consultative examination  
14 can supply substantial evidence. The opinions of Dr. Wassef  
15 are consistent with the medical evidence and his objective  
16 evaluation. He stated at Page 305, the claimant appeared to  
17 be in no acute distress, gait normal. He did say he was  
18 unable to stand and walk on heels and that he cannot squat.

19 He conducted a musculoskeletal exam. He determined  
20 that there was lordosis in the lumbar spine area and diffuse  
21 tenderness in the lumbar spine area but there was full  
22 flexion, extension, lateral flexion bilaterally and full  
23 rotary movement bilaterally in the lumbar spine area.  
24 Straight leg raise was negative bilaterally. And he  
25 determined that the claimant has moderate limitations in

1 regard to standing, walking, climbing and descending stairs,  
2 bending, squatting, lifting and operating foot controls.

3 No one quarrels with the fact that the plaintiff  
4 experiences pain. He suffers from a condition that could be  
5 expected to produce pain but pain alone does not equal  
6 disability.

7 I note that Dr. Wolczynski and Dr. Arguelles did  
8 not opine specifically regarding functional limitations.  
9 Dr. Arguelles did say on April 23, 2014, at Page 253, that he  
10 believed that the plaintiff's pain was relieved best by  
11 moderate level of activity and that all of his symptoms were  
12 worsened by very strenuous activity or maintenance of  
13 sedentary activity level. Dr. Arguelles, all he said with  
14 regard to his opinion on October 1, 2014, is that the  
15 plaintiff has a difficult time engaging in any kind of  
16 strenuous activity -- this is at Page 313 -- and that he is  
17 no longer able to do his work in labor and construction  
18 because of his back pain.

19 He said, I don't think that it is likely that a  
20 surgical procedure would be able to return him to a condition  
21 that would allow for heavy labor. I believe it would be  
22 potentially best in his interest to consider seeking  
23 long-term disability. Of course, long-term disability, we're  
24 not sure what that context is, but if he's meaning Social  
25 Security Disability benefits, of course, that's a matter

1 that's reserved to the Commissioner.

2 Dr. Melcher's opinions were given partial weight  
3 but the administrative law judge explained why he did not  
4 give full credit to that opinion and rejected the statement  
5 that the plaintiff, because of his psychiatric problems,  
6 may -- they may significantly interfere with his ability to  
7 function on a daily basis. That's at 300. And he properly  
8 stated that he relied, in part, on Dr. Ferrin's review of the  
9 records.

10 When it comes to the RFC, plaintiff's burden to  
11 establish the RFC and that burden was not met; in other  
12 words, the burden to establish a greater RFC. The issue of  
13 credibility, I think, is key here. The administrative law  
14 judge explained in detail at Pages 29 through 34 of the  
15 administrative transcript his reason for not fully crediting  
16 plaintiff's pain complaints.

17 He did acknowledge that he suffers from a condition  
18 that could reasonably be expected to produce the symptoms as  
19 testified, but he relied heavily on daily activities, the  
20 reports of plaintiff's daily activities in his reports to the  
21 agency and to the two consultative examiners. He considered  
22 his relatively conservative treatment. He considered the  
23 receipt of unemployment and the certification of ability to  
24 work; and the fact that he was laid off and it doesn't appear  
25 that he was laid off due to his back condition. So, the

1 credibility determination was properly explained and is  
2 supported by substantial evidence.

3 At step five, the hypothetical that was provided to  
4 the Social Securitrial expert was well-supported and,  
5 therefore, the determination of no disability is supported by  
6 substantial evidence.

7 So, I will grant judgment on the pleadings to the  
8 defendant dismissing plaintiff's complaint.

9 Thank you both for excellent presentations.

10 MS. ZURBRUGG: Thank you, your Honor.

11 MR. SCHNEIDER: Goodbye.

12 (Proceedings adjourned.)

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C E R T I F I C A T I O N

I, DIANE S. MARTENS, Registered Professional Reporter, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, that the foregoing is a true and correct copy of same and the whole thereof.

*Diane S. Martens*

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DIANE S. MARTENS, FCRR