UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JOSEPH JOHNSON, Plaintiff, v. NANCY A. BERRYHILL, Acting Commissioner of Social Security, Defendant.	)	Case No. 2:16-cv-58

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR AN ORDER REVERSING THE COMMISSIONER'S DECISION AND DENYING THE COMMISSIONER'S MOTION TO AFFIRM
(Docs. 6 & 7)

Plaintiff Joseph Johnson is a claimant for Social Security Disability Insurance benefits and Supplemental Security Income under the Social Security Act. He brings this action pursuant to 42 U.S.C. §§ 405(g) to reverse the decision of the Social Security Commissioner that he is not disabled.[1] On August 19, 2016, Plaintiff filed his motion to reverse (Doc. 6), and on October 18, 2016, the Commissioner moved to affirm (Doc. 7). On November 1, 2016, Plaintiff filed his response to the Commissioner's motion, at which time the court took the motions under advisement.

Plaintiff raises three issues on appeal: (1) whether substantial evidence supports Administrative Law Judge ("ALJ") Dory Sutker's findings that Plaintiff's osteoarthritis of the hands, knees, and hips was not a severe impairment and that neither the

[1] Disability is defined as the inability "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). A claimant's "physical or mental impairment or impairments" must be "of such severity" that the claimant is not only unable to do any previous work but cannot, considering the claimant's age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

degenerative changes of Plaintiff's spine nor his peripheral vascular disease were medically determinable impairments; (2) whether she properly assessed the medical opinions in the administrative record ("AR"); and (3) whether substantial evidence supports her determinations that Plaintiff has the residual functional capacity ("RFC") for medium work, is able to perform his past relevant work as a dishwasher, and that alternative occupations exist in significant numbers that Plaintiff is able to perform. The Commissioner responds that substantial evidence in the record supports ALJ Sutker's findings and RFC, and asserts that she properly assessed the medical opinions.

Plaintiff is represented by Penelope E. Gronbeck, Esq., and the Commissioner is represented by Special Assistant United States Attorney Fergus J. Kaiser.

I. Procedural History.

Plaintiff's claims were initially denied on January 15, 2013, and upon reconsideration on May 8, 2013. Plaintiff timely requested a hearing, which was held before ALJ Sutker via videoconference on August 7, 2014. Plaintiff was represented and appeared at the hearing, and both he and vocational expert ("VE") Elizabeth Laflamme testified.

On August 22, 2014, ALJ Sutker issued a written decision and found that Plaintiff was not disabled under the Social Security Act. Plaintiff filed a timely appeal which the Appeals Council denied on January 6, 2016. As a result, ALJ Sutker's August 22, 2014 decision stands as the Commissioner's final decision. Plaintiff's claim is ripe for judicial review pursuant to 42 U.S.C. § 405(g).

II. Factual Background.

Plaintiff is a male born in 1959 who attended school through the tenth grade. He alleges a disability onset date of March 15, 2012, based on osteoarthritis in his hands, knees, and hips; degenerative arthritis of the spine; peripheral vascular disease in his lower extremities; obstructive sleep apnea; chronic obstructive pulmonary disorder ("COPD"); anxiety disorder/post-traumatic stress disorder ("PTSD"); and depressive disorder. Plaintiff's employment history includes work in the construction industry, a convenience store, a tire store, and a restaurant.

A. Plaintiff's Medical History.

On October 29, 2012, Craig Knapp, Ph.D., a licensed psychologist, conducted a consultative examination of Plaintiff. Dr. Knapp recounted that Plaintiff, who had separated from his wife and had no children, typically watched television, took walks until his hip hurt, exercised, and played with his stepdaughter's child during the day. He attended to his own personal care, cooked, shopped, cleaned the house, and paid bills with assistance from his sister. Plaintiff maintained a number of friendships and cared for his cat and dog. Plaintiff reported first abusing alcohol and marijuana during his teenage years and identified his last use of marijuana four years prior to the examination. Although he drank two beers once a week, Plaintiff stated that he last excessively consumed alcohol six or seven years ago. Plaintiff claimed that he was seeking disability benefits because "it [was] hard for him to get around because he [had] abused his body and now it [was] catching up to him." (AR 410.)

Dr. Knapp observed that Plaintiff was relaxed, positive, cooperative, and responsive, with normal tone and manner of speech and reported an overall life satisfaction of seventy-five out of one hundred. Plaintiff experienced depression after his sister's death when he was ten years old, and he felt anxiety and uncertainty about "how to deal with things at times." (AR 412.) Plaintiff had difficulty recalling past events and displayed significant confusion about dates and details. Dr. Knapp estimated some degree of cognitive delay and noted that Plaintiff's thought process appeared "somewhat circumstantial and tangential and he did acknowledge having cognitive blocking at times." (AR 413.) Dr. Knapp opined that Plaintiff was nonetheless fully oriented without any indication of perceptual disorder. Dr. Knapp concluded that Plaintiff "would most likely have some difficulty understanding, remembering, and carrying out instructions in a work setting[,]" and that Plaintiff's "ability to relate to coworkers and supervisors . . . [and h]is ability to respond to work pressures on a sustained basis in a work setting would also appear to be impacted upon by his continued use of marijuana," as well as by his physical impairments, "particularly arthritis or asthma[.]" (AR 413-15.)

On November 29, 2012, Russell Tonkin, M.D. performed a consultative physical examination of Plaintiff to evaluate his complaints of worsening arthritis, cramping in his hands, and poor circulation in his legs and occasional leg cramps. Plaintiff reported that his arthritis did not impact his activities of daily living, but it did impair his ability to engage in carpentry. The knee pain that Plaintiff experienced after walking long distances was "somewhat limiting[,]" and he acknowledged that he obtained "some relief" from over-the-counter or prescription nonsteroidal anti-inflammatory drugs. (AR 418.) Plaintiff described his chronic asthma as "unlimiting." *Id.*

Plaintiff stated that he lived with his nephew and performed yardwork and housework. He watched television for entertainment because his hand discomfort and occasional cramping limited his ability to draw, but he nevertheless completed all of his daily activities without assistance and in a timely manner. Plaintiff reported taking Naproxen to relieve his occasional ankle swelling and discomfort and using Dulera and Xopenex inhalers for his COPD and asthma, respectively.

