

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

JONATHON L.,

Plaintiff,

v.

Civil Action No.
8:20-CV-1280 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LAW OFFICES OF STEVEN R.
DOLSON
126 North Salina Street, Suite 3B
Syracuse, NY 13202

GREGORY P. FAIR, ESQ.
STEVEN R. DOLSON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

DANIEL STICE TARABELLI, ESQ.

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), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on April 14, 2022, during a telephone conference held on the record. I issued a bench decision on April 15, 2022, 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

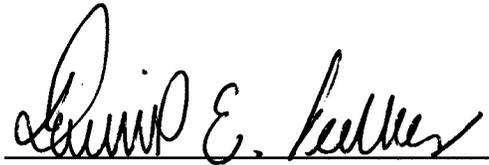
disabled at the relevant times, and thus is not entitled to benefits under the

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.

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: May 9, 2022
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
JONATHON L.,

Plaintiff,

vs.

8:20-CV-1280

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

Transcript of a **Decision** held during a Telephone Conference on April 15, 2022, the 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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1 (The Court and all counsel present by
2 telephone, 12:00 p.m.)

3 THE CLERK: We're on the record in the case of
4 Jonathon L. versus Commissioner of Social Security, Case
5 Number 8:20-CV-1280. Counsel, can you please state your
6 appearances for the record starting with plaintiff.

7 MR. FAIR: Yep, good afternoon I think at this
8 point, Gregory Fair from the law offices of Steven Dolson on
9 behalf of the plaintiff.

10 MR. TARABELLI: Good afternoon, your Honor, this is
11 Dan Tarabelli for the Commissioner.

12 THE COURT: Good afternoon, Counsel. Let me set
13 the stage by saying that I heard oral argument in this case
14 yesterday. There were some matters raised during the
15 argument that I thought warranted me to take a close look at
16 the case and my initial impression. Having done that, I'm
17 ready to render a decision in this case.

18 The plaintiff has commenced this action pursuant to
19 42 United States Code Section 405(g) to challenge an adverse
20 determination by the Acting Commissioner finding that he was
21 not disabled at the relevant times and therefore ineligible
22 for the benefits sought by him.

23 The background is as follows: Plaintiff was born
24 in October of 1969 and is currently 53 years of age. He was
25 49 years old on the alleged onset date of September 27, 2018.

1 Plaintiff is married and has a son 15 years of age and a
2 daughter 19 years of age. Those ages are recorded as of
3 November 2019. Plaintiff lives in Ogdensburg, New York with
4 his wife and children. Plaintiff is 6 feet tall and weighs
5 approximately 330 pounds. Plaintiff has an 11th grade
6 education and did secure a GED. While in school he was in
7 regular classes. Plaintiff is right-handed. Plaintiff
8 worked primarily in two positions, or for two companies, I
9 should say. Between January of 2006 and January 2008, he
10 worked as a maintenance worker and a cleaner for Walmart.
11 Between January 2008 and September 2018, he worked for
12 Loomis, initially as a messenger or courier, and later, in
13 the later years as a driver. He last worked in
14 September 2018. The evidence is somewhat equivocal as to
15 why. It appears at pages 51, 334, and 366 that he lost his
16 position because of downsizing. The administrative law judge
17 in the opinion stated that it was because he was not able to
18 meet the lifting requirements. I didn't necessarily find any
19 reference to that in particular, and that would not make
20 sense because as a driver, he testified that he was not
21 required to lift. That was at page 21, the ALJ's reference.
22 He did say that he is not able to perform the job due to his
23 conditions, that's at 202, and it appears that he was
24 assuming that he would have to transfer to another location
25 where he would be required to lift as a messenger or courier

1 in any event. Plaintiff suffers -- and at page 48 he said
2 that the messenger position got to be too much, and at 51, he
3 stated that just driving would have required lifting at a
4 different branch. So I guess we'll credit his statement that
5 it's due to his conditions that he lost his position.

6 Plaintiff physically suffers from degenerative disk
7 disease of the lumbar region, also has cervical issues, he
8 suffers from hypertension, obesity, tinnitus, psoriasis,
9 diabetes, and left leg issues. In 1987, he underwent
10 essentially two surgeries that were a day or two apart. One
11 was an L4-L5 laminectomy with multi-level rod and the second
12 was a multi-level rod fixation due to scoliosis. He has had
13 one pain injection in his lower back but declined to take
14 more pain injections due to the cost. Plaintiff has treated
15 with several sources including Dr. Aathirayen Thiagarajah one
16 time in December of 2018 for pain. He has treated with
17 Dr. Brian Kerrigan since January 2013, treated with
18 Dr. Manasvi Jaitly from January 2017 until May of 2017. He
19 treated briefly with SOS, Syracuse Orthopedics, in 2018, and
20 at various times with Claxton Hepburn Medical Center for pain
21 management and in their emergency department.

