

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

BRUCE SCHUPP :  
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v. : CIV. NO. 3:02CV103 (WWE)  
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JO ANNE B. BARNHART, :  
COMMISSIONER OF THE :  
SOCIAL SECURITY :  
ADMINISTRATION :

**RECOMMENDED RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Bruce Schupp brings this action under § 205(g) of the Social Security Act ("the Act"), 42 U.S.C. § 405(g), seeking review of a final decision of the Commissioner of Social Security ("the Commissioner"), denying plaintiff Social Security Disability ("SSD") benefits. Pending before the court is plaintiff's Motion for Judgment on the Pleadings [doc # 13], and defendant's Cross Motion to Affirm the Decision of the Commissioner [doc # 16].

The court must determine whether there is substantial evidence in the record to support the finding of the Administrative Law Judge ("ALJ") that plaintiff is not disabled. Specifically, the issues presented are 1) whether the ALJ and the Appeals Council properly weighed the medical evidence and the opinions of treating physicians; 2) whether the ALJ sufficiently explained his findings concerning

plaintiff's residual functional capacity; 3) whether the ALJ erred in his determination that plaintiff can perform work other than his past relevant work; and 4) whether the ALJ correctly assessed the plaintiff's credibility.

For the reasons stated below, defendant's Motion for Order Affirming the Decision of the Commissioner [**doc. # 16**] is **DENIED**. Plaintiff's Motion for Judgment on the Pleadings [**doc. # 13**] is **GRANTED IN PART**, to the extent that it seeks remand to the Commissioner, and **DENIED IN PART**, to the extent that it seeks an immediate award of benefits.

## II. PROCEDURAL HISTORY

Bruce Schupp, the plaintiff, filed an application for Social Security Disability benefits on August 31, 1998, alleging disability since April 15, 1996. [Certified Transcript of Administrative Proceedings, compiled on October 3, 2002 ["Tr."] 90-92.] His claim was denied initially on January 2, 1999, and upon reconsideration on March 27, 1999. [Tr. 64-67, 69-72.] The plaintiff filed a request for a hearing before an Administrative Law Judge on April 12, 1999. [Tr. 73-74.] A hearing was held before ALJ Ronald Thomas on August 20, 1999. [Tr. 35-60.] Plaintiff, represented by counsel, appeared and testified at the hearing. Testimony by

a vocational expert, Dr. Jeff Blank, was also offered. [Tr. 35-60.] On October 19, 1999, the ALJ found the plaintiff not disabled within the meaning of the Social Security Act. [Tr. 25-34.] Plaintiff requested a review of the decision on November 2, 1999. [Tr. 22-24.] On October 4, 2001, counsel appealed and submitted comments and additional evidence. [Tr. 8-18.] On November 23, 2001, the Appeals Council denied plaintiff's request for review, rendering the ALJ's decision the final decision of the Commissioner. [Tr. 5-6.] This appeal followed.

### III. STANDARD OF REVIEW

The scope of review of a Social Security Disability determination involves two levels of inquiry. The court must first decide whether the Commissioner applied the correct legal principles in making the determination. Next, the court must decide whether the determination is supported by substantial evidence. See Balsamo v. Chater, 142 F.3d 75, 79 (2d Cir. 1998). Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion; it is more than a "mere scintilla." Richardson v. Perales, 402 U.S. 389, 401 (1971); Yancey v. Apfel, 145 F.3d 106, 110 (2d Cir. 1998). The substantial evidence rule also

applies to inferences and conclusions that are drawn from findings of fact. See Gonzalez v. Apfel, 23 F. Supp. 2d 179, 189 (D. Conn. 1998); Rodriguez v. Califano, 431 F. Supp. 421, 423 (S.D.N.Y. 1977). The court may not decide facts, reweigh evidence or substitute its judgment for that of the Commissioner. See Dotson v. Shalala, 1 F.3d 571, 577 (7th Cir. 1993). The court must scrutinize the entire record to determine the reasonableness of the ALJ's factual findings. In reviewing an ALJ's decision, the court considers the entire administrative record, including new evidence submitted to the Appeals Council following the ALJ's decision. Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996). The court's responsibility is always to ensure that a claim has been fairly evaluated. Grey v. Heckler, 721 F.2d 41, 46 (2d Cir. 1983)).

The court must also keep in mind that, "[w]here there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to correct legal principles.'" Schaal v. Apfel, 134 F.3d 496, 504 (2d Cir. 1998) (quoting Johnson v. Bowen, 817 F.2d 983, 986 (2d Cir. 1987)). Similarly, the ALJ must set forth the

crucial factors in any determination with sufficient specificity to enable a reviewing court to decide whether the determination is supported by substantial evidence. Ferraris v. Heckler, 728 F.2d 582, 587 (2d Cir. 1984). Thus, although the ALJ is free to accept or reject the testimony of any witness, a finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible review of the record. Williams v. Bowen, 859 F.2d 255, 260-61 (2d Cir. 1988). Moreover, when a finding is potentially dispositive on the issue of disability, there must be enough discussion to enable a reviewing court to determine whether substantial evidence exists to support that finding. See Peoples v. Shalala, 1994 WL 621922, \*4 (N.D. Ill. 1994). See generally Ferraris, 728 F.2d at 587.