Plaintiff denied any significant weakness, regular numbness, or tingling in his extremities, but he reported that his legs felt numb after he sat for extended periods of time. Plaintiff moved around the examination room, removed his shoes and socks, moved on and off of the examination table, and performed the activities of the examination without significant distress. Dr. Tonkin noted Plaintiff had normal dexterity in his arms and hands, his ability to pick up fine objects was unimpaired, and he had full grip strength on both sides. Dr. Tonkin further observed that Plaintiff's coordination, station, and gait were normal, his straight leg raise test was normal, and he had full strength in his arms and legs. Despite an arthritic deformity on his right thumb, Plaintiff did not exhibit any limitation, and his range of motion in his hands and fingers was normal. Dr. Tonkin found that Plaintiff had "crepitance of his left knee, but the range of motion was normal, and there was no swelling." (AR 420.) Plaintiff exhibited decreased breath sounds bilaterally, but he did not exhibit any shortness of breath.

Dr. Tonkin diagnosed arthritis in Plaintiff's hands, poor circulation in his legs, COPD, and asthma. He opined that Plaintiff could stand or walk for at least six hours as

long as he had opportunities to rest and was not walking up steep inclines. Plaintiff's capacity to sit was unlimited as long as he was permitted to change positions periodically, and Plaintiff used no assistive devices. Dr. Tonkin noted that Plaintiff could lift fifty pounds occasionally and twenty-five pounds frequently with opportunities to rest. With respect to postural activities, Dr. Tonkin stated that Plaintiff should only occasionally climb due to his age and the arthritis in his knees, but he had no problems with balancing, stooping, or crouching. Dr. Tonkin further opined that Plaintiff would exacerbate the condition of his knees by kneeling or crawling for extended periods of time and recommended that he avoid dust, fumes, or gases. Although he had "early arthritic changes in his hands[,]" Plaintiff could reach, handle, finger, and feel without limitation. (AR 422.)

On January 4, 2013, Plaintiff received x-rays of his knees at Rutland Regional Medical Center, which were negative for bone or joint abnormalities. On February 26, 2013, lumbosacral x-rays revealed "moderate to severe degenerative change involving the facet joints fairly diffusely" within Plaintiff's spine and "mild degenerative change involving [his] hips bilaterally." (AR 455.)

Kim Kurak, D.O. examined Plaintiff on March 27, 2013. Plaintiff raised "minor complaints" about back and left hip pain and decreased energy and stated that he exercised three to four times a week. (AR 441.) Plaintiff reported excessive sleeping because of his medication regimen, which included Omeprazole for upset stomach; Spironolactone for high blood pressure; Buspar and Mirtazapine for anxiety and depression; Gabapentin, Tramadol, and Naproxen for pain; and inhalers for asthma. Dr. Kurak observed that Plaintiff was alert and not in acute distress with normal breathing and no leg edema, and his mood and affect were normal. Dr. Kurak recommended that Plaintiff stop taking Tramadol to see if his fatigue improved, and she prescribed a cane.

During a follow-up visit with Dr. Kurak on April 10, 2013, Plaintiff reported that he had been avoiding heavy lifting and was less sleepy after an adjustment in his medications. Plaintiff stated that his back was "doing alright" but he remained unable to stand or walk for long periods of time without back pain, which had begun to radiate into

his left hip. (AR 710.) Plaintiff indicated that he was having difficulty breathing in the morning, and as a result he had decreased his daily intake of cigarettes, although he continued to smoke a pack per day through April of 2014. Dr. Kurak noted that Plaintiff was alert, cooperative, in no acute distress, and fully oriented, his breathing was normal, and his legs were not swollen. Dr. Kurak discontinued Plaintiff's Tramadol prescription, instructed him to continue taking Dulera for his COPD, prescribed Combivent, and recommended that Plaintiff exercise.

Beginning in April 2013, Plaintiff met with Coleen Lillie, a licensed independent clinical social worker, for psychiatric evaluation and care. During his initial evaluation, Plaintiff reported mild depression, sleep disturbance, low energy, slow movements, moderate mood swings, severe anxiety, and moderate hopelessness and worthlessness. Despite Plaintiff's report that he suffered "'memory problems[,]'" Ms. Lillie observed that Plaintiff's long-term memory was "very clear." (AR 706.) Ms. Lillie's "working diagnosis" was that Plaintiff suffered from generalized anxiety disorder. *Id.* At their next meeting in June of 2013, Plaintiff was "sad and increasingly tearful[.]" (AR 698.)

On April 16, 2013, Plaintiff was referred to Vermont Sports Medicine Center ("VSMC") for physical therapy to treat his back pain. He was using a cane. Plaintiff exhibited decreased lumbar range of motion, hip muscle tightness, core and hip weakness, abnormal posture, and impaired daily functioning. Plaintiff's rehabilitation potential was nevertheless determined to be "[g]ood" and he was directed to attend therapy twice a week for eight weeks. (AR 449.) Three days later, Plaintiff returned to VSMC for a physical therapy session, during which he exercised and stretched. He was assessed as having responded well to increased exercise.

During a May 9, 2013 visit with Dr. Kurak, Plaintiff reported breathing difficulties. Later that month, Plaintiff completed a sleep study with the Center for Sleep Disorders, which indicated that Plaintiff had moderate obstructive sleep apnea and restless leg syndrome. Treatment options included continuous positive airway pressure ("CPAP") therapy as well as weight loss, exercise, and smoking cessation. June 10, 2013 notes from the Brandon Medical Center included reports that Plaintiff's COPD was "not

well controlled at [that] time" and that he "cont[inued] to work on smoking cessation." (AR 700.) Approximately two weeks later, edema and pitting were observed in Plaintiff's lower extremities.

On July 11, 2013, Dr. Kurak recorded that Plaintiff's feet were swollen and blotchy, and they tingled when he walked. He reported that he could perform his daily activities without problems, but walking quickly caused him to feel breathless. Dr. Kurak noted that Plaintiff was alert, cooperative, and fully oriented and exhibited normal mood and breathing. Plaintiff's legs were swollen, with the right leg slightly more swollen than the left leg, and "pitting edema" and "chronic skin changes [were] visible." (AR 696.) Dr. Kurak ordered compression socks to treat the swelling and his peripheral vascular disease. Plaintiff's breathing issues and physical condition remained stable through the end of 2013.

On July 16, 2013, Plaintiff met with Wendy Leffel, M.D. and reported suicidal thoughts following "emotional stress and legal difficulties." (AR 692.) Plaintiff stated that he "tied a string around his neck on his porch[,]" but "[t]he string broke and he realized what he was doing and that he did[] [not] want to kill himself." *Id.* Dr. Leffel noted that Plaintiff was alert, cooperative, depressed, and fully oriented with a flat affect and assessed "[m]ajor depressive disorder, recurrent episode, severe[.]" (AR 693.)

