UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEAN RUGGIERO, substituted for John Ruggiero, Decedent, Wage Earner,

Plaintiff,

v. No. 3:02CV1347(SRU)(WIG)

JO ANNE B. BARNHART, Commissioner, Social Security Administration,

Defendant.

RECOMMENDED RULING ON PENDING MOTIONS

Plaintiff, Jean Ruggiero, has brought this action under § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), seeking review of a final decision of the Commissioner of the Social Security Administration denying disability insurance benefits to her deceased husband, John Ruggiero. Plaintiff claims that the decedent was disabled due to severe degenerative arthritis of the right knee from December 13, 1999, through the date of his death, March 5, 2002. She has now moved for summary judgment **[Doc. # 13]** seeking an order reversing the decision of the Commissioner. The Commissioner has answered, filed the administrative record, and has moved for an order affirming the decision of the Commissioner **[Doc. # 16]**. For the reasons set forth below, the Undersigned recommends that the Commissioner's decision should be affirmed.

I. "Disability" under the Social Security Act

In order to establish an entitlement to disability benefits under the Social Security Act, a claimant must prove that he is "disabled" within the meaning of the Act. A claimant may be considered disabled only if he cannot perform any substantial gainful work because of a medical or mental condition which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); Shaw v. Chater, 221 F.3d 126, 131 (2d Cir. 2000). The impairment must be of such severity that the claimant is not only unable to do his previous work, but, additionally, considering his age, education, and work experience, he cannot engage in any other kind of substantial gainful employment, which exists in the national economy, regardless of whether such work exists in the immediate area where he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. 42 U.S.C. § 423(d)(2)(A); see Heckler v. Campbell, 461 U.S. 458, 460 (1983). "Work which exists in the national economy" means work which exists in significant numbers either in the region where he lives or in several regions in the country. 42 U.S.C. § 423(d)(2)(A).

The Social Security Administration has promulgated regulations that set forth a sequential, five-step process for evaluating disability claims. See 20 C.F.R. § 404.1520. First,

the Administrative Law Judge ("ALJ") must determine whether the claimant is currently working. 20 C.F.R. § 404.1520(b). If the claimant is currently employed, the claim is disallowed. Id. If the claimant is not working, as a second step, the ALJ must make a finding as to the existence of a severe mental or physical impairment that significantly limits the ability to do basic work activities; if none exists, the claim is denied. 20 C.F.R. § 404.1520(c). Once the claimant is found to have a severe impairment, the third step is to compare the claimant's impairment with those in Appendix 1 of the regulations (the "listings"). 20 C.F.R. § 404.1520(d); Bowen v. Yuckert, 482 U.S. 137, 141 (1987). If the claimant's impairment meets or equals one of the impairments in the listings, the claimant is presumed to be disabled. 20 C.F.R. § 404.1520(d); see Schaal v. Apfel, 134 F.3d 496, 501 (2d Cir. 1998); Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982). If the claimant's impairment does not meet or equal one of the listed impairments, as a fourth step, he will have to show that he does not possess the "residual functional capacity" ("RFC") to perform his past relevant work. 20 C.F.R. § 404.1520(e). If the claimant cannot perform his former work, the burden then shifts to the Commissioner to show that the claimant is prevented from doing any other work. Butts v. Barnhart, 388 F.3d 377, 383 (2d Cir. 2004). A claimant is entitled to receive disability benefits only if he cannot perform

any alternate gainful employment. 20 C.F.R. § 404.1520(f); see Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996).

The initial burden of establishing disability is on the claimant. 42 U.S.C. § 423(d)(5); see Green-Younger v. Barnhart, 335 F.3d 99, 106 (2d Cir. 2003). Once the claimant demonstrates that he is incapable of performing his past work, the burden shifts to the Commissioner to show that the claimant has the residual functional capacity[1] to perform other substantial gainful activity in the national economy. See Curry v. Apfel, 209 F.3d 117, 123 (2d Cir. 2000); Bapp v. Bowen, 802 F.2d 601, 604 (2d Cir. 1986); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980).

II. Background

Mr. Ruggiero was born on February 15, 1943. (R. 80.)[2] He was 56 years old as of the date of his alleged onset of

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[1] "Residual functional capacity" refers to what a claimant can still do in a work setting despite his physical and mental limitations caused by his impairments, including related symptoms such as pain. In assessing an individual's RFC, the ALJ is to consider his symptoms (such as pain), signs and laboratory findings together with the other evidence. See 20 C.F.R. § 404.1545. "Ordinarily, RFC is the individual's maximum remaining ability to do sustained work activities in an ordinary work setting on a regular and continuous basis, and the RFC assessment must include a discussion of the individual's abilities on that basis. A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule." SSR 96-8p; see Melville v. Apfel, 198 F.3d 45, 52 (2d Cir. 1999).