#### IV. FACTUAL BACKGROUND<sup>1</sup>

Mr. Schupp was born on August 10, 1950 and was 49 years old at the time of the date last insured.<sup>2</sup> [Tr. 90, 96.] He has a General Equivalency Diploma, and lives with his wife and

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<sup>1</sup>In discussing Mr. Schupp's factual background, the Court focuses on documents most relevant to plaintiff's claims.

<sup>2</sup>Date last insured refers to the date before which the plaintiff must prove disability in order to be eligible for disability benefits. See 42 U.S.C. § 423(a)(1)(A) and ©; 20 C.F.R. §§ 404.101, 404.120, and 404.315(a).

two sons. [Tr. 38-39.] Plaintiff worked as an electrical tester, a service technician for Pinkerton Banking ATMs, a security guard for Alarm Guard, and an alarm monitor for AJT Alarms [Tr. 40-42, 50, 53.] As an alarm monitor, plaintiff was required to both sit and stand. [Tr. 53.] While he was a security guard, he spent the majority of the day driving a van, spent about 2 ½ hours a day standing, and was required to lift 5-20 pounds. [Tr. 54.] As an electrical tester, he was required to lift more than 100 pounds. [Id.]

Plaintiff describes pain in his spine and shoulders, restrictive motion in his shoulder, and numbness in his hands that prevent him from working. [Tr. 42-44.] Plaintiff reports feeling "pins and needles" in his hands, and reports that he was fired from his job at Alarm Guard in April 1996 in part because he was making mistakes at the computer. [Tr. 44,40.] In February 1999, Plaintiff was seen by Dr. Alan Reznik through medical coverage obtained through his wife's employer. [Tr. 42.] Plaintiff has not worked since April 15, 1996. [Tr.33.]

A. Plaintiff's Medical History

1. Dr. Michael Mankus, M.D.- Primary Care Physician

Dr. Mankus is Mr. Schupp's primary care physician. Two

handwritten notes included in the transcript are largely illegible, but it appears that plaintiff was seen by Dr. Mankus in 1994 for sinusitis. [Tr. 132.] In July 1996, Dr. Mankus reported plaintiff's past medical history, including insomnia, irritable bowels, and chronic diarrhea, and noted that plaintiff had a "voracious appetite" and required weight reduction and dietary consultation. [Tr. 133.] Testing in November 1992 revealed high cholesterol levels. [Tr. 137-140.] An x-ray of the left shoulder on March 1, 1993 revealed no significant findings. [Tr. 131.]

2. Alan M. Reznik, M.D. - Orthopedic Surgeon

Dr. Alan M. Reznik first examined plaintiff on February 1, 1999 regarding his bilateral shoulder problems and upper extremity numbness and tingling. [Tr. 144-145.] Dr. Reznik found that plaintiff was a 48 year old man, weighing 350 pounds, who had significant reaction to pain upon examination of the right shoulder. The movement of the shoulder is described:

he has limited mobility of 30 degrees of elevation, 40 degrees of abduction and he can internally rotate just to his buttock. Any attempt to elevate his arm above 40 or 50 degrees is met by painful resistance. He has point tenderness around the shoulder girdle. [Tr. 144.]

X-rays of the shoulder revealed "some calcific tendonitis<sup>3</sup>, some degenerative, but no other significant abnormalities."

[Id.] Dr. Reznik concluded that plaintiff suffered from chronic pain in the right shoulder causing a decreased ability to use the right arm, and similar, but less severe symptoms on the left side. [Id.] Dr. Reznik's treatment plan stated:

There is little that can be done for this patient. Unfortunately, I do not think he is a good candidate for surgical intervention. I do not think his symptoms will improve. The symptoms have been ongoing for at least 13 years and no intervention to date as been helpful. At this point, the patient remains disabled from any useful type of work because of his ongoing symptoms. Unfortunately, this is a chronic problem that I think little can be done for. [Tr. 144-145.]

Dr. Reznik also completed a Residual Functional Capacity Questionnaire, dated May 17, 1999. [Tr. 154-159.] He repeated the diagnosis of chronic shoulder pain and decreased use of the right arm, and added that plaintiff's prognosis was "poor". [Tr. 154.] His clinical findings were "pain and point tenderness... and decreased range of motion (See notes)." [Tr. 155.] Dr. Reznik also identified emotional and psychological factors contributing to the severity of the physical condition including depression and anxiety, and recommended

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<sup>3</sup>Calcific tendonitis is an inflammation of the tendon due to the forming or depositing of calcium salts. Stedman's Medical Dictionary, 26<sup>th</sup> edition.