At his next session with Ms. Lillie on August 15, 2013, Plaintiff was "very sad and tearful regarding his suicide attempt[.]" (AR 685.) Plaintiff discussed his ongoing divorce and his ex-wife's allegations, and Plaintiff "agreed to not harm himself and no longer report[ed] feeling suicidal." *Id.* At his October 10, 2013 appointment with Ms. Lillie, Plaintiff appeared to be in a "very depressed state" and was "[s]omewhat tearful[.]" (AR 677.) Ms. Lillie described him as cooperative but depressed, sad, and anxious with limited insight and judgment. No significant changes were reported during Plaintiff's visits on December 2, 2013, December 10, 2013, or February 21, 2014.

On January 2, 2014, Plaintiff was referred to John F. Dick, M.D. for a disability examination. Plaintiff reported that he had not worked in three years due to his lower back pain, which "came on insidiously" and was not the result of a specific injury. (AR

752.) Plaintiff stated that the pain radiated down into his left leg and to his knee and was aggravated by walking so that he had to stop and lean on something when he walked more than 200 feet. He indicated that his pain level was eight out of ten at its worst, but that medication reduced his pain to "about a 2." *Id.* Plaintiff reported poor balance and breathing difficulties.

Dr. Dick described Plaintiff as alert with a slightly flat affect. Plaintiff exhibited full strength and normal coordination and flexion in his arms, but flexion was limited in his lower back with mild tenderness over the lumbosacral spine. Plaintiff experienced pain in his back during the straight leg raise at thirty degrees on the left leg and at forty-five degrees on the right leg. Dorsal pedal pulses were absent on Plaintiff's left leg. His station was normal, and his gait favored his left leg with a slight limp.

Dr. Dick assessed chronic back pain and recommended that Plaintiff stop taking Tramadol because he was "not sure [it was] helping and likely making him sleepy." (AR 754.) He further recommended physical therapy and opined that Plaintiff was unable to lift ten pounds or complete a full workweek, even in a sedentary position. He estimated that Plaintiff would miss more than one day of work each month for medical reasons and that Plaintiff was at risk for injury due to his inability to concentrate.

That same day, Dr. Dick completed a Medical Source Statement of Ability to Do Work-Related Activities (Physical) form, wherein he opined that Plaintiff could lift and/or carry less than ten pounds; stand and/or walk less than two hours in an eight hour workday; and sit less than six hours in an eight hour workday. He reported that Plaintiff had limited ability to push and/or pull with his arms and legs; was unable to climb, balance, crouch, crawl, or stoop; and was only occasionally able to kneel. Plaintiff was further limited in his ability to concentrate as well as his ability to reach, although he exhibited no limitation in his fine or gross manipulation. Dr. Dick noted that Plaintiff was limited in his ability to be exposed to temperature extremes, dust, hazards, fumes, odors, chemicals, or gases.

The following month, Plaintiff reported to Dr. Kurak that his COPD was improving and he was smoking less, about half a pack per day. Plaintiff reported he had

"never weighed [as] much in his life" and believed that it contributed to his increased back pain. (AR 740.) Dr. Kurak recommended that Plaintiff return to physical therapy and endeavor to lose weight.

On March 21, 2014, Ms. Lillie observed that Plaintiff was "very depressed" and tearful and had been having "extremely limited social contact[.]" (AR 732.) Plaintiff reported that "[h]is world consist[ed] of smoking outside, eating and sleeping on the couch as well as watching [television] during the day." *Id.* Ms. Lillie was "struck by his level of depression and his rapid state of poor health[,]" and opined that Plaintiff's "spirit ha[d] been broken and he ha[d] given up." *Id.* After visits on April 18, 2014 and April 30, 2014, Ms. Lillie noted that Plaintiff remained "extremely distressed and [was] sobbing." (AR 726.)

On May 14, 2014, Plaintiff informed Dr. Kurak that his breathing had been "alright[,]" but he experienced shortness of breath when he walked outside. (AR 773.) Plaintiff reported that he had no leg pain when he walked, but he did occasionally feel leg pain after he rested. Dr. Kurak again recommended that Plaintiff resume physical therapy to alleviate his back pain. During a visit the next month, Dr. Kurak observed swelling in Plaintiff's legs, and Plaintiff reported swelling and burning in his feet. Dr. Kurak advised him to continue using compression socks and to exercise more.

B. Plaintiff's Function Reports.

Plaintiff completed two undated Function Reports wherein he stated that he walked outside during the day, watched television, walked his pets, and played cards. He was unable to pick up objects weighing more than ten pounds or kneel for extended periods of time and had difficulty sleeping. Plaintiff dressed himself and attended to his daily self-care, as well as paid bills, counted change, and handled a savings account. Unless his hands cramped, Plaintiff cooked, washed dishes, and did laundry. He moved around without difficulty until his feet cramped, at which time he rested until the cramping subsided. He stated that he could not stand for a long time, but he was able to shop for one to two hours at a time.

Plaintiff enjoyed reading and drawing, although he was unable to draw for extended periods of time without his hands cramping. He also fished and assembled models. Although Plaintiff could pay attention for a short time, he had difficulty following instructions, getting along with authority figures, and handling stress. Plaintiff noted that he did not like changes in his routine, but he was able to handle them. Plaintiff used glasses and walked with his cane only when he felt it was necessary. He stated that his medications made him sleep more than he should.

From 1997 through 1999, Plaintiff was employed as a dishwasher and maintenance person at a restaurant and was required to walk, stand, climb, stoop, kneel, crouch, and crawl for eight hours while performing these jobs. He used to be able to lift fifty pounds or more but assessed that he would be "lucky" if he could pick up ten pounds. (AR 280.)

C. State Consultants' Assessments.

On January 14, 2013 and April 26, 2013, state agency medical consultants Leslie Abramson, M.D. and Donald Swartz, M.D. reviewed the record and determined that Plaintiff's COPD, osteoarthritis, and allied disorders were medically determinable, non-severe impairments. Dr. Swartz recognized that Plaintiff had begun to use a cane recently and which reflected "some slight worsening" in his condition. (AR 97.) Dr. Swartz, however, erroneously noted that there was no evidence in Plaintiff's medical records that he was prescribed a cane. Dr. Swartz opined that Plaintiff's reports of being limited to walking only short distances were inconsistent with his reports of cooking and shopping for one to two hours daily. Dr. Swartz also noted that Plaintiff's alleged limitations of walking and standing were inconsistent with the consultative examination results, in particular with Plaintiff's normal gait and his abilities to tandem walk, walk on his heels and toes, and bend.

On November 8, 2012, and April 24, 2013, state agency psychiatric consultants Howard Goldberg, Ph.D. and Ellen Atkins, Ph.D. reviewed the record and concluded that Plaintiff's affective disorder, anxiety disorder, and substance addiction disorder were severe impairments. They determined that Plaintiff had mild limitations in activities of

daily living and maintaining social functioning; moderate limitations in maintaining concentration, persistence, and pace; and no episodes of decompensation. They opined that Plaintiff's anxiety and depressive symptoms could disrupt his memory, but that Plaintiff was able to retain one-to-three step instructions for two hours over an eight-hour period during a forty-hour week.

