UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

BRIAN DIXON,

Plaintiff,

-against-

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant.

- -x

17 Civ. 0334 (AJP)

OPINION & ORDER

ANDREW J. PECK, United States Magistrate Judge:

Plaintiff Brian Dixon, represented by counsel, brings this action pursuant to § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), challenging the final decision of the Commissioner of Social Security denying his application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). (Dkt. No. 1: Compl.) Presently before the Court are the parties' cross motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (Dkt. No. 12: Dixon Notice of Mot.; Dkt. No. 14: Comm'r Notice of Mot.) The parties have consented to decision of the case by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Dkt. No. 18.) For the reasons set forth below, the Commissioner's motion for judgment on the pleadings (Dkt. No. 14) is GRANTED and Dixon's motion (Dkt. No. 12) is DENIED.

FACTS

Procedural Background

Dixon filed for DIB on November 6, 2013, and SSI on March 18, 2014, alleging a disability onset date of October 1, 2013. (Dkt. No. 11: Administrative Record ("R") 147-54.) On May 21, 2015, represented by counsel, Dixon had a hearing before ALJ Michael J. Stacchini. (R.

50-92.) On June 26, 2015, ALJ Stacchini issued a written decision finding Dixon not disabled within the meaning of the Social Security Act. (R. 17-30.) ALJ Stacchini's decision became the Commissioner's final decision when the Appeals Council denied review on December 7, 2016. (R. 1-5.)

Non-Medical Evidence and Testimony

Born on November 29, 1966, Dixon was forty-seven years old at the alleged October 1, 2013 onset of his disability. (R. 147.) Dixon completed high school and "dry cleaning school," working in the dry cleaning business from 1988 to February 2011. (R. 182-83.) He worked as a car salesman from March 2012 to June 2012 and again from January 2013 to September 2013. (R. 183.) Dixon stopped working on September 2, 2013 when he was terminated from his job. (R. 181-82.) Dixon testified that he attempted to work as a car salesman for three to four weeks in January 2015, but was unable to continue this job due to his alleged disability. (R. 73-74.)

On December 29, 2013, in a Function Report (R. 189-201), Dixon declared that he cannot dress because he "cannot bend over," cannot bathe because he is "not steady on [his] feet," and cannot care for his hair or shave because of his neck brace (R. 190-91). Dixon stated that he "never" prepares food because his "hands are numb, and [he] cannot lift anything heavier than ½ [a] gallon of milk," so his girlfriend prepares his meals. (R. 191-92.) Dixon declared that he has "no hobbies now" and "just watch[es] T.V.," whereas before his alleged disability, he used to ride a motorcycle and drive a car. (R. 193.) Dixon stated that he spends time with others when they come to his house. (R. 194.) Dixon stated that he cannot lift objects because of his spinal stenosis, is unsteady standing, and can walk about thirty feet before he has to stop and rest for "a moment or 2." (R. 194-95.) Dixon stated that he is "ok" sitting, seeing, hearing and talking, can "somewhat" use his hands, but cannot climb stairs, kneel, squat or reach. (R. 196.) Dixon testified that he does "not

have any" anxiety symptoms and no stress related issues. (R. 197, 199.)

At the May 21, 2015 hearing before ALJ Stacchini, Dixon testified that he drives "to the store if [he needs] to go" or to "see [his] mother and [his] sons," and takes his daughter to her sporting events. (R. 57-58.) Dixon stated that he sometimes goes to the movies and restaurants with family and friends, and that he flew to Florida to vacation with his son. (R. 58-59.) Dixon claimed that he is unable to play catch with his daughter any more, but can vacuum "for a little bit," is "capable of doing" laundry, and mows the lawn on his tractor. (R. 59-60.)

Dixon testified that he went back to work as a car salesman in January 2015 at a friend's car lot for about a month, but had to "call it quits" since he was "just not able to perform the tasks" and felt "like [he was] putting [himself] at risk." (R. 66-67.) Dixon stated that "[p]retty much everything" was difficult in that job; for instance, he had difficulties sitting for a long time because he needs to elevate his leg throughout the day to prevent swelling. (R. 66-67, 76.)

Dixon stated that before his October 2013 diskectomy, he felt a burning sensation down his right arm, but after he saw his chiropractor, "[i]t actually jumped from one to both arms." (R. 60.) Dixon told ALJ Stacchini that he saw his chiropractor another three or four times, and he "noticed each time [he was] progressively getting worse." (Id.) Dixon stated that, while walking out of his chiropractor's office, he almost fell down the stairs, and the next morning he "couldn't get dressed and [he] couldn't really walk[]," so he saw his primary care physician, Dr. Mark Steenbergen,[1/] and a week later had surgery. (R. 60-61.) Dixon testified that his symptoms are "definitely better than" before, but he feels numbness in his arms, particularly in his right hand and left leg and foot. (R. 61.) Dixon stated that his last surgery follow-up was in January 2014, after

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[1/] Dr. Steenbergen has been Dixon's physician for 14 or 15 years. (R. 77.)

which he had physical therapy, but that further consultation was not recommended. (R. 61-62.) Dixon testified that his legs "don't operate like they used to," so sometimes when he sits for too long and then stands up, he has to "stand there for awhile for [his] legs to function correctly." (R. 63.) Dixon emphasized that because of the numbness in his feet, he began using a cane two months before his ALJ hearing. (R. 64-65.) Dixon does not use the cane at home since he can hold onto things and guide himself through his house. (R. 65.) Dixon can "absolutely" ambulate with his cane for 100 feet. (R. 66.) Dixon testified that "some days [his symptoms] are worse than others," so "sometimes [he] get[s] up and [he] kind of walk[s] okay, and then there are other times where [he] just ha[s] great difficulty walking." (R. 78-79.)

Despite the numbness he feels throughout his body, Dixon testified that Dr. Steenbergen did not think it necessary to refer him to a specialist because the numbness was caused by compression on the spinal cord. (R. 66.) Similarly, Dixon stated that although his hands improved after his surgery, he "noticed that they have gotten worse" to the point that he cannot form a complete fist, his index and middle fingers cannot compress against his hand, he has difficulty picking up objects like paper clips and "[s]ometimes" has difficulty writing. (R. 68-69.) Nevertheless, Dixon testified that Dr. Steenbergen has not sent him for treatment or discussed getting an EMG for his hands. (R. 68.) Dixon admitted that he was present when Dr. Steenbergen filled out the medical source statement of Dixon's alleged capabilities, and that they "went through all the paperwork together." (R. 67.)

Dixon, who is 5' 11" and weighs 275-280 pounds, stated that he lost about forty pounds since he stopped working "[j]ust by watching what [he] eat[s]." (R. 69.) Dixon has diabetes and testified that he gets the "shakes" if his blood sugar gets too low, but that for the past three months, he has "really tried to watch [his] sugars." (Id.) There was a point where he stopped taking

his insulin since he "just gave up" on himself. (R. 69, 76-77.) Dixon testifed that he has never received treatment for depression or anxiety, and he just "tr[ies] to be a pretty positive person." (R. 70.) Dixon testified that he does not have difficulty getting along with people, his high blood pressure does not affect him, and his asthma "seems to be in check," although he uses an inhaler twice a day. (Id.) Dixon continues to smoke and being around smoke does not affect him "at all." (R. 70-71.) Dixon stated that he is not on medication for pain, his nerves or numbness. (Id.)

Vocational expert Amy Leopold testified at the hearing that a hypothetical individual who was able to perform "the full range of light work with push, pull" and carrying; could "occassional[ly] climb[] ramps or stairs," but not "climb[] ladders, ropes, or scaffolds"; occassional[ly] balanc[e], stoop[], kneel[], crouch[], and crawl[]"; "frequent[ly] reach[], handl[e], and finger[]" but would need a cane for uneven terrain or distances greater than 100 feet; and "should avoid extreme cold, concentrated exposure to atmospheric conditions, and exposure to unprotected heights and hazardous machinery" could not perform Dixon's previous work as a car salesman or dry cleaner. (R. 82-83.) Leopold testified that an individual with these limitations could work as a cashier, ticket taker or an assembler, all of which exist in significant numbers in the national economy. (R. 84.) Leopold testified in response to the second hypothetical that an individual who could perform the full range of sedentary work with "push, pull [as] the same as lift, carrying," requires the ability "to shift from a sitting or standing position at 30 minute intervals" and "be off task for 5 percent of the work period, in addition to regularly scheduled breaks," but otherwise had the same limitations as the previous hypothetical, could work as an order clerk, telephone solicitor, document preparer and table worker, and that these jobs exist in significant

numbers in the national economy. (R. 85-86.)[2/] Leopold noted that an individual with limitations such as being unable to lift or carry any weight, being off task twenty percent of the work period[3/] or who was limited to three hours of sitting and three hours of standing in an eight-hour workday, could not do any work. (R. 86.)

Medical Evidence Before the ALJ[4/]

On February 2, 2013, Dixon went to Saint Francis Hospital because for the past day, he had experienced extreme swelling and pain in his left lower extremity extending from the groin and upper thigh area to his toes. (R. 236.) Dixon was able to ambulate, but with a limp due to the pain. (Id.) Other than falling a month prior without sustaining any obvious injury, there was no recent history of trauma or injury. (Id.)[5/6/] Dr. Jacob Essam found that Dixon experienced Charley Horse-like muscle cramps down his bilateral lower extremities and had diffuse swelling that felt warm with pressure. (Id.) Overall, however, Dr. Essam found Dixon to be "comfortable." (Id.)[7/] Dixon underwent a Duplex Doppler ultrasound of his left lower extremity revealing an occlusive deep venous thrombosis of his left external iliac, common femoral, femoral and popliteal veins. (R.

2/ Leopold noted that if manual dexterity and the manual manipulations were put at "occasionally" opposed to "frequently," that "[n]one of those positions would fit the hypothetical." (R. 88.)

3/ This is in addition to regularly scheduled breaks in the work day. (R. 86.)

4/ At the hearing, Dixon's counsel confirmed that the ALJ had "all of the medical evidence for the period of disability . . . support[ing Dixon's] claim." (R. 53-54, 56.)

5/ Dixon was involved in a motorcycle accident approximately five or six years prior that provoked his deep venous thrombosis and immobilized him for about 12 weeks. (R. 241, 243.) Subsequently, Dixon was treated with Coumadin therapy for six months. (R. 244.)