psychological evaluation. [Id.] He found that pain symptoms would frequently interfere with plaintiff's attention and concentration, and identified a "moderate" to "marked" ability to deal with work stress. [Tr. 156.] Dr. Reznik evaluated Mr. Schupp's ability to stand and walk, finding that plaintiff could walk one to two blocks without rest; could sit for 10 minutes and stand for 15 minutes continuously at one time; and could sit or stand for less than two hours of an eight hour work day. [Id.] He indicated that plaintiff would require a job that permits shifting at will from sitting, standing, or walking, and that he would need to take frequent unscheduled breaks throughout the work day. [Tr. 157.] He limited plaintiff to lifting not more than 10 pounds occasionally. [Id.] He reported that plaintiff had significant limitations in doing repetitive reaching, handling, or fingering, and would be unable to use hands, fingers, or arms for grasping or turning objects, fine manipulations, or reaching. [Tr. 158.] Dr. Reznik predicted work absences would occur more than three times a month. [Id.] He indicated that the symptoms and limitations applied as early as 1986. [Tr. 159.]

3. Giovanni Raccuglia, M.D. - Internist

Dr. Raccuglia examined plaintiff on October 26, 1998 at

the request of the Social Security Administration. [Tr. 141.] Plaintiff complained of advanced bursitis in both shoulders, numb hands, a smashed tail bone, bad vision, fatigue, and dizziness. [Id.] Dr. Raccuglia reported that the plaintiff is often short of breath, does not have any edema, has some chest pressure on exertion, and often has diarrhea. [Tr. 142.] Upon examination, Dr. Raccuglia found 1+ edema to the lower third of the tibial region. [Tr. 143.] Plaintiff's arms could be abducted to 90 degrees, but not any higher because of pain, and the range of motion in all other joints was normal. [Id.] He found that fine movements of the hands could be performed normally [Id.] Dr. Raccuglia's conclusion was that plaintiff's main problem was "tremendous obesity", the sleepiness may be Pickwickian syndrome, and that the shoulder and back pain are subjective symptoms, although the range of motion of the shoulders could not be performed with passive movement because of complaints of pain. [Id.]

4. Firooz Golkar, M.D.

Dr. Firooz Golkar reviewed Mr. Schupp's file for disability benefits and completed a Physical Residual Functional Capacity Assessment on March 10, 1999. [Tr. 146-153.] Dr. Golkar determined that plaintiff could occasionally

lift 20 pounds and could frequently lift 10 pounds. [Tr. 147.] He determined that plaintiff could stand or walk six hours of an eight hour workday, and could sit for six hours. [Id.] Dr. Golkar found that plaintiff had no limitations in his ability to push or pull, including the operation of hand and/or foot controls. [Id.] He found that plaintiff's postural limitations would preclude the use of a ladder, rope, or scaffolds, and manipulative limitations included no reaching of the right arm over the head. [Tr. 149.]

5. Richard Matza, M.D. - Consultative Orthopedist

Plaintiff was examined by Dr. Richard Matza on May 22, 2000, after plaintiff's claim for benefits was denied. [Tr. 11.] In an undated narrative report, Dr. Matza diagnosed plaintiff with bilateral carpal tunnel syndrome based upon EMG nerve studies. [Tr. 161.] He obtained x-rays of plaintiff's neck, back, right shoulder, and knees. Dr. Matza diagnosed plaintiff with right shoulder calcified tendonitis, mild to moderate bilateral degenerative joint disease of the knees, severe degeneration of three segments of the back with lumbar spondylolysis<sup>4</sup>, and morbid obesity. [Tr. 162.] Dr. Matza's

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<sup>4</sup>Spondylolysis is the degeneration or deficient development of the articulating part of a vertebra. Stedman's Medical Dictionary, 26<sup>th</sup> edition.

recommendation is that plaintiff:

does remain totally disabled from any useful type of work because of his ongoing symptoms, all of which are chronic in nature. The only thing I would recommend would be weight loss, and exercise in perhaps water. I do not think that any of this is reversible. I do not think that his status will change. [Tr. 162.]

Dr. Matza completed a Multiple Impairments Questionnaire, diagnosing plaintiff with bilateral carpal tunnel syndrome, right shoulder calcific tendinitis, bilateral degenerative joint disease of the knees, and lumbar spondylosis. [Id.] His prognosis was "poor" and he referred to the x-rays to support his diagnosis, and repeated symptoms of pain in the knees, lower back, and shoulders. [Tr. 12-13.] He projected that plaintiff was able to sit for two to three hours and stand or walk for three to four hours in an eight hour day. [Tr.13.] He limited the plaintiff to occasionally lifting and carrying less than 10 pounds. [Tr. 14.] He reported significant limitations in repetitive reaching, handling, or fingering or lifting, including moderate limitations in grasping turning and twisting objects with both hands, and marked limitations using fingers and hands for fine manipulations and marked limitations for reaching with the right arm, and minimal limitations for reaching with the left arm. [Tr. 15.] Dr. Matza reported that the condition would

likely increase if plaintiff were placed in a competitive work environment, and would interfere with his ability to keep his neck in a constant position [Id.] He reported that plaintiff's experience of pain, fatigue, or other symptoms would interfere with his attention and concentration [Tr. 16.] He listed no emotional factors contributing to the severity of the symptoms and functional limitations. [Id.] He found that plaintiff would be capable of handling moderate work stress. [Id.]