22 Plaintiff's activities of daily living include the
23 ability to shower, dress, and groom, prepare some meals, shop
24 occasionally, he has trouble with laundry and cleaning. He
25 watches television. Among the medications that have been

1 prescribed for the plaintiff are gabapentin, Duloxetine, and
2 Celebrex.

3 Procedurally, plaintiff applied for Title II
4 benefits on December 26, 2018 alleging an onset date of
5 September 27, 2018. In his function report he claimed
6 disability based on lumbar spine impairment, cervical spine
7 impairment, left side numbness, balance impairment,
8 hypertension, and morbid obesity. The hearing was conducted
9 by ALJ Jude Mulvey with a vocational expert on November 12,
10 2019. ALJ Mulvey issued an unfavorable decision on
11 December 20, 2019. That became a final determination of the
12 Commissioner on August 21, 2020 when the Social Security
13 Administration Appeals Council denied plaintiff's application
14 for review. This action was commenced on October 16, 2020,
15 and is timely.

16 In her decision, ALJ Mulvey applied the familiar
17 five-step sequential test for determining disability. She
18 first noted that plaintiff's last date of insured status will
19 be December 31, 2022.

20 At step one, she noted that plaintiff had not
21 engaged in substantial gainful activity since his alleged
22 onset date.

23 At step two, she concluded that plaintiff does
24 suffer from severe impairments that impose more than minimal
25 limitations on his ability to perform basic work functions,

1 including diastolic dysfunction, left ventricular
2 hypertrophy, degenerative disk disease of the lumbar spine,
3 hypertension, and obesity.

4 At step three, she concludes that plaintiff's
5 conditions do not meet or medically equal any of the listed
6 presumptively disabling conditions in the Commissioner's
7 regulations, specifically including Listings 1.04 and 4.04.
8 She also referenced Social Security Ruling 19-2p and
9 indicated that she had considered the impact of plaintiff's
10 obesity on his ability to perform work functions. Surveying
11 the medical and other evidence, ALJ Mulvey next concluded
12 that notwithstanding his impairments, plaintiff retains the
13 residual functional capacity to perform light work except
14 that he can frequently reach, stoop, and squat.

15 Applying that RFC, the ALJ next determined at step
16 four, pursuant to the testimony of a vocational expert, that
17 plaintiff is unable to perform his past relevant work.

18 Proceeding to step five, ALJ Mulvey first noted
19 that if plaintiff could perform a full range of light work,
20 the Medical-Vocational Guidelines and the Commissioner's
21 regulations, or so-called Grids, would direct a finding of no
22 disability pursuant to Grid Rules 202.18 and 202.11. Based
23 on the testimony of the vocational expert and considering the
24 additional limitations, exertional limitations set out in the
25 RFC, that would shrink the job base upon which the Grids are

1 predicated. The ALJ concluded that there is available work
2 in the national economy that plaintiff is capable of
3 performing, citing as representative examples marker,
4 cafeteria attendant, and sales attendant.

5 As you know, the court's function in this case is
6 to determine whether correct legal principles were applied
7 and the resulting determination is supported by substantial
8 evidence, which is defined as such relevant evidence as a
9 reasonable mind would conclude sufficient to support a
10 conclusion.

11 The plaintiff's contentions in this matter center
12 upon the residual functional capacity finding, the argument
13 being that it's not supported and that the administrative law
14 judge improperly evaluated the medical opinions of record and
15 substituted her lay opinion for those medical opinions. The
16 determination of disability requires in the first instance a
17 determination of a plaintiff's residual functional capacity
18 which represents finding of a range of tasks that the
19 plaintiff is capable of performing notwithstanding his
20 impairments.

21 Ordinarily, an RFC represents a claimant's maximum
22 ability to perform sustained work activities in an ordinary
23 setting on a regular and continuing basis, meaning eight
24 hours a day for five days a week or an equivalent schedule.
25 An RFC determination is informed by consideration of all of

1 the relevant medical and other evidence. 20 C.F.R. Section
2 404.1545(a), and *Tankisi v. Commissioner of Social Security*,
3 521 F.App'x 29 at 33, Second Circuit, 2013. The RFC in this
4 case was already recited and contains just the limitation to
5 light work and frequent reaching, stooping, and squatting.