D. Plaintiff's Testimony at the August 7, 2014 Hearing.

Plaintiff testified at the August 7, 2014 hearing that he was able to perform simple math and read "[a] little," such as menus and street signs; however, he needed assistance reading "the big long words" on the Social Security Administration's forms. (AR 35.) Plaintiff reported that he did not drive.

Plaintiff testified that he was unable to work due to constant pain in his back and arthritis in his hips. He stated he was unable to sit or stand for long periods of time, and that he could only walk for short distances before his back began to hurt. Plaintiff explained that his back pain started in the small of his back and radiated down into his tailbone and his left leg, and the pain was starting to travel down his right hip and leg as well. Medication alleviated most of his pain, and he utilized physical therapy and home exercises. Plaintiff testified that his doctor had prescribed a cane, which he used "[a]ll the time[.]" (AR 41.) He further testified that his doctor prescribed compression socks, which mostly controlled the swelling in his legs so that they were "almost normal[,]" although they did not eliminate the pain in his calves and feet. (AR 42.) Plaintiff claimed that his leg pain occasionally woke him during the night.

Regarding his COPD, Plaintiff testified that he used four inhalers and took unspecified prescribed medication. Plaintiff reported that his breathing was a constant problem when he "tr[ied] to hurry [him]self[,]" and that it felt like he was "run[ning] out of air[.]" (AR 44.) Plaintiff explained that he used his inhaler "probably occasionally when [he was] at home[,]" but more frequently when he walked or his "nerves [got] the best of [him.]" *Id.*

Plaintiff estimated that he could sit comfortably in a chair for ten minutes and stand comfortably for approximately twenty minutes. He testified that his doctor

restricted him to lifting no more than ten pounds. Plaintiff stated that, on some days, he had difficulties reaching in front of himself or over his head, and he was unable to walk more than fifty feet before needing to rest. Plaintiff further testified that "it [took him] a lot longer to get back up" to his feet when he kneeled. (AR 46.)

Plaintiff reported that he attended counseling every two weeks and had been prescribed medication to minimize his mood swings and "high anxiety[.]" (AR 52.) Plaintiff described his memory as "[n]ot very good[;] [n]ot like it used to be[,]" and stated that he forgot both recent and distant memories. (AR 47.) Plaintiff similarly described his concentration as "[n]ot very good" and reported an ability to concentrate for twenty minutes at a time. *Id.*

Plaintiff acknowledged that he was able to get along with others, deal with strangers, and take care of himself. Plaintiff stated that he had a decreased energy level, which he described as "[m]edium." (AR 48.) Despite "a drug and alcohol problem a long time ago[,]" (AR 49), Plaintiff testified that since 2012 he had not used any non-prescribed medication or drugs and only drank "up to a six-pack" at a time. (AR 51.)

III. ALJ Sutker's Application of the Five-Step, Sequential Evaluation Process.

In order to receive benefits, a claimant must be disabled on or before his or her "date last insured" under the Social Security Act. 42 U.S.C. § 423(a)(1)(A). Social Security Administration regulations set forth the following five-step, sequential evaluation process to evaluate whether a claimant is disabled under the statute:

> (1) whether the claimant is currently engaged in substantial gainful activity; (2) whether the claimant has a severe impairment or combination of impairments; (3) whether the impairment meets or equals the severity of the specified impairments in the Listing of Impairments; (4) based on a "residual functional capacity" [RFC] assessment, whether the claimant can perform any of his or her past relevant work despite the impairment; and (5) whether there are significant numbers of jobs in the national economy that the claimant can perform given the claimant's residual functional capacity, age, education, and work experience.

McIntyre v. Colvin, 758 F.3d 146, 150 (2d Cir. 2014) (citing 20 C.F.R. §§ 404.1520(a)(4)(i)-(v) & 416.920(a)(4)(i)-(v)). "The claimant has the general burden

of proving that he or she has a disability within the meaning of the Act, and bears the burden of proving his or her case at Steps One through Four of the sequential five-step framework established in the SSA regulations[.]" *Burgess v. Astrue*, 537 F.3d 117, 128 (2d Cir. 2008) (internal quotation marks and citations omitted). At Step Five, "the burden shift[s] to the Commissioner to show there is other work that [the claimant] can perform." *McIntyre*, 758 F.3d at 150 (alterations in original) (internal quotation marks omitted).

In this case, ALJ Sutker determined that Plaintiff met the "insured status requirements" of the Social Security Act through June 30, 2015, and that Plaintiff had not engaged in substantial gainful activity since his alleged onset date of March 15, 2012. At Step Two, she found that Plaintiff had the following severe impairments: obstructive sleep apnea; COPD; anxiety disorder; depressive disorder; alcohol dependence in partial sustained remission; and cannabis dependence. She concluded that Plaintiff's other impairments did not meet the definition of a severe impairment, including his osteoarthritis of the hands, knees, and hips.

ALJ Sutker further determined that the degenerative changes of Plaintiff's spine and peripheral vascular disease were not medically determinable impairments due to the absence of objective medical abnormalities. Although she did not find that Plaintiff's hip and hand arthritis and back pain were severe impairments, she considered those impairments when determining his RFC. With respect to Plaintiff's mental health impairments, ALJ Sutker found that he had mild restrictions in activities of daily living, mild restrictions in social functioning, and moderate restrictions in concentration, persistence, or pace.

With regard to Plaintiff's use of a cane, ALJ Sutker found as follows: "Although the claimant reports use of a cane to ambulate, he was noted at his consultative exam without the use of any assistive device. There also is no evidence that the cane was prescribed, as the claimant reports. In addition, his records show that he walks regularly for exercise." (AR 16) (citations omitted).

ALJ Sutker found at Step Three that Plaintiff did not have an impairment or combination of impairments that met or equaled the severity of any listed impairment. At Step Four, she determined Plaintiff had the RFC:

> to perform medium work . . . . He is unable to climb ladders, ropes and scaffolds, and he may occasionally kneel and crawl. He is able to rarely climb steep inclines (less than 10% of the workday), and is limited to concentrated exposure to temperature extremes and pulmonary irritants. He is limited to uncomplicated tasks (defined as tasks able to be learned in 30 days or less). He is able to maintain concentration, persistence and pace for 2-hour blocks of time throughout a normal workday and workweek.

(AR 15-16) (emphasis omitted).