B. Plaintiff's Testimony

Plaintiff testified at the disability hearing on August 20, 1999. In describing the impairments that prevent him from working, he stated that:

Every-every day when I wake up, okay, it, it, it felt like someone, you know, beat the stuffings out of me with bats, on my, on my spine. Both of my shoulders hurt really, really, really bad. My hands are always partially numb... I am always dropping things. [Tr. 42.]

He testified that he is right-handed, but has been forced to do things such as driving, with his left hand. [Tr. 43-44.] Plaintiff reported feeling "pins and needles" in his hands, and was fired from his job at Alarm Guard in April 1996 in part because he was making mistakes at the computer. [Tr. 44,40.] In February 1999, plaintiff was seen by Dr. Reznik through medical coverage obtained through his wife's employer.

[Tr. 42.] Plaintiff testified that Dr. Reznik took multiple x-rays, and diagnosed plaintiff with "calcified bursitis" of the right shoulder.<sup>5</sup> [Id.] Dr. Reznik informed plaintiff that the condition was "inoperable". [Id.] He testified that Dr. Reznik told him that he could have operated by taking apart the shoulder and cleaning off the bones, but that, "in 2 years it would be back the way it is... it's a complete waste of time...he showed me on the x-rays...how my spine, from the neck down, okay, is loaded with arthritis." [Tr. 42-43.] Dr. Reznik told him that there was nothing he could do for his condition. [Tr. 45]. Plaintiff describes the diagnosis as:

extensive arthritis on my spine. The base of my neck, I have two fused vertebrae, okay, pinched nerves, which caused the numbness and the tingling sensation in my hands, okay, which has caused me to drop things, you know, all, all too often. I have to really concentrate, or my hands will just open up by themselves. [Tr. 46.]

Plaintiff testified that he has lost two inches in height due to fused vertebrae. [Tr. 50.] He reported that Dr. Reznik advised pain medication and muscle relaxers, and that he takes Percocet and Flexeril every day but noted that he monitors it carefully, stating that, "I do it when the pain is so much I

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<sup>5</sup>Bursitis is the inflammation of a bursa. A bursa is a closed sac or envelope containing fluid found in areas subject to friction, e.g. where a tendon passes over a bone.

can't stand it, but I also want to be mentally alert to take care of my boys." [Tr. 50, 43.]

Plaintiff testified that he eats breakfast with his sons and then spends the remainder of the day on the sofa or walking around a bit. [Tr. 47.] He reported that he can grocery shop only if it is a short drive, and that his wife must drive if they travel longer distances, "I tried driving, and it was scary when my, my right arm would just shut, shut down, and just fall off the steering." [Tr. 48.] He noted that he misses working and would be trying to do work if there was any way he could do so. [Tr. 59.]

#### C. Vocational Testimony

Vocational expert Dr. Jeffrey Blank appeared and testified at the administrative hearing. [Tr. 35-60.] Dr. Blank was asked whether an individual of plaintiff's age, education, and past relevant work history, who was limited to sedentary exertional work with restrictions including the need to alternate sitting and standing at will and the inability to reach with the right arm above the shoulder height, would be able to perform his past relevant work or other jobs in the national economy. [Tr. 56-57.] The doctor testified that such an individual would not be able to perform his past relevant

work, but would be able to perform other work of a sedentary, unskilled nature, such as desk clerk or cashier. [Id.] Dr. Blank reported that 800 desk clerk jobs existed in Connecticut, and 50,000 existed nationwide. He reported that 1,200 sedentary cashiering positions existed in Connecticut, and over 50,000 existed nationwide. [Tr. 57.]

The ALJ asked Dr. Blank to assume a second hypothetical in which the individual was capable of light exertional work with the same sit/stand and reaching restrictions. [Tr. 57.] Dr. Blank testified that the individual would not be able to perform past relevant work, but would be able to hold the position of institutional cashier or self-service cashier. [Id.] Dr. Blank reported that at least 500 institutional cashiering jobs exist in Connecticut, and at least 25,000 exist nationwide. He reported that 1,000 self-service cashiering jobs exist locally, and at 40,000 exist nationwide. [Id.]

On cross examination, plaintiff's attorney described the individual in the first hypothetical, and added a severe limitation in the use of the dominant right hand or arm for gross/fine movements. [Tr. 58.] Dr. Blank testified that this individual would not be able to perform the sedentary work as a desk attendant or cashier because of the need to use the



dominant upper extremity. [Tr. 58-59.] Plaintiff's counsel asked Dr. Blank to assume the individual in the second hypothetical, once again adding a severe limitation in the use of the right hand or arm for gross/fine movements. [Id.] Dr. Blank responded that the individual would not be able to perform the work of cashiering. [Id.] Dr. Blank indicated that an individual who is limited to sitting and standing/walking less than two hours per day would be precluded from all work activity. [Tr. 59.]