6/ Dixon underwent left knee surgery in 2012. (R. 236, 273.)

7/ Dr. Essam also noted that Dixon smokes one pack of cigarettes each day. (R. 236.)

239.) The peroneal and posterior tibial veins were not visualized, but there was a flow in the anterior tibial vein and no identifiable popliteal fossa cyst. (Id.) Dixon had a deep venous thrombosis a few days later and began taking Lovenox in addition to Coumadin. (R. 243, 252.) On February 5, 2013, Dixon was able to ambulate steadily without assistance. (R. 255.) Dixon was discharged from the hospital on February 5, 2013, with directions to follow-up with Dr. Steenbergen. (R. 253-54.) At the follow-up on February 8, 2013, Dr. Steenbergen noted that Dixon experienced pain on movement and that there was swelling in his left leg, but he did not display any neurological issues and was in no acute distress. (R. 414.)

On May 23, 2013, Dr. Steenbergen found that Dixon had no numbness/tingling, no trouble balancing, no pain on movement, and a normal gait. (R. 346-47.) On June 19, 2013, Dixon informed Dr. Steenbergen's nurse that the prior night he had a cramp in his left leg and when he tried to straighten the leg, he felt something "pop," and afterwards, he had difficulty walking. (R. 349.) Dr. Steenbergen diagnosed it as a "sprain." (R. 350.)

On September 23, 2013, Dr. Steenbergen reported that Dixon had no weakness, a normal gait with no disturbances, normal range of motion, and did not suffer from numbness/tingling. (R. 354-55.) On October 9, 2013, Dr. Steenbergen found that Dixon suffered from "severe" weakness, disturbance in his gait, and numbness/tingling. (R. 360.) Dr. Steenbergen noted that Dixon went to the chiropractor three weeks prior with a pinched nerve in his right neck and his condition progressively worsened to the point that Dixon said he could not sit up without assistance. (Id.)

On October 10, 2013, Dr. McNulty noted that Dixon reported suffering from spontaneous neck and right arm pain. (R. 262.) Dixon informed Dr. McNulty that he recently underwent chiropractic manipulation, and then he began to feel pain and numbness in both arms and

felt unsteady on his feet. (Id.) Upon physical examination, Dr. McNulty found that Dixon had 5/5 strength in his upper and lower extremities, but Dixon stated that "it is not equal to his usual ability." (Id.) Dr. McNulty noted that Dixon had hardened skin and hair loss in the lower extremities consistent with chronic vascular changes, decreased sensation in his lower extremities, poor hand dexterity, a slow gait, and that he was "surprisingly hyporeflexic." (Id.) Dr. McNulty diagnosed "[c]ervical spondylosis with myelopathy" with "a disc herniation with cord compression at C4-5," and he recommended surgery. (Id.)

On October 25, 2013, Dixon informed Dr. McNulty that his hands and balance were improved even though he still had some numbness in his hands. (R. 264.) Dr. McNulty found that there was improvement with cervical decompression, but that Dixon should continue to use the neck brace. (Id.)

On October 16, 2013, Dixon presented at Vassar Brothers Medical Center with a three-week history of upper extremity burning and bilateral numbness. (R. 275.) Dr. Deepa Joseph noted Dixon's neurological complaints included "[n]umbness and tingling over all his extremities, mainly over the right upper extremity and left lower extremity." (R. 278.) Dr. Joseph, however, found that Dixon's motor strength was 5/5 in all of his extremities with no gross sensory deficit, although Dixon complained of numbness and tingling. (Id.) Dixon was admitted to the hospital and underwent a cervical 4-5 diskectomy with fusion and a 7-mm round drain was placed. (R. 275.)[8/] The pathological report of the C4-C5 disc specimen indicated that there were degenerative changes in his spinal tissue. (R. 267.) The morning after surgery, Dixon reported that "his upper extremities were much stronger" and he had "considerably less numbness." (R. 275.) Although the doctors

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[8/] Dixon was diagnosed with spinal stenosis in October 2012. (R. 391.)

initially believed that Dixon would need post-discharge rehabilitation, after he was evaluated by physical and occupational therapists, the doctors decided that rehabilitation would not be necessary. (Id.) Dixon was discharged on October 17, 2013 with instructions to see Dr. McNulty in a week. (Id.) On October 25, 2013, Dixon informed Dr. McNulty that his hands and balance had improved, but he still felt "some" numbness in his hands. (R. 445.) Dr. McNulty found that Dixon had improved with cervical decompression. (Id.)

On December 2, 2013, Dixon told Dr. McNulty that he was "having some improvement in his hands." (R. 447.) Dr. McNulty reported that Dixon was "doing well" following the anterior cervical diskectomy and fusion. (Id.) On January 27, 2014, Dixon once again reported improvements in his hands and Dr. McNulty noted that if Dixon's pending cervical X-rays looked good, he would start physical therapy. (R. 449.)

On December 10, 2013, Dixon underwent a psychological evaluation with consultive psychologist Alex Gindes, Ph.D. (R. 391-94.) Dr. Gindes stated that Dixon "vehemently denied any symptoms of depression, anxiety, bipolar disorder, and psychosis" or any cognitive problems. (R. 391.) Dr. Gindes found that Dixon's "[m]ood seemed euthymic," "[s]ensorium was clear," and "[h]e did not seem to have any emotional difficulties that would interfere with his functioning." (R. 392-93.) Overall, Dr. Gindes' prognosis was "[g]ood given an absence of clearly debilitating psychiatric symptoms." (R. 394.)

On January 16, 2014, consulting internal medicine physician Dr. Gilbert Jenouri examined Dixon regarding his disability claim. (R. 396-99.) Dixon informed Dr. Jenouri that there had been "significant improvement" after his spinal surgery and he only felt numbness and tingling "occasionally." (R. 396.) Dixon denied any complications from his diabetes, which Dr. Jenouri found was medically managed. (Id.) Additionally, Dixon was diagnosed with asthma in 2010, and

he reported suffering from shortness of breath at least once a month with no dyspnea on exertion or breathing attacks. (Id.) Upon examination, Dr. Jenouri found that Dixon's gait was normal, he was able to rise from the chair without difficulty and he needed no assistance getting on and off the examination table, but he was unable to walk on heels and toes without difficulty, and his squat was only 50%. (R. 397.) Dr. Jenouri did not observe any sensory deficiencies and found that Dixon's strength was 5/5 in the upper and lower extremities. (R. 398.) Dr. Jenouri reported that Dixon's hand and finger dexterity were intact with a grip strength of 5/5 bilaterally. (Id.) Overall, Dr. Jenouri diagnosed Dixon with cervical spinal stenosis, neck pain with increased range of motion, bilateral hand paresthesia, diabetes and asthma. (Id.) Dr. Jenouri opined that Dixon had "[m]inimal to mild" restrictions in lifting, carrying, squatting and reaching, but should avoid smoke, dust, and other respiratory irritants. (R. 399.)

On January 22, 2014, consulting physician Dr. T. Hepp reviewed Dixon's medical records and opined that Dixon could "occasionally"[9/] lift/carry twenty pounds, "frequently"[10/] lift/carry ten pounds, stand/walk for about six hours in an eight-hour workday, sit for a total of approximately six hours in an eight-hour workday, and was "unlimited" in his ability to push/pull. (R. 98.) Dr. Hepp opined that Dixon could "occasionally" climb ramps, stairs, ladders, ropes and scaffolds in addition to "occasionally" balancing, stooping, kneeling and crouching. (Id.) Dr. Hepp stated that Dixon did not have manipulative, visual or communicative limitations, but had environmental limitations due to his asthma and should avoid concentrated exposures to fumes,

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[9/] The Disability Determination Explanation form defines "occasionally" as "cumulatively 1/3 or less of an 8 hour day." (R. 98.)

[10/] The Disability Determination Explanation form defines "frequently" as "cumulatively more than 1/3 up to 2/3 of an 8 hour day." (R. 98.)

odors, dusts, gases and poor ventilation. (R. 99.)

On February 24, 2015, Dixon was evaluated by Dr. Steenbergen (R. 468-70), who found that Dixon had a bilateral lower extremity dysesthesia with an antalgic gait unsteadiness (R. 468). Dixon "has trouble with balance . . . [and] uses a cane due to difficulty ambulating." (Id.) Furthermore, Dr. Steenbergen opined that Dixon's neurological condition would not improve and that his diabetes would continue to make his peripheral neuropathy worse unless he had "excellent control" over his diabetes. (Id.) Dr. Steenbergen also noted that Dixon suffered from arthralgia, joint pain and arthritis, and had lost a "significant" amount of weight since his last visit. (R. 468-69.)[11/] Although Dr. Steenbergen reported under his subjective findings that Dixon had a gait disturbance (R. 468), upon objective physical examination he found Dixon's gait was "normal" (R. 469). Dixon also complained that he had anxiety, depression and sleep disturbances. (R. 468.)

On April 30, 2015, Dr. Steenbergen completed a medical source statement regarding Dixon's ability to do work-related activities. (R. 455-60.) Dr. Steenbergen opined that Dixon was "[n]ever" able to lift/carry objects "up to 10 lbs" or heavier. (R. 455.) Dr. Steenbergen estimated that at one time without interruption Dixon could sit for thirty minutes and stand/walk for ten to fifteen minutes. (R. 456.) Overall, in an eight-hour workday Dr. Steenbergen opined that Dixon could sit/stand for three hours and walk for two hours. (Id.) Dr. Steenbergen noted that Dixon's cane was "medically necessary" for him to ambulate. (Id.) Dr. Steenbergen reported that Dixon could "[o]ccasionally" reach, push/pull, operate foot controls and crawl, but "[n]ever" handle, finger, feel, climb stairs/ramps/ladders/scaffolds, balance, stoop, kneel or crouch. (R. 457-58.) Dr. Steenbergen opined that Dixon could "[n]ever" tolerate unprotected heights, moving mechanical

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[11/] On March 6, 2015, Dr. Steenbergen did not address any of these medical symptoms/issues and, overall, the follow-up appears to be within normal limits. (See R. 473-74.)

parts or operating a motor vehicle, "[o]ccasionally" tolerate dust/odors/fumes/pulmonary irritants and extreme cold, and "[c]ontinuously" tolerate humidity/wetness, extreme heat and vibrations. (R. 459.) Finally, Dr. Steenbergen believed that Dixon could perform activities like shopping using a scooter, travel without a companion for assistance, use public transportation, climb some steps at a reasonable pace with the use of a single hand rail, prepare meals and feed himself, and maintain personal hygiene, but he could not walk a block at a reasonable pace on rough or uneven surfaces. (R. 460.) Dr. Steenbergen opined that Dixon "was nearly a quadriplegic," but he is now "stable but severely impaired." (Id.) The doctor also believed that these limitations have or will last for 12 consecutive months. (Id.) As noted above, Dixon was present when Dr. Steenbergen filled out the form and they "went through all the paperwork together." (R. 67; see page 4 above.)