ALJ Sutker deemed Plaintiff's testimony at the August 7, 2014 hearing regarding the intensity, persistence, and limiting effects of his symptoms to be "not entirely credible[.]" (AR 16.) Based on Plaintiff's RFC for medium work and his specific limitations, she determined that Plaintiff was capable of performing his past relevant work as a dishwasher, but that he was unable to perform his past relevant work as a lead maintenance worker, construction worker, or tire changer. (AR 19.) At Step Five, she concluded, based upon VE Laflamme's testimony, that Plaintiff was able to perform alternative work at the medium exertional level as a production helper, hand packager, or grocery bagger, and at the light exertional level as a price marker, laundry classifier, or assembler of small products. For these reasons, ALJ Sutker determined that Plaintiff was not disabled.

IV. Conclusions of Law and Analysis.

A. Standard of Review.

In reviewing the Commissioner's decision, the court "'conduct[s] a plenary review of the administrative record to determine if there is substantial evidence, considering the record as a whole, to support the Commissioner's decision and if the correct legal standards have been applied.'" *Cichocki v. Astrue*, 729 F.3d 172, 175-76 (2d Cir. 2013) (quoting *Kohler v. Astrue*, 546 F.3d 260, 265 (2d Cir. 2008)). Substantial evidence is "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion.'" *Selian v. Astrue*, 708 F.3d 409, 417 (2d Cir. 2013) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

Even if the court could draw different conclusions after an independent review of the record, the court must uphold the Commissioner's decision when it is supported by substantial evidence and when the proper legal principles have been applied. *See* 42 U.S.C. § 405(g). It is the Commissioner that resolves evidentiary conflicts and determines credibility issues, and the court may not substitute its own judgment for the Commissioner's. *See Yancey v. Apfel*, 145 F.3d 106, 111 (2d Cir. 1998); *Aponte v. Sec'y, Dep't of Health & Human Servs. of U.S.*, 728 F.2d 588, 591 (2d Cir. 1984).

B. Whether ALJ Sutker's Step Two Findings were Erroneous.

Plaintiff raises two arguments with respect to ALJ Sutker's Step Two findings. First, he asserts that her determination that the arthritis in his hands, knees, and hips did not constitute a severe impairment was erroneous because that finding was "materially inconsistent with the medical assessments of all of the treating, examining, and non-examining physicians[.]" (Doc. 6 at 4.) Second, he contends that her finding that the degenerative changes of his spine and peripheral vascular disease were not medically determinable impairments due to the lack of signs, symptoms, or laboratory findings was directly contradicted by the medical evidence.

At Step Two of the sequential analysis, the claimant must demonstrate that he or she has a "medically determinable impairment" that "result[s] from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques[.]" *Mussaw v. Comm'r of Soc. Sec.*, 2013 WL 1293774, at *2 (N.D.N.Y. Mar. 28, 2013) (citing 20 C.F.R. § 404.1508). In order for such an impairment to be "severe," SSA regulations provide that the claimant's impairment must "significantly limit[] [his or her] physical or mental ability to do basic work activities[.]" 20 C.F.R. § 404.1520(c). If the ALJ "rate[s] the degrees of [the claimant's] limitation as 'none' or 'mild,' [the ALJ] will generally conclude that [the] impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in [the claimant's] ability to do basic work activities[.]"

Id. § 404.1520a(d)(1). The ALJ's severity assessment "may do no more than screen out *de minimis* claims." *Dixon v. Shalala*, 54 F.3d 1019, 1030 (2d Cir. 1995) (citing *Bowen v. Yuckert*, 482 U.S. 137, 158 (1987)).

In finding that Plaintiff's arthritis was not severe, ALJ Sutker concluded that "there are no significant objective medical findings in the record which exist in order for [this] impairment[] to be considered severe within the meaning of the regulations." (AR 13.) ALJ Sutker noted that in November 2012, Dr. Tonkin observed that Plaintiff maintained full grip strength in his hands, the arthritic deformity on Plaintiff's right thumb did not limit him, and Plaintiff's range of motion in his hands and fingers was normal. Dr. Tonkin further found that Plaintiff was able to reach, handle, finger, and feel without limitation and his treatment notes described the changes in Plaintiff's hands as "early arthritic changes[,]" that nonetheless permitted Plaintiff to pick up objects, including fine objects. (AR 422.) None of Plaintiff's other physicians identified severe limitations stemming from the arthritis in Plaintiff's hands, and Plaintiff reported in November of 2012 that the arthritis did not limit his activities of daily living.

With respect to the osteoarthritis of Plaintiff's hips, ALJ Sutker noted diagnostic imaging from February of 2013 showed mild degenerative changes bilaterally to the hips. Plaintiff reported only "minor complaints" about left hip pain one month later, and also stated that he exercised three to four times per week. (AR 441.) Despite Plaintiff's statements about experiencing pain after walking long distances, Dr. Tonkin found during the November 2012 consultative examination that Plaintiff had no swelling; normal range of motion in his knees; normal gait, coordination, and station, including walking on his heels/toes; the ability to hop and bend; and full motor function of his upper and lower extremities.

While Plaintiff reported that his legs became numb if he sat for extended periods of time, he denied significant weakness or regular numbness or tingling in his extremities and demonstrated no difficulties moving around the examination room, getting on and off the exam table, removing his socks and shoes, and performing the activities of his consultative examination. In November of 2012, Plaintiff reported that over-the-counter

or prescription nonsteroidal anti-inflammatory drugs provided "some relief" for his knee pain, and a January 4, 2013 x-ray of Plaintiff's knees was negative for bone or joint abnormalities.

Against this backdrop, whether the abnormalities in Plaintiff's hands, hips, and knees constitute *de minimis* impairments presents a close question. However, because ALJ Sutker proceeded to consider those impairments in formulating her RFC determination,[2] any error in failing to designate them as "severe" at Step Two is harmless and does not warrant remand. *See Reices-Colon v. Astrue*, 523 F. App'x 796, 798 (2d Cir. 2013) (concluding "any error was harmless" where ALJ excluded claimant's anxiety disorder and panic disorder from his review at Step Two but considered them in subsequent steps); *Lasiege v. Colvin*, 2014 WL 1269380, at *11 (N.D.N.Y. Mar. 24, 2015) (holding that "even if the ALJ erred in failing to find Plaintiff's headaches to be a severe impairment, such an error would be harmless" where the ailment was considered in determining the claimant's RFC).

Plaintiff next challenges ALJ Sutker's determination that the degenerative changes of his spine and his peripheral vascular disease were not medically determinable impairments. While acknowledging that x-rays contained evidence of "moderate to severe" degenerative changes in the facet joints (AR 455), ALJ Sutker concluded Plaintiff's back pain was not a medically determinable impairment because treatment providers recommended minimal treatment beyond weight management and physical therapy. This conclusion is supported by substantial evidence in the record, even if this court might have reached a different conclusion.