#### V. DISCUSSION

To receive federal disability benefits, an applicant must be "disabled" within the meaning of the Social Security Act ("the Act"). See 42 U.S.C. § 423(a),(d). An individual is disabled if he or she can establish an "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." Id. § 423(d)(1)(A), 1382c(a)(3). A "physical or mental impairment" must be supported by medically acceptable clinical and laboratory diagnostic techniques. Id. The impairment must be of such severity that the claimant "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." Id. § 423(d)(2)(A).

The Commissioner is required to apply a five-step analysis in evaluating disability claims, as provided by the Act. See 20 C.F.R §§ 404.1520, 416.920. The Commissioner must first determine whether the claimant is engaged in substantial gainful activity. See 20 C.F.R. §§ 404.1510(b), 404.1572(b). If not, the Commissioner next considers whether the claimant has a "severe impairment" which limits his ability to perform basic work activities. See 20 C.F.R. § 404.1520(c). If the claimant suffers such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment listed in Appendix 1 of the regulations (the "Listings"). See 20 C.F.R. § 404.1520(d); Bowen v Yuckert, 482 U.S. 137, 141 (1987); Balsamo, 142 F.3d at 79-80. If the impairment meets or equals one of the impairments in the Listings, the claimant is automatically considered disabled, without considering vocational factors such as age, education, and work experience. See 20 C.F.R. § 404.1520(d); Balsamo, 142 F.3d at 80. If the impairment does not meet or equal one of the listed impairments, the fourth

inquiry is whether, despite the claimant's severe impairment, he or she has the residual functional capacity ("RFC") to perform his or her past work. See 20 C.F.R. 404.1520(e). If the claimant is unable to perform his or her past work, as a final step, the Commissioner must determine whether there is other work that the claimant could perform. See 20 C.F.R. 404.1520(f).

The claimant has the initial burden to establish disability with respect to the first four steps. See 42 U.S.C. §§ 423(d)(5); Rivera v. Schweiker, 717 F.2d 719, 722 (2<sup>nd</sup> Cir 1983). The burden shifts to the Commissioner at step five to show that the claimant has the residual functional capacity to perform substantial gainful activity in the national economy. See Balsamo, 142 F. 3d at 80.

The RFC determination may require that the Commission apply the Medical Vocational Guidelines ("the grid"), which places claimants with severe exertional impairments who can no longer perform their past work into grid categories according to their RFC, age, education and work experience, which then determines the claimant's disability status. See 20 C.F.R. § 404.1520(f). If non-exertional limitations significantly diminish a claimant's ability to perform the full range of work in a particular grid category, testimony of a vocational

expert or other similar evidence with regard to the existence of jobs in the national economy is required. See Bapp v. Bowen, 802 F.2d 601, 606.

A. The ALJ's findings

The ALJ undertook the required five-step analysis and determined that the plaintiff carried his burden at the first four steps. In particular, the ALJ found that (1) plaintiff had not worked since April 15, 1996; (2) plaintiff suffers severe limitations due to obesity and restrictions in the use of his right arm; (3) the impairments did not meet or equal any listed impairments; (4) plaintiff is unable to perform any of his past relevant work. [Tr. 28,33.] The ALJ determined at step five that plaintiff has the residual capacity to perform a limited range of light work.<sup>6</sup> The range was limited because of the plaintiff's "need for a sit/stand option providing the

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<sup>6</sup>The full range of light work generally requires standing and walking intermittently for a total of about six hours of an eight hour work day. Sitting may occur during the remaining time. Lifting requirements for most light jobs can be accomplished by occasional rather than frequent stooping. Many unskilled light jobs are performed primarily in one location, with the ability to stand being more critical than the ability to walk. Light jobs require use of the arms and hands to grasp and to hold and turn objects, and generally they do not require the use of the fingers for fine activities to the extent required by sedentary work. [Tr. 32.]

ability to alternately sit or stand at will and would normally entail standing for 2/3 of time and sitting 1/3 of the time.”

[Tr. 32.] The ALJ concluded that plaintiff’s statements concerning the severity of his impairments were not credible. [Tr. 33.] He found the plaintiff was not disabled and denied disability insurance benefits. [Id.]

B. Plaintiff’s Argument

1. The ALJ and Appeals Council’s assessment of the medical evidence and treating physician opinions

Plaintiff contends that the ALJ committed reversible error by failing to evaluate and weigh the medical opinion of Dr. Alan Reznik, plaintiff’s treating physician. [Pl.’s Mem. at p.11.] Specifically, plaintiff argues that the ALJ neglected to expressly state the weight he attached to Dr. Reznik’s opinion and the reasons given for that weight, in violation of the Social Security Administration’s “treating physician rule”. The “treating physician rule” provides that the medical opinion of a claimant’s treating physician is assigned controlling weight if the opinion is well-supported by medically-acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial medical evidence of record. See 20 C.F.R. §

416.927(d)(2); SSR 96-2p; Shaw v. Chater, 221 F.3d 126, 134 (2d. Cir 2000). The Commissioner must consider the following factors if the treating physician's opinion is not assigned controlling weight:

- (i) the frequency of examination and the length, nature, and extent of the treatment relationship;
- (ii) the evidence in support of the opinion;
- (iii) the opinion's consistency with the record as a whole;
- (iv) whether the opinion is from a specialist.