ALJ Stacchini's Decision

On June 26, 2015, ALJ Stacchini denied Dixon's application for benefits. (R. 17-30.) ALJ Stacchini applied the appropriate five step legal analysis. (R. 21-22.) First, he found that Dixon had "not engaged in substantial gainful activity since October 1, 2013, the alleged onset date." (R. 22.)[12/] Second, ALJ Stacchini found that Dixon had the "following severe impairments: status-post cervical diskectomy and fusion with instrumentation due to cervical stenosis with myelopathy; chronic obstructive pulmonary disease (COPD); history of deep venous thrombosis (DVT), status-post placement of Greenfield filter; juvenile onset insulin-dependent diabetes mellitus, and morbid obesity." (Id.) ALJ Stacchini found Dixon's benign hypertension to be "nonsevere" because it "appears to be controlled with medication with no limitations thereof," and Dixon's alleged

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[12/] ALJ Stacchini took into account Dixon's work as a car salesman for three weeks during this time period, but noted that his earnings were below substantial gainful activity level. (R. 22.)

depressive disorder and anxiety to be "nonsevere"[13] because they "do[] not cause more than minimal limitation in [Dixon's] ability to perform basic mental work activities." (R. 23-24.)[14]

Third, ALJ Stacchini found that Dixon did not "have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1." (R. 24.) ALJ Stacchini specifically addressed Dixon's musculoskeletal impairment, concluding that it was not severe since he could "ambulate independently" with the use of one cane. (Id.) Similarly, ALJ Stacchini concluded that despite Dixon's hand numbness which had improved post-October 2013 surgery, Dixon's neurological impairment was nonsevere because it was "intact" with good muscle and grip strength and his reflexes were intact in the lower and upper extremities. (Id.) ALJ Stacchini considered Dixon's diabetes mellitus noting that it was "uncontrolled per hgA1C level,"[15] but that it was without complications and had not caused listing-level end organ damage. (Id.) Finally, ALJ Stacchini emphasized that although there is no listing for obesity, Dixon's Level II obesity had been "fully considered in the same manner as all other medically determinable impairments in arriving at the residual functional capacity limitations" in accordance with SSR 02-1p. (R. 25.)

ALJ Stacchini determined that Dixon had the residual functional capacity ("RFC")

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[13] In making this finding, ALJ Stacchini "considered the four broad functional areas set out in the disability regulation for evaluating mental disorders in section 12.00C of the Listing of Impairments." (R. 23.)

[14] ALJ Stacchini gave great weight to Dr. Gindes' findings that "failed to note any 'clearly deliberating psychiatric symptoms' or . . . 'any emotional difficulties that would interfere with his functioning.'" (R. 23.) Additionally, he noted that Dixon "vehemently" denied any symptoms of cognitive problems, anxiety or depression. (Id.)

[15] In February 2015, Dixon had a HgA1C level of 13 and fasting glucose level of 360. (R. 26.)

to

> perform sedentary work, as defined in 20 CFR 404.1567(a) and 416.967(a), except that he must be allowed to alternate from sitting/standing positions at 30 minute intervals, allowing [Dixon] to be "off task" for 5% of the workday, in addition to regularly scheduled breaks of 15 minutes in the morning and afternoon and ½ hour to an hour midday. [Dixon] can lift/carry/push/pull 5 pounds frequently and 10 pounds occasionally; he can climb ramps and stairs occasionally, but not ladders, ropes or scaffolds; he can occasionally balance, stoop, kneel, crouch and crawl and he can reach, handle and perform tasks requiring fine fingering frequently. [Dixon] must use a cane for ambulating on uneven terrains and distances greater than 100 feet; he must avoid exposure to extreme cold, concentrated atomospheric conditions, unprotected heights and hazardous machinery.

(R. 25.) In making this determination, ALJ Stacchini "considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and 416.1529 and SSRs 96-4p and 96-7p" along with considering "opinion evidence in accordance with the requirements of 20 CFR 404.1527 and 416.927 and SSRs 96-2p, 96-5p, 96-6p, and 06-3p." (R. 25.)

ALJ Stacchini considered Dr. Jenouri's January 2014 opinion regarding Dixon's respiratory limitations "less persuasive" than his other findings since Dixon "can tolerate the presence of some pulmonary irritants" as shown through smoking six to ten cigarettes per day for twenty years. (R. 26-27.) Additionally, ALJ Stacchini noted that Dixon's testimony regarding his symptoms was inconsistent with the medical evidence and his own testimony: Dixon complained of ongoing neck pain, but Dr. Jenouri found he had an "essentially normal musculoskeletal exam without neurological deficits." (R. 27.) Despite Dixon's testimony that he "cannot walk without assistance, or pick up small objects/small coins," Dixon testified that he could "drive, shop, go out to eat and to the movies, vacuum, shop and mow the lawn." (Id.)

ALJ Stacchini further noted that despite Dixon's complaints, he has not gone back to Dr. McNulty or another surgeon or neurologist for his alleged symptoms. (Id.) Additionally, the

ALJ remarked that although Dixon alleges numbness, he has never been referred to any specialists for an evaluation of his lower extremities nor has he been sent for any updated imaging scans. (Id.) Furthermore, the ALJ observed that Dr. Steenbergen's diagnosis of peripheral neuropathy had not been documented by the appropriate electrodiagnostic studies, nor has Dixon had an MRI/CT scan study for his lower spinal pathology. (R. 27-28.) Moreover, ALJ Stacchini considered Dixon's "conservative treatment" after his October 2013 surgery. (R. 28.)

ALJ Stacchini gave "little weight" to Dr. Steenbergen's opinions that Dixon is "unable to be employed" and has "extreme limitations, i.e. no lifting/carrying; sit and stand for only 3 hours; occasional reaching and no handling" because he found that these opinions were "based largely on [Dixon's] subjective statements,"[16/] finding them inconsistent with the consulting physician's exam and treating neurosurgeon's reports,[17/] and Dr. Steenbergen had only recommended "conservative care" without referring Dixon to a specialist or ordering further diagnostic testing. (R. 28.) After considering the "paragraph B" criteria, ALJ Stacchini gave Dr. Gindes' opinion that Dixon only had "mild" mental limitations "great weight." (Id.)

At the fourth step, ALJ Stacchini determined that Dixon is unable to perform any past relevant work. (Id.) At the fifth step, ALJ Stacchini found that given Dixon's "age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy" that he could perform. (R. 28-29.) ALJ Stacchini relied on vocational expert Amy H. Leopold's testimony that a person with Dixon's characteristics and limitations could work as an order clerk, document preparer or table worker. (R. 30.)

[16/] Dixon was present when Dr. Steenbergen filled out the disability form. (R. 28.)

[17/] Dr. McNulty noted improvement and discharged Dixon three months post-surgery. (R. 28.)

Accordingly, ALJ Stacchini concluded that Dixon has not been "under a disability" as defined in the Social Security Act from October 1, 2013 through June 26, 2015. (Id.)

ANALYSIS

I. THE APPLICABLE LAW

A. Definition Of Disability

A person is considered disabled for Social Security benefits purposes when he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A); see, e.g., Barnhart v. Thomas, 540 U.S. 20, 23, 124 S. Ct. 376, 379 (2003); Barnhart v. Walton, 535 U.S. 212, 214, 122 S. Ct. 1265, 1268 (2002); Impala v. Astrue, 477 F. App'x 856, 857 (2d Cir. 2012).[18/]

> An individual shall be determined to be under a disability only if [the combined effects of] his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); see, e.g., Barnhart v. Thomas, 540 U.S. at 23, 124 S.

[18/] See also, e.g., Salmini v. Comm'r of Soc. Sec., 371 F. App'x 109, 111 (2d Cir. 2010); Betances v. Comm'r of Soc. Sec., 206 F. App'x 25, 26 (2d Cir. 2006); Surgeon v. Comm'r of Soc. Sec., 190 F. App'x 37, 39 (2d Cir. 2006); Rodriguez v. Barnhart, 163 F. App'x 15, 16 (2d Cir. 2005); Malone v. Barnhart, 132 F. App'x 940, 941 (2d Cir. 2005); Butts v. Barnhart, 388 F.3d 377, 383 (2d Cir. 2004), amended on other grounds, 416 F.3d 101 (2d Cir. 2005); Veino v. Barnhart, 312 F.3d 578, 586 (2d Cir. 2002); Draegert v. Barnhart, 311 F.3d 468, 472 (2d Cir. 2002); Shaw v. Chater, 221 F.3d 126, 131 (2d Cir. 2000); Brown v. Apfel, 174 F.3d 59, 62 (2d Cir. 1999); Rosa v. Callahan, 168 F.3d 72, 77 (2d Cir. 1999); Tejada v. Apfel, 167 F.3d 770, 773 (2d Cir. 1999); Balsamo v. Chater, 142 F.3d 75, 79 (2d Cir. 1998); Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996).

Ct. at 379; Barnhart v. Walton, 535 U.S. at 218, 122 S. Ct. at 1270.[19/]

In determining whether an individual is disabled for disability benefit purposes, the Commissioner must consider: "(1) the objective medical facts; (2) diagnoses or medical opinions based on such facts; (3) subjective evidence of pain or disability testified to by the claimant or others; and (4) the claimant's educational background, age, and work experience." Mongeur v. Heckler, 722 F.2d 1033, 1037 (2d Cir. 1983) (per curiam).[20/]

B. Standard Of Review

A court's review of the Commissioner's final decision is limited to determining whether there is "substantial evidence" in the record as a whole to support such determination. E.g., 42 U.S.C. § 405(g); Giunta v. Comm'r of Soc. Sec., 440 F. App'x 53, 53 (2d Cir. 2011).[21/] "'Thus, the role of the district court is quite limited and substantial deference is to be afforded the Commissioner's decision.'" Morris v. Barnhart, 02 Civ. 0377, 2002 WL 1733804 at *4 (S.D.N.Y.