6 There are two medical opinions in the record that
7 speak to plaintiff's physical abilities. Both were rejected
8 by the administrative law judge. The analysis of medical
9 opinions in the record in this case is governed by the new
10 regulations that took effect for cases filed after March of
11 2017. Under the new regulations, an ALJ does not defer or
12 give any specific evidentiary weight, including controlling
13 weight, to any medical opinions or prior administrative
14 medical findings, including those from the claimant's medical
15 sources. Instead, the ALJ must consider relevant factors,
16 particularly supportability and consistency, when evaluating
17 medical opinions. 20 C.F.R. Section 404.1520c(a). The ALJ
18 also may, but is not required, to explain how he or she
19 considered the other relevant factors as appropriate; those
20 factors being the source's relationship to the claimant,
21 including the length of the treatment relationship, the
22 frequency of examinations, the purpose of the treating
23 relationship, the extent of the treating relationship and
24 whether it was merely an examining relationship, the
25 specialization, if any, of the source, and other factors that

1 tend to support or contradict the opinion.

2 Speaking to the two primary factors, the
3 regulations define supportability as follows: The more
4 relevant the objective medical evidence and supporting
5 explanations presented by a medical source are to support his
6 or her medical opinions or prior administrative medical
7 findings, the more persuasive the medical opinions or prior
8 administrative medical findings will be.

9 The regulations define consistency as follows: The
10 more consistent a medical opinion or prior administrative
11 medical finding is with the evidence from other medical
12 sources and nonmedical sources in the claim, the more
13 persuasive the medical opinion or prior administrative
14 medical finding will be.

15 The first opinion that was spoken to in the ALJ's
16 decision is from Dr. Elke Lorensen. It was rendered on
17 February 26, 2019 and included in the record at pages 366
18 through 369 with a couple attached exhibits. In the opinion,
19 Dr. Lorensen's examination showed a limited lumbar range of
20 motion upon examination and Dr. Lorensen opined in her
21 medical source statement, no gross limitation sitting,
22 standing, walking, or handling small objects with the hands,
23 moderate limitations with bending, lifting, reaching, pushing
24 and pulling with the arms and squatting. That's at page 369.

25 The administrative law judge addressed

1 Dr. Lorensen's opinion on page 22, found it persuasive to the
2 extent that it found no limitations in sitting, standing,
3 walking, and handling, and, however, found the moderate
4 limitations to be vague and do not assess what the claimant
5 can do despite his impairments.

6 The Commissioner concedes that it was error to
7 reject it strictly on the basis of vagueness but argues that
8 it was harmless error. The other areas in which no
9 limitation was found is deficient because it doesn't discuss
10 supportability and consistency and point to specifics in the
11 record as required by the new regulations. *Raymond M. v.*
12 *Commissioner of Social Security*, 2021 WL 706645 from the
13 Northern District of New York, 2021.

14 Here, there are excerpts cited in support of the
15 finding of persuasiveness of the no-limitation portion of
16 Dr. Lorensen's opinions, and those simply don't support the
17 finding. 3F at page 4, for example, that's page 301,
18 plaintiff appears uncomfortable, reports 10 out of 10 pain;
19 noting part of the hardware from the surgery has dislodged at
20 303; mild cervical tenderness, moderate lumbar back pain with
21 painful range of motion, 304. 4F at 8, or is it 3? States
22 normal gait but moderate limited lumbar range of motion and
23 mild tenderness, 312. 4F at 17, moderate limitation of range
24 of motion, moderate tenderness, diminished leg sensation,
25 316. 5F at 4, reduced left hip range of motion, reduced

1 lumbar sensation, limited cervical spine range of motion with
2 tenderness, full lumbar range of motion but tenderness
3 present, 322. 7F at 7, antalgic gait and decreased range of
4 motion, that's at 335. 9F at 13, reduced range of motion,
5 cervical and lumbar, decreased left leg sensation, 368. 10F
6 at 11, increasing pain medications because previous dose is
7 not helping, 372. 10F at 5, reduced left hip range of
8 motion, full lumbar range of motion but tenderness and
9 limited cervical spine range of motion with tenderness, 376
10 to 377. 13F at 8, reduced left hip range of motion, reduced
11 left leg sensation, limited cervical spine range of motion,
12 full lumbar range of motion with tenderness, 396. 13F at 11,
13 same as the previous, that's at 399 to 400. 14F at 2, very
14 cursory physical examination but did note limited range of
15 motion in the back, 419. 4F at 5, decreased back range of
16 motion, that's at 422.