Plaintiff reported to Dr. Kurak throughout 2013 and 2014 that he was able to complete his daily activities despite ongoing back pain and swelling in his legs and that medication alleviated most of his pain. Despite the recommendations that he engage in weight management and physical therapy to alleviate his back pain, there is no evidence

[2] *See* AR 13 (noting that while Plaintiff's "hip and hand arthritis/pain and back pain are not severe impairments, these impairments were considered upon assessing his residual functional capacity").

that Plaintiff attended physical therapy after his initial sessions in April of 2013. Although Plaintiff is correct that his medical records reflect that he continued to complain of back pain, he reported activities such as shopping for one to two hours and walking which support a conclusion that his back pain did not interfere with his daily living activities. Any conflicts regarding the severity and limiting effects of Plaintiff's impairments in the administrative record were within the ALJ's discretion to resolve. *See Cage v. Comm'r of Soc. Sec.*, 692 F.3d 118, 122 (2d Cir. 2012) ("In our review, we defer to the Commissioner's resolution of conflicting evidence"). Plaintiff therefore "failed to carry his burden at step two to provide evidence showing that his . . . impairments were severe or caused functional limitations that precluded him from performing substantial gainful activity." *Collier v. Colvin*, 2016 WL 4400313, at *5 (W.D.N.Y. Aug. 17, 2016).

ALJ Sutker's conclusion that Plaintiff's peripheral vascular disease was not a medically determinable impairment, by contrast, was not supported by substantial evidence. Although Plaintiff informed ALJ Sutker that compression socks controlled the swelling in his legs so that they were "almost normal" (AR 42), Dr. Kurak diagnosed Plaintiff with peripheral vascular disease following an October 23, 2013 physical examination. Her treatment notes further noted that Plaintiff exhibited swelling, chronic skin changes, and pitting edema in his legs. Plaintiff also showed decreased range of motion and strength at her physical therapy examination. The error was not harmless because ALJ Sutker did not consider the physical limitations stemming from Plaintiff's peripheral vascular disease in determining his RFC. While she concluded that Plaintiff was unable to climb ladders, ropes, and scaffolds, she found he could otherwise perform work at the medium exertional level, including work that entails occasional kneeling and crawling. She did not address whether Plaintiff was further limited in another areas, such as his ability to sit, stand, or lift objects. It is therefore impossible to determine whether Plaintiff could perform his past relevant work as a dishwasher or alternative occupations if limitations from his peripheral vascular disease were included in his RFC. A remand for this determination is therefore warranted. *See Concepcion v. Astrue*, 2010 WL 4038769, at *4 (D. Conn. Sept. 30, 2010) (holding that "[w]ithout the ALJ's analysis of

the relevant evidence, the court cannot determine whether his conclusion would have been different if he had considered all factors" in his RFC determination).

C. Whether ALJ Sutker Failed to Properly Assess the Medical Evidence.

Plaintiff argues that ALJ Sutker failed to properly assess the medical evidence by "rejecting . . . without good cause for doing so" the opinion of Dr. Dick and according significant weight to the opinions of state agency non-examining physicians. (Doc. 6 at 9.) The Commissioner disputes that Dr. Dick was Plaintiff's treating physician and argues that ALJ Sutker properly accorded Dr. Dick's opinion lesser weight because it was contradicted by other evidence in the record, including the opinions of the state agency medical consultants to which she accorded significant weight.

1. Whether ALJ Sutker Properly Assigned Lesser Weight to Dr. Dick's Opinion.

"The opinion of a treating physician on the nature or severity of a claimant's impairments is binding if it is supported by medical evidence and not contradicted by substantial evidence in the record." *Selian*, 708 F.3d at 418; *see* 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2) (directing that opinions from treating sources are accorded "more weight" because "these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [any] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations"). Pursuant to 20 C.F.R. §§ 404.1527(c)(2) & 416.927(c)(2), the ALJ must provide "good reasons" regarding "the weight" given to a treating source's opinion. *Halloran v. Barnhart*, 362 F.3d 28, 32-33 (2d Cir. 2004) (internal quotation marks omitted).

In order to "override" the opinion of the treating physician, the Second Circuit has held that the ALJ must consider, *inter alia*: "(1) the frequently, length, nature, and extent of treatment; (2) the amount of medical evidence supporting the opinion; (3) the consistency of the opinion with the remaining medical evidence; and (4) whether the physician is a specialist." *Selian*, 708 F.3d at 418. Notwithstanding this rule, "[w]hen other substantial evidence in the record conflicts with the treating physician's

opinion[] . . . that opinion will not be deemed controlling." *Snell v. Apfel*, 177 F.3d 128, 133 (2d Cir. 1999).

Plaintiff testified at the August 7, 2014 hearing that Dr. Dick was not his "main doctor" and that he saw him only "once in a while but not all the time[.]" (AR 53.) On the basis of this testimony, ALJ Sutker properly concluded that Dr. Dick was not Plaintiff's treating physician. *See Mongeur v. Heckler*, 722 F.2d 1033, 1039 n.2 (2d Cir. 1983) (holding that the opinions of a treating physician who had only seen the claimant "once or twice" were not entitled to controlling weight). The Commissioner also points out that Plaintiff was referred to Dr. Dick by his attorney in connection with his application for benefits. *See* AR 752 (January 2, 2014 treatment notes recording that Plaintiff was "referred by his attorney for evaluation for Social Security disability").[3] In any event, the issue is not Dr. Dick's "designation but whether, guided by the factors set forth in § 404.1527(c), [the ALJ] provided good reasons for not according [his] opinions controlling weight." *Sanborn v. Berryhill*, 2017 WL 923248, at *12 (D. Vt. Mar. 8, 2017).

Regarding Plaintiff's COPD, ALJ Sutker correctly noted that "the use of his inhaler results in significant improvement in his breathing, without noted daily functional limitations" (AR 19) and his COPD and shortness of breath were "generally controlled" (AR 16). *See Wilferth v. Colvin*, 49 F. Supp. 3d 359, 363 (W.D.N.Y. 2014) (affirming the Commissioner's decision where "[t]here is no evidence whatsoever that the plaintiff's COPD had some [e]ffect on his RFC for which the ALJ failed to account"). This conclusion is supported by Dr. Kurak's treatment notes, which ALJ Sutker cited in her decision. ALJ Sutker therefore properly rejected Dr. Dick's proposed limitations arising

[3] The Social Security Administration "will not consider an acceptable medical source to be [a] treating source if [the] relationship with the source is not based on . . . medical need for treatment or evaluation, but solely on [the] need to obtain a report in support of [a] claim for disability." 20 C.F.R. § 404.1527(a)(2); *see also Petrie v. Astrue*, 412 F. App'x 401, 405 (2d Cir. 2011) (reasoning the ALJ properly refused to give controlling weight to the medical opinion of a provider where that provider "only examined [the] claimant once or twice[,] did not see th[e] claimant regularly and did not develop a physician/patient relationship with the claimant, even though other practitioners in the same facility had also submitted medical opinions on behalf of the claimant") (internal quotation marks and citation omitted).

from Plaintiff's COPD which restricted him from lifting or carrying less than ten pounds, standing or walking less than two hours, and sitting less than six hours in an eight-hour workday.