[19/] See also, e.g., Salmini v. Comm'r of Soc. Sec., 371 F. App'x at 111; Betances v. Comm'r of Soc. Sec., 206 F. App'x at 26; Butts v. Barnhart, 388 F.3d at 383; Draegert v. Barnhart, 311 F.3d at 472; Shaw v. Chater, 221 F.3d at 131-32; Rosa v. Callahan, 168 F.3d at 77; Balsamo v. Chater, 142 F.3d at 79.

[20/] See, e.g., Brunson v. Callahan, No. 98-6229, 199 F.3d 1321 (table), 1999 WL 1012761 at *1 (2d Cir. Oct. 14, 1999); Brown v. Apfel, 174 F.3d at 62.

[21/] See also, e.g., Prince v. Astrue, 514 F. App'x 18, 19 (2d Cir. 2013); Salmini v. Comm'r of Soc. Sec., 371 F. App'x 109, 111 (2d Cir. 2010); Acierno v. Barnhart, 475 F.3d 77, 80-81 (2d Cir.), cert. denied, 551 U.S. 1132, 127 S. Ct. 2981 (2007); Halloran v. Barnhart, 362 F.3d 28, 31 (2d Cir. 2004); Jasinski v. Barnhart, 341 F.3d 182, 184 (2d Cir. 2003); Veino v. Barnhart, 312 F.3d 578, 586 (2d Cir. 2002); Shaw v. Chater, 221 F.3d 126, 131 (2d Cir. 2000); Brown v. Apfel, 174 F.3d 59, 61 (2d Cir. 1999); Rosa v. Callahan, 168 F.3d 72, 77 (2d Cir. 1999); Tejada v. Apfel, 167 F.3d 770, 773 (2d Cir. 1999); Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996); Rivera v. Sullivan, 923 F.2d 964, 967 (2d Cir. 1991); Mongeur v. Heckler, 722 F.2d 1033, 1038 (2d Cir. 1983) (per curiam); Dumas v. Schweiker, 712 F.2d 1545, 1550 (2d Cir. 1983).

July 26, 2002) (Peck, M.J.).[22/]

The Supreme Court has defined "substantial evidence" as "'more than a mere scintilla [and] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971); accord, e.g., Selian v. Astrue, 708 F.3d 409, 417 (2d Cir. 2013); Rosa v. Callahan, 168 F.3d at 77; Tejada v. Apfel, 167 F.3d at 773-74.[23/] "[F]actual issues need not have been resolved by the [Commissioner] in accordance with what we conceive to be the preponderance of the evidence." Rutherford v. Schweiker, 685 F.2d 60, 62 (2d Cir. 1982), cert. denied, 459 U.S. 1212, 103 S. Ct. 1207 (1983). The Court must be careful not to "'substitute its own judgment for that of the [Commissioner], even if it might justifiably have reached a different result upon a de novo review.'" Jones v. Sullivan, 949 F.2d 57, 59 (2d Cir. 1991).[24/]

The Court, however, will not defer to the Commissioner's determination if it is "'the product of legal error.'" E.g., Duvergel v. Apfel, 99 Civ. 4614, 2000 WL 328593 at *7 (S.D.N.Y. Mar. 29, 2000) (Peck, M.J.); see also, e.g., Douglass v. Astrue, 496 F. App'x 154, 156 (2d Cir. 2012); Butts v. Barnhart, 388 F.3d 377, 384 (2d Cir. 2004), amended on other grounds, 416 F.3d 101 (2d Cir. 2005); Tejada v. Apfel, 167 F.3d at 773 (citing cases).

[22/] See also, e.g., Florencio v. Apfel, 98 Civ. 7248, 1999 WL 1129067 at *5 (S.D.N.Y. Dec. 9, 1999) (Chin, D.J.) ("The Commissioner's decision is to be afforded considerable deference; the reviewing court should not substitute its own judgment for that of the Commissioner, even if it might justifiably have reached a different result upon a de novo review." (quotations & alterations omitted)).

[23/] See also, e.g., Halloran v. Barnhart, 362 F.3d at 31; Jasinski v. Barnhart, 341 F.3d at 184; Veino v. Barnhart, 312 F.3d at 586; Shaw v. Chater, 221 F.3d at 131; Brown v. Apfel, 174 F.3d at 61; Perez v. Chater, 77 F.3d at 46.

[24/] See also, e.g., Campbell v. Astrue, 465 F. App'x 4, 6 (2d Cir. 2012); Veino v. Barnhart, 312 F.3d at 586.

The Commissioner's regulations set forth a five-step sequence to be used in evaluating disability claims. 20 C.F.R. §§ 404.1520, 416.920; see, e.g., Barnhart v. Thomas, 540 U.S. 20, 24-25, 124 S. Ct. 376, 379-80 (2003); Bowen v. Yuckert, 482 U.S. 137, 140, 107 S. Ct. 2287, 2291 (1987). The Supreme Court has articulated the five steps as follows:

> Acting pursuant to its statutory rulemaking authority, the agency has promulgated regulations establishing a five-step sequential evaluation process to determine disability. If at any step a finding of disability or nondisability can be made, the SSA will not review the claim further. [1] At the first step, the agency will find nondisability unless the claimant shows that he is not working at a "substantial gainful activity." [2] At step two, the SSA will find nondisability unless the claimant shows that he has a "severe impairment," defined as "any impairment or combination of impairments which significantly limits [the claimant's] physical or mental ability to do basic work activities." [3] At step three, the agency determines whether the impairment which enabled the claimant to survive step two is on the list of impairments presumed severe enough to render one disabled; if so, the claimant qualifies. [4] If the claimant's impairment is not on the list, the inquiry proceeds to step four, at which the SSA assesses whether the claimant can do his previous work; unless he shows that he cannot, he is determined not to be disabled. [5] If the claimant survives the fourth stage, the fifth, and final, step requires the SSA to consider so-called "vocational factors" (the claimant's age, education, and past work experience), and to determine whether the claimant is capable of performing other jobs existing in significant numbers in the national economy.

Barnhart v. Thomas, 540 U.S. at 24-25, 124 S. Ct. at 379-80 (fns. & citations omitted).[25/]

The claimant bears the burden of proof as to the first four steps; if the claimant meets the burden of proving that he cannot return to his past work, thereby establishing a prima facie case, the Commissioner then has the burden of proving the last step, that there is other work the claimant can perform considering not only his medical capacity but also his age, education and training. See,

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[25/] Accord, e.g., Talavera v. Astrue, 697 F.3d 145, 151 (2d Cir. 2012); Rosa v. Callahan, 168 F.3d at 77; Tejada v. Apfel, 167 F.3d at 774; see also, e.g., Jasinski v. Barnhart, 341 F.3d at 183-84; Shaw v. Chater, 221 F.3d at 132; Brown v. Apfel, 174 F.3d at 62; Balsamo v. Chater, 142 F.3d 75, 79-80 (2d Cir. 1998); Perez v. Chater, 77 F.3d at 46; Dixon v. Shalala, 54 F.3d 1019, 1022 (2d Cir. 1995); Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982).

e.g., Barnhart v. Thomas, 540 U.S. at 25, 124 S. Ct. at 379-80.[26/]

C. The Treating Physician Rule

The "treating physician's rule" is a series of regulations set forth by the Commissioner in 20 C.F.R. § 404.1527 detailing the weight to be accorded a treating physician's opinion. Specifically, the Commissioner's regulations provide that:

> If we find that a treating source's medical opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.

20 C.F.R. § 404.1527(c)(2); see, e.g., Rugless v. Comm'r of Soc. Sec., 548 F. App'x 698, 699-700 (2d Cir. 2013); Meadors v. Astrue, 370 F. App'x 179, 182 (2d Cir. 2010); Colling v. Barnhart, 254 F. App'x 87, 89 (2d Cir. 2007); Lamorey v. Barnhart, 158 F. App'x 361, 362 (2d Cir. 2006).

Further, the regulations specify that when controlling weight is not given a treating physician's opinion (because it is not "well-supported" by other medical evidence), the ALJ must consider the following factors in determining the weight to be given such an opinion: (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship; (3) the evidence that supports the treating physician's report; (4) how consistent the treating physician's opinion is with the record as a whole; (5) the specialization of the physician in contrast to the condition being treated; and (6) any other factors which may be significant. 20 C.F.R. § 404.1527(c)(2)-(6); see, e.g., Cichocki v. Astrue, 534 F. App'x 71, 74 (2d

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[26/] See also, e.g., Selian v. Astrue, 708 F.3d at 418; Betances v. Comm'r of Soc. Sec., 206 F. App'x 25, 26 (2d Cir. 2006); Green-Younger v. Barnhart, 335 F.3d 99, 106 (2d Cir. 2003); Rosa v. Callahan, 168 F.3d at 80; Perez v. Chater, 77 F.3d at 46; Berry v. Schweiker, 675 F.2d at 467.

Cir. 2013); Gunter v. Comm'r of Soc. Sec., 361 F. App'x 197, 197 (2d Cir. 2010).[27/]

When a treating physician provides a favorable report, the claimant "is entitled to an express recognition from the [ALJ or] Appeals Council of the existence of [the treating physician's] favorable . . . report and, if the [ALJ or] Council does not credit the findings of that report, to an explanation of why it does not." Snell v. Apfel, 177 F.3d 128, 134 (2d Cir. 1999); see, e.g., Cichocki v. Astrue, 534 F. App'x at 75; Zabala v. Astrue, 595 F.3d 402, 409 (2d Cir. 2010) (ALJ's failure to consider favorable treating physician evidence ordinarily requires remand pursuant to Snell but does not require remand where the report was "essentially duplicative of evidence considered by the ALJ"); Ferraris v. Heckler, 728 F.2d 582, 587 (2d Cir. 1984) ("We of course do not suggest that every conflict in a record be reconciled by the ALJ or the Secretary, but we do believe that the crucial factors in any determination must be set forth with sufficient specificity to enable [reviewing courts] to decide whether the determination is supported by substantial evidence." (citations omitted)); Ramos v. Barnhart, 02 Civ. 3127, 2003 WL 21032012 at *7, *9 (S.D.N.Y. May 6, 2003) (The ALJ's "'failure to mention such [treating physician report] evidence and set forth the reasons for his conclusions with sufficient specificity hinders [this Court's] ability . . . to decide whether his determination is supported by substantial evidence.'").