Clark v. Commissioner of Soc. Sec., 143 F.3d 115.

An adjudicator must give good reasons in the notice of the determination of decision for the weight given to a treating source's medical opinion on the nature and severity of an individual's impairment. See 20 CFR § 404.1527(d)(2), 416.927; SSR 96-2p. If the notice of the determination or decision is a denial, it must contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and reasons for that weight. SSR 96-2p.

The ALJ considered the opinion of the treating physician, Dr. Reznik, who was seen by the plaintiff prior to the proceedings, and treating physician Dr. Raccuglia, the state

agency doctor. The ALJ described the findings of both doctors in detail. [Tr. 30-31.] In discussing the opinion of Dr. Resnik, the ALJ wrote:

Despite the estimate of the severity of the claimant's impairments and the limitations described by Dr. Reznik (Ex. 5F, 7F), there is very little objective evidence to support his findings. The doctor's suggestion that the claimant may have a psychiatric impairment finds no support from any other source, including the claimant. The State Agency gave plaintiff a residual functional capacity for light work (Ex. 6F) and Dr. Raccuglia concluded that his main problem was obesity. He found no objective support for a significant musculoskeletal impairment (Ex. 4F). The x-ray taken in March 1993 had no significant findings (Ex. 2F). After a thorough review of all the medical evidence, the Administrative Law Judge has concluded that the claimant retains the residual functional capacity for a limited range of light work. [Tr. 31.]

Although the ALJ did not state this explicitly, in finding that the plaintiff was able to perform a limited range of light work, the ALJ did not give controlling weight to Dr. Reznik's opinion. Specifically, the ALJ determined that plaintiff would be able to sit or stand for six hours of an eight hour work day, and would be able to use his hands and arms to grasp and to hold and turn objects. [Tr. 32.] This determination is in direct contradiction to Reznik's findings that plaintiff could not sit, stand or walk for more than two hours of the work day, and had severe limitations in the use of arms and hands to grasp and turn objects and for fine

manipulations. [Tr. 157-158.]

The ALJ apparently did not afford controlling weight to Dr. Reznik's opinion because he found it to be unsupported by medical evidence, and contradicted by other record evidence. The SSR regulations, provide, however, that even if controlling weight is not given to a treating physician's opinion, some weight may still be attached to that opinion, and the ALJ must still designate and explain the weight that is actually given to the opinion. From the ALJ's limited discussion, it is not clear how he weighted the findings of Dr. Reznik in making his final determination that plaintiff is not disabled. The court will address this further in the context of plaintiff's argument concerning Dr. Matza's opinion.

Secondly, the plaintiff contends that the Commissioner erred in failing to consider the opinion of treating physician Dr. Matza as "new and material evidence" relating to plaintiff's disability. [Pl.'s Mem. at p.13.] The plaintiff also argues that the Commissioner should have expressly weighed the opinion of Dr. Matza as a treating physician.

The ALJ did not consider the opinion of Dr. Matza because plaintiff was not seen by him until after the ALJ issued his October 19, 1999 decision. Dr. Matza's notes were received by



the Appeals Council on November 23, 2001. In a letter dated November 23, 2001, the Appeals Council denied plaintiff's request for review. The Appeals Council stated only that:

[t]he Appeals Council has also considered the additional evidence identified on the attached order of the Appeals Council, but concluded that this evidence does not provide a basis for changing the Administrative Law Judge's decision. [Tr. 5.]

The attached order refers to the undated narrative report from Dr. Matza.

Dr. Matza diagnosed plaintiff with bilateral carpal tunnel syndrome "based on EMG nerve studies". [Tr. 161.] He examined x-rays of plaintiff's neck, back, and right shoulder, and diagnosed him with right shoulder calcified tendinitis, mild to moderate bilateral degenerative joint disease of the knees, severe degeneration of three segments of the back with lumbar spondylosis, and morbid obesity. [Id.] Dr. Matza also completed a multiple impairments questionnaire, dated July 18, 2001. [Tr. 11-18.] He projected that plaintiff was able to sit for two to three hours and stand or walk for three to four hours in an eight hour day. [Tr. 13.] He limited the plaintiff to occasionally lifting and carrying less than 10 pounds. [Tr. 14.] He reported significant limitations in repetitive reaching, handling, or fingering or lifting, including moderate limitations in grasping turning and twisting objects

with both hands. [Tr. 15.] He found marked limitations using fingers and hands for fine manipulations and marked limitations for reaching with the right arm, and minimal limitations for reaching with the left arm. [Id.]