However, ALJ Sutker erred when she found that Dr. Dick's proposed limitations arising out of Plaintiff's back pain were "inconsistent with [Plaintiff's] medical records," which did "not reflect treatment or diagnosis of a back impairment, or ongoing functional limitations[.]" (AR 19.) Plaintiff's February 2013 lumbosacral x-rays revealed moderate to severe degenerate changes involving his facet joints. In addition, Plaintiff consistently reported at least some functional limitations that were attributable to his back pain. While the court agrees that the limitations arising from Plaintiff's back impairments were included in his RFC, according Dr. Dick's opinion lesser weight on this ground was a factual error. Although by itself this error would not warrant remand, as the court has already determined that a remand is appropriate, this issue should be revisited. *See Goff v. Astrue*, 993 F. Supp. 2d 114, 122 (N.D.N.Y. 2012) (remanding where the ALJ's "dismiss[al]" of a treating physician's opinion was "factually inaccurate" and "legally inadequate"). The court finds no other errors in the weight ALJ Sutker ascribed to Dr. Dick's opinion.

2. Whether ALJ Sutker Properly Assigned Significant Weight to State Agency Medical Consultants' Opinions.

Plaintiff further contends that the findings of the state agency physicians that Plaintiff does not suffer from any severe physical impairment were contrary to the ALJ's findings and were based on an incomplete record. In January and April of 2013, Dr. Abramson and Dr. Swartz determined that Plaintiff's COPD, osteoarthritis, and allied disorders were medically determinable, non-severe impairments. Although ALJ Sutker ultimately concluded that Plaintiff's COPD and sleep apnea were severe impairments, she nevertheless accorded "significant weight" to the assessments of Dr. Abramson and Dr. Swartz because they were "consistent with the evidence of record which does not reflect disabling physical impairments." (AR 18.)

"In appropriate circumstances, opinions from State agency medical and psychological consultants and other program physicians and psychologists may be entitled to greater weight than the opinions of treating or examining sources." SSR 96-6p, 1996 WL 374180, at *3 (July 2, 1996). Provided that the non-examining sources' opinions "are supported by evidence in the record[,]" the ALJ may "permit the opinions of non[-]examining sources to override treating sources' opinions[.]" *Diaz v. Shalala*, 59 F.3d 307, 313 n.5 (2d Cir. 1995) (citing *Schisler v. Sullivan*, 3 F.3d 563, 567-68 (2d Cir. 1993)); *see also Mongeur*, 722 F.2d at 1039 ("[T]he opinion of a treating physician is not binding if it is contradicted by substantial evidence, and the report of a consultative physician may constitute such evidence.") (citation omitted).

Plaintiff contends that ALJ Sutker engaged in a "lay assessment" of the medical evidence by "reject[ing]" Dr. Abramson's and Dr. Swartz's opinions that Plaintiff's COPD and sleep apnea were non-severe. (Doc. 6 at 9.) The court disagrees. ALJ Sutker did not "reject" their opinions but rather found that these two impairments were severe after "viewing the evidence in the light most favorable to" Plaintiff. (AR 18.) The limitations attributable to those two impairments were reflected not only in Dr. Dick's treatment notes, but also in Dr. Tonkin's observation that "[b]ecause of [Plaintiff's] COPD and asthma, I would not let him work around dust, fumes, or gases." (AR 422.) ALJ Sutker's determination that Plaintiff's COPD and sleep apnea were severe impairments was therefore supported by substantial evidence in the record and does not undermine the propriety of her reliance on Dr. Abramson's and Dr. Swartz's opinions. *See Savage v. Comm'r of Soc. Sec.*, 2014 WL 690250, at *7 (D. Vt. Feb. 24, 2014) (holding that the ALJ "did not err in crediting some aspects of the agency consultant opinions while discounting others, as ALJs are entitled to accept certain portions of medical opinions while rejecting others").

D. Whether the ALJ Erred in Finding Plaintiff Was Not Prescribed a Cane in Determining His RFC.

ALJ Sutker found that there was "no evidence" that Plaintiff was prescribed a cane. (AR 16.) As Plaintiff correctly points out, this finding was in error. Dr. Kurak's

March 27, 2013 treatment notes reflect that she directed Plaintiff to use a cane. *See* AR 442 (recording that Plaintiff had "[s]tarted [c]ane . . . AS DIRECTED"). This error, in turn, undermines the reliability of Dr. Swartz's opinions which reflect that same error. As Dr. Swartz submitted his opinions without reviewing Dr. Dick's opinions, which were rendered several months thereafter, his opinions may change if he were informed that Plaintiff's use of a cane was prescribed and if he considered Dr. Dick's opinions regarding Plaintiff's functional limitations. Because the absence of a prescribed cane is reflected in Plaintiff's RFC, it cannot be deemed to be harmless.

Pursuant to Social Security Ruling 96-8p, "RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis[,]" which "means 8 hours a day, for 5 days a week, or an equivalent work schedule." SSR 96-8p, 1996 WL 374184, at *1 (July 2, 1996). "RFC is not the *least* an individual can do despite his or her limitations or restrictions, but the *most*[,]" and any RFC assessment requires consideration of "functional limitations and restrictions that result from an individual's medically determinable impairment or combination of impairments, including the impact of any related symptoms." *Id.*

In making the RFC determination, an ALJ must consider the claimant's reports of pain and other limitations, but is not required to accept the claimant's subjective complaints without question. Instead, an ALJ "may exercise discretion in weighing the credibility of the claimant's testimony in light of other evidence in the record." *Genier v. Astrue*, 606 F.3d 46, 49 (2d Cir. 2010).

The ALJ "'must first identify [an] individual's functional limitations or restrictions and assess his or her work-related abilities on a function-by-function basis[.]'" *Cichocki*, 729 F.3d at 176 (quoting SSR 96-8p, 1996 WL 374184, at *1). These functions include:

> [P]hysical abilities such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions; mental abilities such as understanding, remembering, carrying out instructions, and responding appropriately to supervision; and other abilities that may be affected by

> impairments, such as seeing, hearing, and the ability to tolerate environmental factors.