The Commissioner's "treating physician" regulations were approved by the Second Circuit in Schisler v. Sullivan, 3 F.3d 563, 568 (2d Cir. 1993).[28/]

[27/] See also, e.g., Foxman v. Barnhart, 157 F. App'x 344, 346-47 (2d Cir. 2005); Halloran v. Barnhart, 362 F.3d 28, 32 (2d Cir. 2004); Shaw v. Chater, 221 F.3d 126, 134 (2d Cir. 2000); Clark v. Comm'r of Soc. Sec., 143 F.3d 115, 118 (2d Cir. 1998); Schaal v. Apfel, 134 F.3d 496, 503 (2d Cir. 1998).

[28/] Although not applicable to this case, the Court notes that the regulations governing the "treating physician rule" have recently changed as to claims filed on or after March 27, 2017. (continued...)

II. APPLICATION OF THE FIVE STEP SEQUENCE

A. Dixon Was Not Engaged In Substantial Gainful Activity

The first inquiry is whether Dixon was engaged in substantial gainful activity after his application for DIB and SSI. "Substantial gainful activity" is defined as work that involves "doing significant and productive physical or mental duties" and "[i]s done (or intended) for pay or profit." 20 C.F.R. § 404.1510. ALJ Stacchini's conclusion that Dixon did not engage in substantial gainful activity during the applicable time period is not disputed. (See generally Dkt. No. 13: Dixon Br.; Dkt. No. 15: Comm'r Br.) The Court therefore proceeds with the analysis.

B. Dixon Demonstrated "Severe" Impairments That Significantly Limited His Ability To Do Basic Work Activities

The second step of the analysis is to determine whether Dixon proved that he had a severe impairment or combination of impairments that "significantly limit[ed] his physical or mental ability to do basic work activities." 20 C.F.R. § 404.1522(a). The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1522(b). "Basic work activities" include:

> walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling . . . seeing, hearing, and speaking . . . [u]nderstanding, carrying out, and remembering simple instructions . . . [u]se of judgment . . . [r]esponding appropriately to supervision, co-workers and usual work situations . . . [d]ealing with changes in a routine work setting.

20 C.F.R. § 404.1522(b)(1)-(6).

ALJ Stacchini determined that Dixon's severe impairments were status-post cervical diskectomy and fusion with instrumentation due to cervical stenosis with myelopathy; chronic

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28/ (...continued)
See 20 C.F.R. §§ 404.1527, 404.1520c; Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 FR 5844-01, 2017 WL 168819 at *5844, *5867-68 (Jan. 18, 2017).

obstructive pulmonary disease; history of deep venous thrombosis, status-post placement of Greenfield filter; juvenile onset insulin-dependent diabetes mellitus; and morbid obesity. (See page 12 above.) ALJ Stacchini's findings regarding the severity of these impairments benefit Dixon, and Dixon does not materially contest those findings. (See generally Dkt. No. 13: Dixon Br.)[29/] Accordingly, the Court proceeds to the third step of the five-part analysis.

[29/] Dixon argues that ALJ Stacchini's failure "to specifically note either dysesthesia or neuropathy . . . as a 'severe' impairment at Step Two" was an error of law. (Dixon Br. at 11.) But the failure to list an impairment as "severe" is a harmless error if the ALJ ultimately considered the impairment within the RFC determination. See, e.g., Vasquez v. Berryhill, 16 Civ. 6707, 2017 WL 1592761 at *20 (S.D.N.Y. May 1, 2017) (Peck, M.J.) ("[E]ven if [the ALJ] erred in finding [claimant's] knee pain non-severe at step two, any error would be harmless because [the ALJ] identified other severe impairments and discussed [claimant's] knee pain at subsequent steps of the analysis."); Reices-Colon v. Astrue, 523 F. App'x 796, 798 (2d Cir. 2013) ("At step two, the ALJ identified other 'severe impairments,' including [claimant's] 'back problem, migraine headaches, depression, and post traumatic stress disorder,' and therefore proceeded with the subsequent steps. And, in those subsequent steps, the ALJ specifically considered her anxiety and panic attacks. Because these conditions were considered during the subsequent steps, any error was harmless."); Burch v. Comm'r of Soc. Sec., 15 Civ. 9350, 2017 WL 1184294 at *8 n.7 (S.D.N.Y. Mar. 29, 2017) ("[E]ven if the ALJ had erroneously found some of [claimant's] conditions to be non-severe, it would be harmless error, since the ALJ considered all of [claimant's] impairments (both severe and non-severe) in the remainder of the sequential evaluation process."); Killings v. Comm'r of Soc. Sec., 15 Civ. 8092, 2016 WL 4989943 at *8 n.9 (S.D.N.Y. Sept. 16, 2016) ("The failure to address a condition at step two will constitute harmless error, and therefore not warrant remand, if, after identifying other severe impairments, ALJ considers the excluded conditions or symptoms in the subsequent steps and determines that they do not significantly limit the plaintiff's ability to perform basic work."), R. & R. adopted, 2016 WL 6952342 (S.D.N.Y. Nov. 28, 2016); Smith v. Colvin, No. 12-CV-1665, 2014 WL 98676 at *8 (N.D.N.Y. Jan. 9, 2014) ("[W]hen there are multiple impairments, as in this case, and the ALJ finds some, but not all of them severe, an error in the severity analysis at Step 2 may be harmless because the ALJ continued with sequential analysis and did not deny the claim based on the lack of a severe impairment alone."). Here, Dixon concedes that ALJ Stacchini considered Dixon's symptoms of neuropathy and dysesthesia in the RFC determination and "the error may be seen as 'harmless.'" (Dixon Br. at 11.) Accordingly, the Court finds no error regarding ALJ Stacchini's failure to specifically denote neuropathy and dysesthesia as "severe" since the respective symptoms were ultimately considered in the RFC determination.

C. Dixon Did Not Have A Disability Listed In Appendix 1 Of The Regulations

The third step of the five-step test requires a determination of whether Dixon had an impairment listed in Appendix 1 of the Regulations. 20 C.F.R. Pt. 404, Subpt. P, App. 1. "These are impairments acknowledged by the [Commissioner] to be of sufficient severity to preclude gainful employment. If a claimant's condition meets or equals the 'listed' impairments, he or she is conclusively presumed to be disabled and entitled to benefits." Dixon v. Shalala, 54 F.3d 1019, 1022 (2d Cir. 1995).

ALJ Stacchini concluded that Dixon "does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Supbart P, Appendix 1." (See page 13 above.) In forming this conclusion, ALJ Stacchini considered Dixon's musculoskeletal and neurological impairments along with his diabetes and obesity. (Id.)

Dixon only contests ALJ Stacchini's failure to consider his ambulation impairment as meeting or equaling the Listing criteria (see Dkt. No. 13: Dixon Br. at 9-11; Dkt. No. 17: Dixon Reply Br. at 2), and the Court thus reviews only that impairment. Dixon argues that his ambulation limitation meets a Listing because '"examples of ineffective ambulation include, but are not limited to, . . . the inability to walk a block at a reasonable pace on rough or uneven surfaces [and] the inability to carry out routine ambulatory activities, such as shopping.'" (See Dixon Br. at 10.) However, "[i]neffective ambulation is defined generally as having insufficient lower extremity functioning (see 1.00J) to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00(B)(2)(b)(1). Dixon only uses one cane when he is traveling outside of his home, and there is no indication that his cane causes limitations in both upper extremities. (See page 4 above.)

Thus, ALJ Stacchini's conclusion that Dixon's ambulation limitation does not meet or equal the Listing is supported by substantial evidence.[30/] Moreover, Dixon—who only uses one cane—conveniently leaves out the portion of the regulation that weakens his argument: "the inability to walk without the use of a walker, two crutches or two canes." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00(B)(2)(b)(2) ("[E]xamples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping." (emphasis added)). The ALJ did not err in concluding that Dixon could ambulate effectively such that his impairments did not satisfy the Listing.

D. Credibility And Residual Functional Capacity Determinations

Before proceeding to step four, the Court will address ALJ Stacchini's credibility and residual functional capacity ("RFC") determinations.

1. Credibility Determination

Because subjective symptoms only lessen a claimant's RFC where the symptoms "'can reasonably be accepted as consistent with the objective medical evidence and other evidence,' the ALJ is not required to accept allegations regarding the extent of symptoms that are inconsistent with the claimant's statements or similar evidence." Moulding v. Astrue, 08 Civ. 9824, 2009 WL

[30/] Furthermore, "[i]nability to ambulate effectively means an extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00(B)(2)(b)(1). Yet Dixon testified that he could "absolutely" ambulate with his cane for 100 feet, shop, vacuum, do laundry and mow the lawn. (See page 3 above.) Thus there is substantial evidence that Dixon is not "very seriously" hindered from initiating, sustaining or completing activities.