Defendants concede that new evidence should have been considered by the Appeals Council. [Def.'s Mem. at p.8.] They contend, however, that in order for new evidence to be considered, plaintiffs must also show good cause for not presenting the evidence earlier in accord with Clark v Commissioner of Social Security, 143 F.3d 115, n.1 (2<sup>nd</sup> Cir. 1998)("in deciding whether to remand a case to the agency, the court may consider new evidence that is material, provided that the claimant demonstrates good cause for failing to present the evidence earlier.") In the alternative, the defendant argues that the Appeals Council did consider the additional evidence, and determined that it did not warrant remand for reconsideration by the ALJ. [Def's Mem. at p.9.]

Dr. Matza's diagnosis is based upon x-rays of the neck, back, right shoulder, and knees, and upon an "EMG nerve" study. This evidence is not duplicative of the medical evidence already in the record. Dr. Matza's findings concerning carpal tunnel syndrome, and the extent of

plaintiff's problems with his back, neck, and knees are new information that may support his persistent complaints concerning the extent of his pain and physical limitations. The plaintiff was not seen by Dr. Matza until August 2001, and the ALJ's decision was issued in October 19, 1999. Therefore, plaintiff could not have submitted the evidence earlier. The court finds that the new evidence is material, and the plaintiff has established good cause for not presenting the evidence at an earlier date.

Based upon a careful review of the record as a whole, the court concludes that the case should be remanded to the ALJ. First, in his initial opinion, the ALJ did not expressly state the weight he attached to Dr. Resnik's opinion and thus failed to comply with the treating physician rule. Secondly, notwithstanding the Appeals Council's claim that the new evidence was considered, the record suggests that Dr. Matza's opinion was not given careful consideration. It appears that the Appeals Council letter to plaintiff denying review is date-stamped for the same day that Dr. Matza's report was actually received by the Appeals Council. [Tr. 5-7.] The letter appears to be a simple form letter, and has no information specific to plaintiff's case, nor does it give specific reasons for denying reconsideration. [Tr. 5,6.]

Moreover, the x-rays and nerve study may offer additional medical support for Dr. Reznik's findings, which were originally discounted by the ALJ in his ultimate determination that plaintiff was not disabled. Additionally, Dr. Matza's opinion is largely consistent with Dr. Resnik's opinion, which may also provide grounds for the ALJ to attach more weight to the latter's opinion. A fair disposition of plaintiff's case mandates that the SSA weigh and evaluate all of the medical evidence of record, which has yet to occur in this case.

Accordingly, the court remands the case to the ALJ to consider and weigh the opinion of treating physician Dr. Matza, and to reconsider and weigh the opinion of Dr. Resnik. Specifically, the ALJ must consider and expressly weigh Dr. Matza's diagnosis that plaintiff suffers from carpal tunnel syndrome and degenerative joint disease in the neck, severe degenerative spondylolysis, degenerative joint disease in three segments of the back, and mild to moderate degeneration of both knees. The ALJ must consider Dr. Matza's recommendations about the plaintiff's residual functional capacity, particularly the ability to sit for two to three hours and stand for three to four hours during an eight hour work day, the moderate limitations in the ability to grasp, twist, and turn objects, and the marked limitations in the

ability to use the hands and fingers for fine manipulations. The ALJ must also reconsider the opinion of Dr. Reznik in light of the new medical evidence. The ALJ should offer a detailed account of the weight assigned to the opinions of both Dr. Reznik and Dr. Matza and state clearly the reasons supporting his decision.

2. The ALJ's assessment of residual functional capacity

Plaintiff argues that the ALJ failed to make detailed findings of fact regarding his assessment of plaintiff's residual functional capacity. [Pl.'s Mem. at p.14.] Specifically, plaintiff argues that the ALJ did not comprehensively outline his limitations on a function-by-function basis as required by SSR 96-8p. Further, plaintiff argues, he did not provide any medical evidence to support the finding of a "'sit/stand' option...[t]hat ...provides the ability to alternatively sit or stand at will and would normally entail standing for 2/3 of the time and sitting for 1/3 of the time." [Tr. 32.] Plaintiff argues that the ALJ's decision lacks any specific findings regarding Mr. Schupp's other physical limitations such as lifting, reaching, walking, and fine manipulations. [Pl.'s Mem. at p.16.]

The RFC assessment considers only functional limitations

and restrictions that result from an individual's medically determinable impairments or combination of impairments, including the impact of any related symptoms. SSR 96-8p. The RFC must first identify the individual's functional limitations or restrictions and assess his or her work-related abilities on a function by function basis. Id. The RFC assessment must be based on all of the relevant evidence in the case record, such as: medical history; medical signs and laboratory findings; the effects of treatment; reports of daily activities; lay evidence; recorded observations; medical source statements; effects of symptoms, including pain, that are reasonably attributed to a medically determinable impairment; evidence from attempts to work. Id.

In assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis, and must describe the maximum amount of each work-related activity the individual can perform based on the evidence in the case record. Id. The adjudicator must also explain how any material inconsistencies or ambiguities were resolved. SSR 96-8p. At step 5 of the evaluation process, the RCF must be expressed in relation to exertional categories (e.g. sedentary, light), and in order for an individual to do a full

range of work at a given exertional and nonexertional level, the individual must be able to perform substantially all of the exertional and nonexertional functions required in work at that level. Therefore, it is necessary to assess the individual's capacity to perform each of these functions. Id.

In light of the court's decision to remand the case to the ALJ, the court need not rule on whether the ALJ's first opinion met the above standard described. However, the court instructs the ALJ to address plaintiff's RFC in careful compliance with SSR 96-8p, specifically with reference to the plaintiff's ability to sit, stand, and walk for a specified number of hours during the work day, and with reference to which specific functions (i.e. grasping or turning objects, using the fingers for fine manipulations) the plaintiff can perform with his hands, arms, and fingers.

3. The ALJ's assessment of the ability of plaintiff to perform other work

Plaintiff argues that the Commissioner failed to carry his burden of establishing that the plaintiff can perform other work. [Pl.'s Mem at p. 17.] Plaintiff argues that the ALJ should have expressly listed or outlined jobs that Mr.

Schupp can physically perform. Plaintiff asserts that the ALJ's reliance on the testimony of Dr. Blank was in error because the hypothetical relied upon by the ALJ was flawed. [Tr. 18.] Specifically, the individual described to him was not fully representative of Mr. Schupp's limitations because neither of the individuals described by the ALJ were impaired by limitations to the dominant hand and fingers, despite the fact the Dr. Reznik opined that Mr. Schupp was severely limited in grasping, turning, and twisting objects, and in fingering and fine manipulations. [Pl.'s Mem. at 20; Tr. 158.]

In light of the above ruling, the court orders that, upon remand, the ALJ consider the vocational expert's responses to hypotheticals that accurately reflect the full range of plaintiff's limitations once Dr. Reznik's and Dr. Matza's findings have been considered.<sup>7</sup>

#### 4. The ALJ's credibility determination

Finally, plaintiff argues that the ALJ failed to adequately articulate the reason for his finding that

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<sup>7</sup> Because the case is remanded for rehearing, the ALJ is not necessarily bound to the answers given by the vocational expert to the second set of hypotheticals posed at the hearing, as suggested in plaintiff's memorandum.



plaintiff's statements concerning his impairments and their impact on his ability to work are not credible. [Pl.'s Mem. at 20.]

In making this credibility determination, the SSA takes into account the following factors: the entire case record, including the objective medical evidence; the individual's own statements about symptoms; statements and other information provided by treating or examining physicians or psychologists and how they affect the individual and any other relevant evidence in the case record. SSR 96-7p. In addition to medical evidence, the ALJ must also consider: 1) the individual's daily activities; 2) the location, duration frequency, and intensity of pain; 3) factors that aggravate symptoms; 4) medications taken to alleviate pain; 5) treatment, other than medication, to relieve pain 6) any measures other than treatment used to relieve pain 7) any other factors concerning the individual's functional limitations and restrictions due to pain. Id. An individual's statements about the intensity and persistence of pain or other symptoms or about the effect the symptoms have on his or her ability to work may not be disregarded solely because they are not substantiated by objective medical evidence. Id. The determination or decision must contain specific reasons for the finding on credibility,

supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight. Id.

The ALJ determined that plaintiff was not credible based on the following: that his wife works and he stays home with the children; that he has his own car and can drive; that he has never been hospitalized or had surgery; that he is able to do some grocery shopping, and that the 9 year old cooks because he cannot. [Tr. 33.] The ALJ did not analyze or explain how these factors suggest that plaintiff's statements concerning the severity of his impairments are not credible. The ALJ did not state what weight he assigned to the plaintiff's statements. Thus, the reviewing court cannot assess whether this determination was supported by substantial evidence. Upon remand, the ALJ must provide a detailed credibility determination based upon SSR 96-7p, taking into consideration the additional medical evidence and plaintiff's work history.

#### IV. Conclusion

For the reasons stated above, defendant's Motion for Order Affirming the Decision of the Commissioner [**doc. # 16**] is **DENIED**. Plaintiff's Motion for Judgment on the Pleadings [**doc. # 13**] is **GRANTED IN PART**, to the extent that it seeks remand to the Commissioner, and **DENIED IN PART**, to the extent that it seeks an immediate award of benefits. The decision of the Commissioner is reversed and the case is remanded to the ALJ for further proceedings consistent with this ruling.

Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; Small v. Secretary of H.H.S., 892 F.2d 15 (2d Cir. 1989)(per curiam); F.D.I.C. v. Hillcrest Assoc., 66 F.3d 566, 569 (2d Cir. 1995).

SO ORDERED this 12<sup>th</sup> day of March 2004, at Bridgeport, Connecticut.

\_\_\_\_\_/s/\_\_\_\_\_  
HOLLY B. FITZSIMMONS  
UNITED STATES MAGISTRATE

JUDGE