Id. An RFC is "expressed in terms of the exertional levels of work, sedentary, light, medium, heavy, and very heavy," that are outlined in 20 C.F.R. § 404.1567. SSR 96-8p, 1996 WL 374184, at *1.

ALJ Sutker found that Plaintiff had the RFC to perform medium work, subject to certain limitations. Medium work involves "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work." 20 C.F.R. § 404.1567(c).

Plaintiff contends that the omission of his need to use a cane in his RFC was reversible error, citing Social Security Ruling 96-9p:

> [t]o find that a hand-held assistive device is medically required, there must be medical documentation establishing the need for a hand-held assistive device to aid in walking or standing, and describing the circumstances for which it is needed (i.e., whether all the time, periodically, or only in certain situations; distance and terrain; and any other relevant information). The adjudicator must always consider the particular facts of a case.

SSR 96-9p, 1996 WL 374185, at *7 (July 2, 1996). Plaintiff further maintains that in light of his use of a cane, "the ALJ could not apply the 'Grid' and was obligated to obtain evidence from a vocational witness regarding the specific issue of whether [he] could still perform the required standing for light and medium work" while using a cane. (Doc. 6 at 13.) The cases Plaintiff cites for this proposition involved claimants who had proffered medical opinions that identified specific limitations arising from the use of a cane which eroded the claimant's occupational base. *See, e.g.*, *White v. Barnhart*, 153 F. App'x 432, 433 (9th Cir. 2005) (noting that claimant's provider opined that "she could walk without it for only a short distance and that when she did not use her cane she had rather severe pain"); *Sawyer v. Astrue*, 775 F. Supp. 2d 829, 835 (E.D.N.C. 2011) (noting that the claimant was prescribed a cane, "must lean on walls and furniture" and had "difficulty with balance and gait and has fallen"); *Robinson v. Astrue*, 2005 WL 6077067, at *9 (E.D. Cal. Mar. 7, 2005) (holding that "[a]lthough the circumstances under which this

cane must be used were not described, it is clear the cane is a necessity and its use was not limited").

Here, Plaintiff cites no medical documentation establishing his need to use a cane beyond Dr. Kurak's March 27, 2013 treatment notes, which do not describe the circumstances for which a cane was needed. The record contains conflicting evidence regarding whether, as Plaintiff testified before ALJ Sutker, he used a cane "all the time" (AR 41), or as he stated in his Function Report, that he uses a cane "only if [he] ha[s] to use it[.]" (AR 281.)

Although ALJ Sutker, rather than this court, is authorized to resolve such a conflict in the evidence, ALJ Sutker's RFC determination was nevertheless erroneous because her analysis proceeded from the false premise that no cane was prescribed to Plaintiff. This error was not harmless because ALJ Sutker did not ask VE Laflamme whether Plaintiff's use of a cane, even on an occasional basis, impacted his ability to work:

> [Q.] I want you to assume the same age, . . . educational background, and past work that I said before. I want you to assume the individual would not be able to climb ladders, ropes or scaffolds. The individual would have no limitations on balancing, stooping or crouching, but would not be able [to] climb steep inclines except on a rare basis. Kneeling and . . . crawling could be performed on an occasional basis. Again, the individual would not be able to engage in concentrated exposure to temperature extremes or pulmonary irritants; and would be limited to uncomplicated tasks; could concentrate, persist at tasks, and stay on pace for two hour blocks of time throughout the workday. Based upon that hypothetical, would such an individual be able to perform any of the Claimant's past work?
>
> A. And again, we're at the medium duty level, Your Honor?
>
> Q. Yes.
>
> A. Thank you. Yes, the dishwasher position, Your Honor.

(AR 59-60.)

While "[a]n ALJ may rely on a vocational expert's testimony regarding a hypothetical" there must be "'substantial record evidence to support the assumption[s] upon which the vocational expert based his opinion'" and which "accurately reflect the

limitations and capabilities of the claimant involved." *McIntyre*, 758 F.3d at 151 (citing *Aubeuf v. Schweiker*, 649 F.2d 107, 114 (2d Cir. 1981)). Social Security Ruling 96-9p provides "that it *may* be especially useful to consult a vocational resource in order to make a judgment regarding the individual's ability to make an adjustment to other work" where the claimant "uses [a medically required hand-held device] for balance because of significant involvement of both lower extremities[.]" SSR 96-9p, 1996 WL 1374185, at *7 (emphasis supplied). In addition, as ALJ Sutker had an affirmative obligation to develop the evidence, she could have sought an opinion from Dr. Kurak regarding in what circumstances and how often she expected Plaintiff to need a cane. *See Rosa v. Callahan*, 168 F.3d 72, 79 (2d Cir. 1999) (commenting that "an ALJ cannot reject a treating physician's diagnosis without first attempting to fill any clear gaps in the administrative record"); *Schaal v. Apfel*, 134 F.3d 496, 505 (2d Cir. 1998) ("[E]ven if the clinical findings were inadequate, it was the ALJ's duty to seek additional information from [the treating physician] *sua sponte*.").

If Plaintiff's use of a cane had been reflected in his RFC, the outcome might have been different because "the requirement of a cane can significantly erode the number of available jobs as it may impact the ability to perform the full range of work." *Kelly v. Colvin*, 2016 WL 5374113, at *12 (N.D.N.Y. Sept. 26, 2016). Under such circumstances, the disability determination required an analysis of whether Plaintiff's use of a cane affected his ability to work. *See Stanley v. Colvin*, 2014 WL 1311963, at *8 (N.D.N.Y. Mar. 31, 2014) (holding that "because there is evidence in the record of Plaintiff's use of a cane and her difficulty ambulating" and because remand was warranted on other grounds, "the ALJ should also inquire about Plaintiff's use of a cane to ambulate and the effect of such use on Plaintiff's ability to perform work-related functions."). For this additional reason, a remand is warranted.

CONCLUSION

For the foregoing reasons, the court GRANTS Plaintiff's motion to reverse the decision of the Commissioner (Doc. 6) and DENIES the Commissioner's motion to affirm (Doc. 7). This action is REMANDED for further proceedings consistent with this

Opinion and Order. On remand, the ALJ must determine Plaintiff's RFC, which shall include the limitations, if any, stemming from Plaintiff's peripheral vascular disease and use of a cane. The ALJ should seek clarification from Dr. Kurak regarding the circumstances for which the cane was prescribed. The ALJ may obtain testimony from an impartial vocational source regarding whether Plaintiff's use of a cane impacts his ability to work. The ALJ must also correct the factual error indicating no diagnosis of a back impairment in his or her analysis of Dr. Dick's opinions.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 21st day of June, 2017.

Christina Reiss, Chief Judge
United States District Court