3241397 at *7 (S.D.N.Y. Oct. 8, 2009) (citation & emphasis omitted); see, e.g., Campbell v. Astrue, 465 F. App'x 4, 7 (2d Cir. 2012) ("As for the ALJ's credibility determination, while an ALJ 'is required to take the claimant's reports of pain and other limitations into account,' he or she is 'not require[d] to accept the claimant's subjective complaints without question.' Rather, the ALJ 'may exercise discretion in weighing the credibility of the claimant's testimony in light of the other evidence in the record.'" (citations omitted)); Genier v. Astrue, 606 F.3d 46, 49 (2d Cir. 2010) ("When determining a claimant's RFC, the ALJ is required to take the claimant's reports of pain and other limitations into account, but is not required to accept the claimant's subjective complaints without question; he may exercise discretion in weighing the credibility of the claimant's testimony in light of the other evidence in the record." (citations omitted)); Brown v. Comm'r of Soc. Sec., 310 F. App'x 450, 451 (2d Cir. 2009) ("'Where there is conflicting evidence about a claimant's pain, the ALJ must make credibility findings.'").[31/] In addition, "courts must show special deference to an ALJ's credibility determinations because the ALJ had the opportunity to observe plaintiff's demeanor

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[31/] Accord, e.g., Rivers v. Astrue, 280 F. App'x 20, 22 (2d Cir. 2008) (same); Thompson v. Barnhart, 75 F. App'x 842, 845 (2d Cir. 2003) (ALJ properly found that plaintiff's "description of her symptoms was at odds with her treatment history, her medication regime, and her daily routine"); Snell v. Apfel, 177 F.3d 128, 135 (2d Cir. 1999); Norman v. Astrue, 912 F. Supp. 2d 33, 85 (S.D.N.Y. 2012) ("It is 'within the discretion of the [Commissioner] to evaluate the credibility of plaintiff's complaints and render an independent judgment in light of the medical findings and other evidence regarding the true extent of such symptomatology.'"); Astolos v. Astrue, No. 06-CV-678, 2009 WL 3333234 at *12 (W.D.N.Y. Oct. 14, 2009) (ALJ properly determined that plaintiff's subjective pain complaints were not supported by the medical record); Speruggia v. Astrue, No. 05-CV-3532, 2008 WL 818004 at *11 (E.D.N.Y. Mar. 26, 2008) ("The ALJ 'does not have to accept plaintiff's subjective testimony about her symptoms without question' and should determine a plaintiff's credibility 'in light of all the evidence.'"); Soto v. Barnhart, 01 Civ. 7905, 2002 WL 31729500 at *6 (S.D.N.Y. Dec. 4, 2002) ("The ALJ has the capacity and the discretion to evaluate the credibility of a claimant and to arrive at an independent judgment, in light of medical findings and other evidence, regarding the true extent of pain alleged by the claimant."); Brandon v. Bowen, 666 F. Supp. 604, 608 (S.D.N.Y. 1987) (same).

while [the plaintiff was] testifying." Marquez v. Colvin, 12 Civ. 6819, 2013 WL 5568718 at *7 (S.D.N.Y. Oct. 9, 2013).[32/]

ALJ Stacchini determined that Dixon's "medically determinable impairments could reasonably be expected to cause" his alleged symptoms, but that his "statements concerning the intensity, persistence and limiting effects" of those symptoms were "not credible to the disabling degree alleged." (R. 27.)

When an ALJ determines that a claimant's own statements regarding her symptoms are not supported by the record, that "decision must contain specific reasons for the weight given to the individual's symptoms, be consistent with and supported by the evidence, and be clearly articulated so the individual and any subsequent reviewer can assess how the adjudicator evaluated the individual's symptoms." SSR 16-3p, 2016 WL 1119029 at *9 (Mar. 16, 2016). The regulations set out a two-step process for assessing a claimant's statements about pain and other limitations:

> At the first step, the ALJ must decide whether the claimant suffers from a medically determinable impairment that could reasonably be expected to produce the symptoms alleged. . . . If the claimant does suffer from such an impairment, at the second step, the ALJ must consider the extent to which the claimant's symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence of record. The ALJ must consider statements the claimant or others make about his impairment(s), his restrictions, his daily activities, his efforts to work, or any other relevant statements he makes to medical sources during the course of examination or treatment, or to the agency during interviews, on applications, in letters, and in testimony in its administrative proceedings.

[32/] Accord, e.g., Campbell v. Astrue, 465 F. App'x at 7 ("[W]e have long held that '[i]t is the function of the [Commissioner], not ourselves, . . . to appraise the credibility of witnesses, including the claimant.'"); Nunez v. Astrue, 11 Civ. 8711, 2013 WL 3753421 at *7 (S.D.N.Y. July 17, 2013); Guzman v. Astrue, 09 Civ. 3928, 2011 WL 666194 at *7 (S.D.N.Y. Feb. 4, 2011); Ruiz v. Barnhart, 03 Civ. 10128, 2006 WL 1273832 at *7 (S.D.N.Y. May 10, 2006); Gernavage v. Shalala, 882 F. Supp. 1413, 1419 & n.6 (S.D.N.Y. 1995); Mejias v. Soc. Sec. Admin., 445 F. Supp. 741, 744 (S.D.N.Y. 1978) (Weinfeld, D.J.); Wrennick v. Sec'y of Health, Educ. & Welfare, 441 F. Supp. 482, 485 (S.D.N.Y. 1977) (Weinfeld D.J.).

Genier v. Astrue, 606 F.3d at 49 (quotations, citation & brackets omitted) (citing 20 C.F.R. §§ 404.1529(a), 404.1529(b), and the now-superseded SSR 96-7p); see also SSR 16-3p, 2016 WL 1119029 at *2; Burgess v. Colvin, 15 Civ. 9585, 2016 WL 7339925 at *11 (S.D.N.Y. Dec. 19, 2016) (quoting SSR 16-3p for an explanation of the two-step process for assessing claimants' statements about their symptoms).

In March 2016, the SSA released SSR 16-3p, which provides updated guidance on evaluating a claimant's claims about the work-preclusive nature of his symptoms. See generally SSR 16-3p, 2016 WL 1119029; accord, e.g., Duran v. Colvin, 14 Civ. 8677, 2016 WL 5369481 at *13 n.27 (S.D.N.Y. Sept. 26, 2016) ("SSR 16-3p supersedes SSR 96-7p, 1996 WL 374186 (July 2, 1996), and clarifies the policies set forth in the previous SSR.").

> The purpose of [SSR 16-3p] is to provide "guidance about how [to] evaluate statements regarding the intensity, persistence, and limiting effects of symptoms in disability claims." S.S.R. 16-3P, 2016 WL 1119029, at *1. The Ruling supersedes . . . S.S.R. 96-7p, which placed a stronger emphasis on the role of the adjudicator to make a "finding about the credibility of the individual's statements about the symptom(s) and its functional effects." S.S.R. 96-7P, 1996 WL 374186, at *1. In contrast, S.S.R. 16-3p espouses a more holistic analysis of the claimant's symptoms, and "eliminate[s] the use of the term 'credibility'" from sub-regulation policy. S.S.R. 16-3P, 2016 WL 1119029, at *1. The Commissioner notes that the "regulations do not use this term," and by abandoning it, "clarif[ies] that subjective symptom evaluation is not an examination of an individual's character." Id.

Acosta v. Colvin, 15 Civ. 4051, 2016 WL 6952338 at *18 (S.D.N.Y. Nov. 28, 2016).

ALJ Stacchini applied the appropriate two-step process, supporting his determination at the second step with a review of Dixon's testimony regarding his activities of daily living, his conservative course of treatment post-surgery, and his medical records. (R. 25-28.) Despite Dixon's complaints regarding extreme persistent numbness with radiating neck pain down the upper and lower extremities, with difficulty picking up coins and small objects, difficulty ambulating and balance issues due to peripheral neuropathy and dysesthesia in the upper and lower extremities,

Dixon has never been treated for these symptoms, and Dr. Steenbergen has not referred him to a specialist for any condition associated with the upper and lower extremities. (R. 27; see pages 6-12 above.)[33/34/] Additionally, contrary to Dixon's assertions that he is unable to walk without assistance or pick up small objects, he testified that he is able to drive, go to the movies and out to eat, shop, vacuum and mow the lawn. (See page 3 above.)

Thus, ALJ Stacchini properly found that objective medical evidence and Dixon's own statements failed to support his claims regarding the intensity of his symptoms. See, e.g., Stanton v. Astrue, 370 F. App'x 231, 234 (2d Cir. 2010) (the court will not "second-guess the credibility finding . . . where the ALJ identified specific record-based reasons for his ruling"); Rutkowski v. Astrue, 368 F. App'x 226, 230 (2d Cir. 2010) (ALJ adequately supported credibility finding when he noted that "substantial evidence existed showing that [plaintiff] was relatively 'mobile and functional,' and that [plaintiff's] allegations of disability contradicted the broader evidence"); Duran v. Colvin, 14 Civ. 4681, 2015 WL 4476165 at *13 (S.D.N.Y. July 22, 2015) (Peck, M.J.) (the ALJ "met his burden in finding [plaintiff] not entirely credible because the objective medical evidence and her stated independence in activities of daily living failed to support her claims of disability"); Kessler v. Colvin, 48 F. Supp. 3d 578, 596 (S.D.N.Y. 2014) (claimant's "subjective complaints of

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33/ "Courts in this Circuit routinely uphold credibility determinations in which the ALJ finds a claimant's statements about their symptoms not credible based, inter alia, on a conservative treatment record." Mayor v. Colvin, 15 Civ. 0344, 2015 WL 9166119 at *21 n.29 (S.D.N.Y. Dec. 17, 2015) (Peck, M.J.); see, e.g., McGann v. Colvin, 14 Civ. 1585, 2015 WL 5098107 at *10 (S.D.N.Y. Aug. 31, 2015); Russitano v. Colvin, No. 14-CV-403, 2015 WL 4496383 at *8-9 (N.D.N.Y. July 23, 2015); Evans v. Comm'r of Soc. Sec., 110 F. Supp. 3d 518 at 539 (S.D.N.Y. 2015); Sagastivelsa-Garcia v. Colvin, 12 Civ. 9168, 2014 WL 85121 at *2 (S.D.N.Y. Jan. 6, 2014).

34/ Dixon did have a cervical fusion, but his condition improved after surgery to the extent that Dr. McNulty found it unnecessary for Dixon to have medical supervision only three months after the surgery. (R. 26.)

pain lacked the necessary objective medical support, and therefore were not entitled to any special weight. Accordingly, the ALJ's adverse credibility determination was not erroneous."); Givens v. Colvin, 13 Civ. 4763, 2014 WL 1394965 at *10-11 (S.D.N.Y. Apr. 11, 2014) (Peck, M.J.) (ALJ properly found claimant's disability claims not entirely credible where claimant "admitted that he was capable of performing many day-to-day activities, such as reading, watching television, caring for his personal needs, using public transportation, and going to church"); Hilliard v. Colvin, 13 Civ. 1942, 2013 WL 5863546 at *15 (S.D.N.Y. Oct. 31, 2013) (Peck, M.J.) (the ALJ "met his burden in finding [plaintiff's] claims not entirely credible because she remains functional in terms of activities of daily living and the objective medical evidence fails to support her claims of total disability based on pain" (citations omitted)); Ashby v. Astrue, 11 Civ. 2010, 2012 WL 2477595 at *15 (S.D.N.Y. Mar. 27, 2012) ("[I]n making his credibility assessment, the ALJ appropriately considered Plaintiff's ability to engage in certain daily activities as one factor, among others suggested by the regulations."), R. & R. adopted, 2012 WL 2367034 (S.D.N.Y. June 20, 2012). Indeed, Dixon's counsel does not challenge the ALJ's decision as to Dixon's credibility. (See generally Dixon Br.; Dkt. No. 17: Dixon Reply Br.)