17 In sum, although the ALJ states that plaintiff has
18 normal lumbar range of motion on some exams, most of them in
19 fact show limited or decreased range of motion. And the
20 general normal gait and strength notations ignore all of the
21 consistent positive findings in other aspects, range of
22 motion, sensation loss, hip range of motion issues. The ALJ
23 discusses these in the overall summary but does not explain
24 how these findings are inconsistent with the opinions of
25 Dr. Lorensen and the state agency opinion. So I do not find

1 that the finding of persuasiveness of Dr. Lorensen's opinion
2 regarding no limitations is adequately explained and
3 supported by substantial evidence.

4 The question is whether this error is harmless.
5 The residual functional capacity specifies frequent reaching.
6 According to the Dictionary of Occupational Titles, the three
7 jobs identified do specify frequent reaching. The record is
8 equivocal as to whether, if the hypothetical on which the
9 vocational expert based his opinion is changed to occasional
10 reaching, the three jobs would still be available, at page 78
11 of the administrative transcript. It looks like the
12 vocational expert is saying yes, but it's not sure.

13 In any event, ordinarily, I would say that the
14 error was harmless because a moderate limitation in reaching
15 is not inconsistent with light work. *Monserate B. v.*
16 *Commissioner of Social Security*, 2021 WL 2587249, from the
17 Western District of New York, it is dated June 24, 2021, and
18 *Carl D. v. Commissioner of Social Security*, 2019 WL 1115704
19 from the Northern District of New York, March 11th, 2019.

20 And I have to say that the second opinion that was
21 addressed by the administrative law judge comes from Dr. R.
22 Reynolds and it was affirmed, so to speak, by Dr. S.
23 Siddiqui. Dr. Reynolds' opinion is rendered on March 27,
24 2019, appears at 83 to 93 of the administrative transcript.
25 Dr. Siddiqui on April 30, 2019 at page 100 of the

1 administrative transcript states, "I have reviewed all the
2 physical evidence in file and the physical assessment of
3 March 27, 2019 per Dr. R. Reynolds is affirmed as written."
4 In that RFC finding, Dr. Reynolds concludes that plaintiff is
5 only capable of lifting 10 pounds occasionally and frequently
6 less than 10 pounds, can sit for two hours, walk -- I'm
7 sorry, walk and stand for two hours and sit about six hours
8 in an eight-hour workday, only occasional stooping and only
9 occasional crouching. That's an RFC -- it's an opinion that
10 is consistent more with sedentary work and not with light
11 work.

12 The question again is, is that supported by
13 substantial evidence, the finding that those two opinions are
14 not persuasive. And for much the same reason, I don't find
15 it persuasive. All the administrative law judge did was
16 reference normal gait and normal strength in bilateral lower
17 and upper extremities, several examinations have noted lumbar
18 spine range of motion normal, normal spine range of motion
19 and then cited the same excerpts that I already referenced,
20 also confusingly states, "Finally, the claimant has received
21 no ongoing treatment for his cardiac impairment and there's
22 no indication of complications such as end organ disease from
23 his hypertension." As I indicated before, that is
24 inconsistent with the record for the reasons I've already
25 stated.

1 Again, the question is, is that harmless error?
2 The opinions of Dr. Reynolds and Dr. Siddiqui are consistent
3 with sedentary work. The vocational expert did say that
4 there are jobs available in the national economy and cited
5 three that could be performed with a sedentary RFC at 76 to
6 78, and even with occasional reaching. The VE also testified
7 if you were to change the hypothetical to occasional stooping
8 rather than frequent, there would be no impact on the jobs
9 identified. That's at page 75. However, as plaintiff's
10 counsel pointed out, the errors are not necessarily harmless
11 in that under the Medical-Vocational Guidelines, once the
12 plaintiff turned 50, he would, pursuant to the Grids, if he
13 were capable of performing only sedentary work, would be
14 deemed disabled and so he could potentially be entitled to at
15 least a partially favorable determination.

16 So for that reason, I do not find harmless error.
17 I do find error, and I am going to order that the
18 Commissioner's determination be vacated and the matter be
19 remanded for further consideration. So I will grant judgment
20 on the pleadings to the plaintiff and make those
21 determinations.

22 Thank you both for excellent presentations
23 yesterday, and whatever holiday you may be celebrating this
24 weekend, I wish you a happy holiday. Thank you.

25 MR. FAIR: Thank you, your Honor.

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MR. TARABELLI: Thank you, your Honor.
(Proceedings Adjourned, 12:26 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, 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.

Dated this 15th day of April, 2022.

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