2. Residual Functional Capacity Determination

ALJ Stacchini found that Dixon had the RFC to "perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a)," except that he must

> be allowed to alternate from sitting/standing positions at 30 minute intervals, allowing [Dixon] to be "off task" for 5% of the workday, in addition to regularly scheduled breaks of 15 minutes in the morning and afternoon and ½ hour to an hour midday. [Dixon] can lift/carry/push/pull 5 pounds frequently and 10 pounds occasionally; he can climb ramps and stairs occasionally, but not ladders, ropes or scaffolds; he can occasionally balance, stoop, kneel, crouch and crawl and he can reach, handle and perform tasks requiring fine fingering frequently. [Dixon] must use a cane for ambulating on uneven terrains and distances greater than 100 feet; he must avoid exposure to extreme cold, concentrated atomospheric conditions,

unprotected heights and hazardous machinery.

(See pages 13-14 above.)

ALJ Stacchini's RFC determination was based on his review of Dixon's testimony and the medical evidence. (R. 25-28.) ALJ Stacchini considered Dixon's spontaneous neck and arm pain and gait unsteadiness on October 10, 2013, following Dixon's chiropractic manipulation and the C4-5 anterior cervical discectomy with fusion, cage placement and plating on October 16, 2013. (R. 26.) But ALJ Stacchini noted that Dr. McNulty reported that after surgery Dixon was "doing well" with "some improvement in his hands"[35/] and discharged Dixon three months post-surgery; Dixon did not see doctors other than his primary care physician afterwards nor was he prescribed any medication for his alleged neurological symptoms. (R. 26, 28.)

Dixon argues that ALJ Stacchini erred in not giving Dr. Steenbergen's opinion controlling weight as the treating physician. (See Dkt. No. 13: Dixon Br. at 12-14; Dkt. No. 17: Dixon Reply Br. at 4.) ALJ Stacchini found that Dr. Steenbergen's opinions of "extreme limitations" deserved "little weight" because they were largely based on Dixon's subjective statements and were contrary to other medical evidence such as consulting physician Dr. Hepp's opinion and treating neurologist Dr. McNulty's determination of improvement post-surgery. (R. 28.) The regulations specify that when controlling weight is not given a treating physician's opinion (because it is not "well-supported" by other medical evidence), the ALJ must consider the following factors in determining the weight to be given such an opinion: (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship; (3) the

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35/ With regard to Dixon's diabetes mellitus, despite Dixon's complaints of dysesthesias in his hands, ALJ Stacchini noted that the post-surgical notes indicated that Dixon's hands were improving after surgery. (R. 26.)

evidence that supports the treating physician's report; (4) how consistent the treating physician's opinion is with the record as a whole; (5) the specialization of the physician in contrast to the condition being treated; and (6) any other factors which may be significant. (See pages 20-21 above.) Therefore, because ALJ Stacchini considered the circumstances that shaped Dr. Steenbergen's opinion and the medical evidence as a whole in forming his conclusion, he was entitled to not give controlling weight to Dr. Steenbergen's opinion.

With regard to ALJ Stacchini's RFC determination, Dixon only argues that the ALJ's RFC determination that Dixon is capable of doing tasks that require fine fingering "frequently" was erroneous because it "is in contrast with Dr. Steenbergen's FCA, which states not only that Dixon cannot finger at all, but that he has further limitations to no handling or feeling." (See Dixon Br. at 15.) As discussed previously, ALJ Stacchini was entitled to give "little weight" to Dr. Steenbergen's extreme limitations, particularly because they went against the other medical evidence. (See page 15 above.) Furthermore, Dr. Jenouri did not observe any sensory deficiencies, but instead found that Dixon's hand and finger dexterity were intact with a grip strength of 5/5 bilaterally. (See page 10 above.) Thus, ALJ Stacchini was justified in determining that Dixon could "frequently" complete tasks requiring fine fingering. Other than the limitations on manual dexterity, Dixon does not dispute ALJ Stacchini's RFC determination, which, in any event, is supported by substantial evidence in the record. (See Dixon Br. at 14-16.)

E. Duty to Develop the Record

Dixon makes two arguments that ALJ Stacchini failed in his duty to develop the record: ALJ Stacchini was required to re-contact the consulting physician to obtain a "complete report" and ALJ Stacchini failed in his duty to re-contact the treating physician for an explaination of his opinion before diminishing its weight. (See Dkt. No. 13: Dixon Br. at 16-17.)

It is the "well-established rule in [the Second] circuit" that the ALJ must develop the record:

> "[T]he social security ALJ, unlike a judge in a trial, must on behalf of all claimants . . . affirmatively develop the record in light of the essentially non-adversarial nature of a benefits proceeding." Social Security disability determinations are "investigatory, or inquisitorial, rather than adversarial." "[I]t is the ALJ's duty to investigate and develop the facts and develop the arguments both for and against the granting of benefits."

Moran v. Astrue, 569 F.3d 108, 112-13 (2d Cir. 2009) (citations omitted). The Second Circuit has clarified, however, that "'where there are no obvious gaps in the administrative record, and where the ALJ already possesses a "complete medical history," the ALJ is under no obligation to seek additional information in advance of rejecting a benefits claim.'" Swiantek v. Comm'r of Soc. Sec., 588 F. App'x 82, 84 (2d Cir. 2015) (quoting Rosa v. Callahan, 168 F.3d 72, 79 n.5 (2d Cir. 1999) (citing Perez v. Chater, 77 F.3d 41, 48 (2d Cir. 1996))).[36/]

Despite Dixon's argument that ALJ Stacchini committed an "error of law" by not re-contacting the consulting physician for being "completely silent" on Dixon's ability to finger, handle and feel (see Dixon Br. at 16), Dr. Hepp reported that Dixon had no manipulative limitations (see page 10 above). Moreover, Dixon mischaracterizes 20 C.F.R. § 404.1519n by arguing that because Dr. Hepp did not address manipulative limitations such as handling objects, ALJ Stacchini was

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[36/] See also, e.g., Ramos v. Comm'r of Soc. Sec., 13 Civ. 6561, 2015 WL 708546 at *18 (S.D.N.Y. Feb. 4, 2015) (ALJ had no further obligation to develop the record where the medical record from the treating clinic was "extensive, including more than two years of consistent treatment notes."); Matos v. Colvin, 13 Civ. 4525, 2014 WL 3746501 at *9 (S.D.N.Y. July 30, 2014) (ALJ properly fulfilled duty to develop the record where he questioned claimant thoroughly, solicited testimony from medical and vocational experts and admitted voluminous submissions from physicians), aff'd, 618 F. App'x 14 (2d Cir. 2015).

required to re-contact Dr. Hepp to complete the record. (See Dixon Br. at 16.)[37/] However, the regulation states that the consultative "statement should describe the opinion of the medical source about your ability, despite your impairment(s), to do work-related activities, such as sitting, standing, walking, lifting, carrying, handling objects, hearing, speaking, and traveling . . . ." 20 C.F.R. § 404.1519n(c)(6). The Court notes that "sitting, standing, walking, lifting, carrying, handling objects, hearing, speaking and traveling" are examples of what the consultive physician can report and not things the physician must report, as is indicated by the introductory phrase, "such as." Moreover, Dr. Hepp did address these work-related activities when he completed the standard Disability Determination Explanation form. (See pages 10-11 above.) For instance, Dr. Hepp noted that Dixon could stand, walk, sit for about six hours, was "unlimited, other than shown" for push, pull, lift, carry, and could "occasionally" climb, balance, stoop, kneel and crouch. (Id.)

Finally, Dixon's argument fails due to the portion of the regulation: "although we will ordinarily request . . . a medical source statement about what you can still do despite your impairment(s), the absence of such a statement in a consultive examination report will not make the report incomplete." 20 C.F.R. § 404.1519n(c)(6) (emphasis added). Moreover, as noted, the other consultative physician, Dr. Jenouri, found Dixon's hand and finger dexterity was intact. (See pages 9-10 above.)

Next, although Dixon argues that ALJ Stacchini erred in not "reach[ing] out to [Dr. Steenbergen] for clarification and additional evidence" to "complete the record" (Dixon Br. at 16-17), he has not identified any gaps in the record or otherwise shown that ALJ Stacchini possessed an incomplete medical history. See, e.g., Vasquez v. Berryhill, 16 Civ. 6707, 2017 WL 1592761

[37/] The other consulting physician, Dr. Jenouri, found Dixon's hand and finger dexterity were intact. (See page 10 above.)

at *22-23 (S.D.N.Y. May 1, 2017) (Peck, M.J.) (citing cases). The ALJ's duty to develop the record is not a duty to go on a fishing expedition. Fraizer v. Berryhill, 16 Civ. 4320, 2017 WL 142264 at *16 (S.D.N.Y. April 21, 2017) (Peck, M.J.); see, e.g., Schaal v. Apfel, 134 F.3d 496, 505 (2d Cir. 1998) ("Plaintiff suggests that the ALJ failed adequately to develop the record concerning the possibility that plaintiff was mentally disabled. However, we find little indication in the record suggesting a disabling mental disorder during the period in question that would have obliged the ALJ to develop the record further.").[38/] In fact, Dixon's attorney confirmed that the record was complete at Dixon's hearing before ALJ Stacchini. (See R. 53-56.) Furthermore, ALJ Stacchini gave several bases for not giving Dr. Steenbergen's RFC opinion controlling weight: ALJ Stacchini noted that it was "based largely on [Dixon's] subjective statements," and was "inconsistent with the consulting physician's exam, as well as those reported by the treating neurosurgeon." (See page 14 above.) There was no need for ALJ Stacchini to recontact Dr. Steenbergen to "complete the record" since there was evidence from the other physicians to determine Dixon's RFC.

The Court finds that ALJ Stacchini's RFC determination is supported by substantial evidence in the record. See, e.g., Sizer v. Colvin, 592 F. App'x 46, 47 (2d Cir. 2015) (RFC determination "based on the medical opinion evidence, the objective medical evidence, and Appellant's testimony at the ALJ hearing" was supported by substantial evidence.); Diaz v. Shalala, 59 F.3d 307, 315 (2d Cir. 1995) ("The opinions of three examining physicians, plaintiff's own

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[38/] Accord, e.g., Miller v. Colvin, No. 15-CV-0552, 2016 WL 4402035 at *7-8 (N.D.N.Y. Aug. 18, 2016) ("[A]lthough Plaintiff argues that the ALJ should have sought additional information regarding her diagnosis [of fibromyalgia], she fails to articulate what this evidence consists of and whether it was missing from the record."); Santiago v. Astrue, No. 10-CV-937, 2011 WL 4460206 at *2 (D. Conn. Sept. 27, 2011) ("The plaintiff makes only a general argument that any missing records possibly could be significant, if they even exist. That argument is insufficient to carry his burden.").

testimony, and the medical tests together constitute substantial evidence adequately supporting the [Commissioner's] conclusion that plaintiff's injuries did not prevent her from resuming her job as a sewing machine operator."); Fuentes v. Colvin, No. 13-CV-6201, 2015 WL 631969 at *8 (W.D.N.Y. Feb. 13, 2015) ("'The opinion of a consultative examiner can constitute substantial evidence supporting an ALJ's decision.'").

F. Dixon Cannot Perform His Past Relevant Work

The fourth prong of the five part analysis asks whether Dixon had the residual functional capacity to perform his past relevant work. (See page 15 above.) ALJ Stacchini concluded that Dixon was "unable to perform any past relevant work." (Id.) This finding is not disputed, so the Court proceeds to the fifth and final step of the analysis.

G. There Are Jobs In Substantial Numbers In The Economy That Dixon Can Perform

In the fifth step, the burden shifts to the Commissioner, "who must produce evidence to show the existence of alternative substantial gainful work which exists in the national economy and which the claimant could perform, considering not only his physical capability, but as well his age, his education, his experience and his training." Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980).[39/]

In meeting his burden under the fifth step, the Commissioner:

> may rely on the medical-vocational guidelines contained in 20 C.F.R. Part 404, Subpart P, App. 2, commonly referred to as "the Grid". The Grid takes into account the claimant's residual functional capacity in conjunction with the claimant's age, education and work experience. Based on these factors, the Grid indicates whether

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[39/] See, e.g., Roma v. Astrue, 468 F. App'x 16, 20 (2d Cir. 2012); Arruda v. Comm'r of Soc. Sec., 363 F. App'x 93, 95 (2d Cir. 2010); Butts v. Barnhart, 388 F.3d 377, 381 (2d Cir. 2004), amended on other grounds, 416 F.3d 101 (2d Cir. 2005); Rosa v. Callahan, 168 F.3d 72, 77 (2d Cir. 1999).

> the claimant can engage in any other substantial gainful work which exists in the national economy. Generally the result listed in the Grid is dispositive on the issue of disability.

Zorilla v. Chater, 915 F. Supp. 662, 667 (S.D.N.Y. 1996) (fn. omitted); see also, e.g., Heckler v. Campbell, 461 U.S. 458, 461-62, 465-68, 103 S. Ct. 1952, 1954-55, 1956-58 (1983) (upholding the promulgation of the Grid); Roma v. Astrue, 468 F. App'x at 20-21; Martin v. Astrue, 337 F. App'x 87, 90 (2d Cir. 2009); Rosa v. Callahan, 168 F.3d at 78; Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996); Bapp v. Bowen, 802 F.2d 601, 604 (2d Cir. 1986).

However, "relying solely on the Grids is inappropriate when nonexertional limitations 'significantly diminish' plaintiff's ability to work so that the Grids do not particularly address plaintiff's limitations." Vargas v. Astrue, 10 Civ. 6306, 2011 WL 2946371 at *13 (S.D.N.Y. July 20, 2011); see also, e.g., Travers v. Astrue, 10 Civ. 8228, 2011 WL 5314402 at *10 (S.D.N.Y. Nov. 2, 2011) (Peck, M.J.), R. & R. adopted, 2013 WL 1955686 (S.D.N.Y. May 13, 2013); Lomax v. Comm'r of Soc. Sec., No. 09-CV-1451, 2011 WL 2359360 at *3 (E.D.N.Y. June 6, 2011) ("Sole reliance on the grids is inappropriate, however, where a claimant's nonexertional impairments 'significantly limit the range of work permitted by his exertional limitations.'").

Rather, where the claimant's nonexertional limitations "'significantly limit the range of work permitted by his exertional limitations,' the ALJ is required to consult with a vocational expert." Zabala v. Astrue, 595 F.3d 402, 410 (2d Cir. 2010) (quoting Bapp v. Bowen, 802 F.2d at 605); see also, e.g., Selian v. Astrue, 708 F.3d 409, 421 (2d Cir. 2013) ("We have explained that the ALJ cannot rely on the Grids if a non-exertional impairment has any more than a 'negligible' impact on a claimant's ability to perform the full range of work, and instead must obtain the testimony of a vocational expert."); Rosa v. Callahan, 168 F.3d at 82 ("Where significant nonexertional impairments are present at the fifth step in the disability analysis, however, 'application of the grids

is inappropriate.' Instead, the Commissioner 'must introduce the testimony of a vocational expert (or other similar evidence) that jobs exist in the economy which claimant can obtain and perform.'" (quoting & citing Bapp v. Bowen, 802 F.2d at 603, 605-06)); Suarez v. Comm'r of Soc. Sec., No. 09-CV-338, 2010 WL 3322536 at *9 (E.D.N.Y. Aug. 20, 2010) ("If a claimant has nonexertional limitations that 'significantly limit the range of work permitted by his exertional limitations,' the ALJ is required to consult with a vocational expert." (quoting Zabala v. Astrue, 595 F.3d at 411)).

ALJ Stacchini properly relied on the testimony of vocational expert Amy Leopold to determine that jobs exist that Dixon could perform. (See pages 5, 15 above.)[40/] ALJ Stacchini asked Leopold whether jobs existed that Dixon could perform, assuming he could perform a "full range of sedentary work, except that . . . the push, pull would be the same as lift, carrying," he would be "permitted to shift from a sitting or standing position at 30 minute intervals," permitted "to be off task 5 percent of the work period, in addition to regularly scheduled breaks," could "occassional[ly] climb[] ramps or stairs," but not climb ladders, ropes or scaffolds, "occassional[ly] balanc[e],

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[40/] A vocational expert can provide evidence regarding the existence of jobs in the economy and a particular claimant's functional ability to perform any of those jobs. 20 C.F.R. §§ 404.1566(e), 416.966(e); see, e.g., Calabrese v. Astrue, 358 F. App'x 274, 275-76 (2d Cir. 2009); Butts v. Barnhart, 416 F.3d at 103-04; Taylor v. Barnhart, 83 F. App'x 347, 350 (2d Cir. 2003); Jordan v. Barnhart, 29 F. App'x 790, 794 (2d Cir. 2002); Rautio v. Bowen, 862 F.2d 176, 180 (8th Cir. 1988); Dumas v. Schweiker, 712 F. 2d 1545, 1553-54 (2d Cir. 1983); DeJesus v. Astrue, 762 F. Supp. 2d 673, 693 n.20 (S.D.N.Y. 2011) (Peck, M.J.); Quezada v. Barnhart, 06 Civ. 2870, 2007 WL 1723615 at *13 n.20 (S.D.N.Y. June 15, 2007) (Peck, M.J.); Snipe v. Barnhart, 05 Civ. 10472, 2006 WL 2390277 at *18 (S.D.N.Y. Aug. 21, 2006) (Peck, M.J.), R. & R. adopted, 2006 WL 2621093 (S.D.N.Y. Sept. 12, 2006); De Roman v. Barnhart, 03 Civ. 0075, 2003 WL 21511160 at *17 (S.D.N.Y. July 2, 2003) (Peck, M.J.); Bosmond v. Apfel, 97 Civ. 4109, 1998 WL 851508 at *8 (S.D.N.Y. Dec. 8, 1998); Fuller v. Shalala, 898 F. Supp. 212, 218 (S.D.N.Y. 1995) (The "vocational expert, . . . provided several examples of unskilled . . . jobs that are available in the national and local economies for a person with [plaintiff's] condition, age, education, and work experience. . . . Accordingly, the Secretary satisfied her burden of showing that such jobs exist in the national economy.").

stoop[], kneel[], crouch[], and crawl[]," "frequent[ly] reach[], handl[e], and finger[]," and would need a cane for uneven terrain or distances greater than 100 feet, "should avoid extreme cold, concentrated exposure to atmospheric conditions, and exposure to unprotected heights and hazardous machinery." (See page 5 above.) Leopold opined that with those restrictions, Dixon could not perform his past work as a car salesman or dry cleaner, but that he could work as an order clerk, document preparer and table worker. (Id.) Leopold testified that these jobs exist in significant numbers in the national economy. (Id.)[41/] ALJ Stacchini relied on Leopold's testimony in reaching his step five determination when he specifically referred to those jobs in his findings. (See page 15 above.) Accordingly, ALJ Stacchini's decision at step five was supported by substantial evidence.

[41/] Dixon argues that ALJ Stacchini "created an RFC" and then relied upon it to create a hypothetical which "did not fully and accurately represent Dixon's limitation with respect to his manual dexterity." (See Dkt. No. 13: Dixon Br. at 15.) However, as discussed above, ALJ Stacchini's RFC determination was supported by substantial evidence (see page 35 above), and "[a]n ALJ may rely on a vocational expert's testimony regarding a hypothetical as long as 'there is substantial record evidence to support the assumption[s] upon which the vocational expert based his opinion'" and the hypothetical "accurately reflect[s] the limitations and capabilities of the claimant involved," McIntyre v. Colvin, 758 F.3d 146, 151 (2d Cir. 2014); see also, e.g., Dumas v. Schweiker, 712 F.2d 1545, 1553-54 (2d. Cir. 1983).

CONCLUSION

For the reasons set forth above, the Commissioner's determination that Dixon was not disabled within the meaning of the Social Security Act during the period from October 1, 2013 to June 26, 2015 is supported by substantial evidence. Accordingly, the Commissioner's motion for judgment on the pleadings (Dkt. No. 14) is GRANTED and Dixon's motion (Dkt. No. 12) is DENIED.

SO ORDERED.

Dated: New York, New York
July 26, 2017

Andrew J. Peck
United States Magistrate Judge

Copies ECF to: All Counsel