[2] "(R.___)" refers to the pages of the Administrative Record.

disability. He had a high school education. (R. 47, 51.) Other than working as a custodian for the City of Waterbury for approximately one to two years around 1989, his only past relevant work was as a production toolmaker, in which capacity he had worked since 1982. (R. 47, 50, 96, 104.) Mr. Ruggiero described his work as a toolmaker as maintaining production on eyelets machines. (R. 96, 105.) It required him to use machines, tools or equipment; it required the use of technical knowledge or skills; and it required him to fill out production reports. (R. 96, 105.) This job involved walking two hours per day (R. 96, 105), standiing seven to nine hours per day (R. 96, 105), sitting one to one and one-half hours per day (R. 96, 105), and bending occasionally (R. 105). The heaviest weight he was required to lift was twenty pounds, which he had to carry three feet from the machine to his cart. (R. 105.) He frequently lifted or carried weights up to ten pounds. (R. 96, 105.)

As a custodian, his job duties involved vacuuming, washing and waxing floors, and emptying the trash. He had to walk four hours per day, stand four hours per day, sit one hour per day, and bend frequently. (R. 106.) The heaviest weight that he had to lift was ten pounds, and he frequently lifted up to ten pounds in weight. (R. 106.)

The only medical records produced by Mr. Ruggiero were from Waterbury Hospital and Dr. Richard Matza, his treating

physician.[3]

On June 19, 1991, Mr. Ruggiero underwent a right total knee replacement at Waterbury Hospital. Dr. Matza performed the operation and later noted that the patient had done "exceptionally well, no pain, no problems at all" until December 1999. (R. 137-38, 252.) On December 13, 1999, Mr. Ruggiero was taken by ambulance to Waterbury Hospital[4] where he gave a history of having choked on coffee that he was drinking and, after a severe coughing bout, having collapsed to the floor, losing consciousness for a very brief period of time. When he fell, he struck his right knee, which caused pain and swelling. (R. 165, 172, 252.) He was treated and discharged from the hospital the same day. (R. 166.)

Two days later, on December 15, 1999, Mr. Ruggiero was seen by Dr. Matza, whose impression was "[c]ontusion right knee, with a question of a crack in the tibial tray of a total knee replacement." (R. 252.) Mr. Ruggiero remained out of work and, on January 20, 2000, returned to Waterbury Hospital for a surgical revision of the right total knee arthroplasty by Dr. Matza. (R. 175, 189.) His post-operative course was relatively

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[3] Mr. Rugggiero indicated on the Disability Report that he completed that no one else had medical records or information about his condition. (R. 99.)

[4] Mr. Ruggiero had one interim admission in 1996 for day surgery on his eye. This is unrelated to his claimed disability.

unremarkable. At the time of discharge, he tolerated up to 50 degrees of flexion, he had progressed well with physical therapy, and was ambulating with a walker with minimal assistance by one person. (R. 175.)

Dr. Matza saw him on January 31, 2000, and noted that he was doing "exceptionally well" and had "very little discomfort." (R. 254.) He had 85 degrees of flexion, full extension, with no instability. NNV[5] function was present. (R. 254.) The plan was for continued physical therapy. (R. 254.) On February 28, 2000, Dr. Matza again saw Mr. Ruggiero, whom he described as "doing satisfactorily" with very little discomfort. (R. 257.) He had 95 degrees of flexion and full extension. Dr. Matza recommended range of motion and strengthening exercises. (R. 257.) On April 10, 2000, Dr. Matza again saw Mr. Ruggiero two and one-half months post-operatively. He reported that Mr. Ruggiero was "doing fine." (R. 258.) "He has some discomfort and swelling posteriorly. He has 110 degrees of flexion, full extension. He has a well healed wound. There is no instability, with NNV function." (R. 258.) His impression was that Mr. Ruggiero had made "excellent progress" following his surgery "with some swelling and stiffness." (R. 258.) He recommended that he continue with physical therapy, exercise, and to follow-up in a

[5] It appears from the context in which this abbreviation is used throughout Dr. Matza's medical records that "NNV" refers to "normal neurovascular."

month, at which time he probably could return to work. (R. 258.)

Following that visit, Dr. Matza wrote a letter "To Whom It May Concern," stating that Mr. Ruggiero was "still recovering. He has limited ability to bend, kneel, climb and walk, which is permanent." (R. 260.) He also responded to a questionnaire from the Social Security Administration, stating that Mr. Ruggiero had 105 degrees of flexion in his right knee, his motor/sensorian status was "intact," his DTR's/pulses were "intact," that an ambulation device was not medically necessary, and that Mr. Ruggiero was able to bear weight without the need for an assistive device. His treatment response was described as "good." (R. 259.)

Dr. Matza's records dated May 15, 2000, indicate that Mr. Ruggiero was "doing quite well." He showed 115 degrees of flexion, full extension, with no instability. (R. 260.) Dr. Matza noted soreness over the medial aspect of the knee, without any swelling in that area. (R. 260.) His impression was that Mr. Ruggiero had made "excellent progress" and should continue on strengthening exercises. (R. 260.) The next office note from Dr. Matza is dated July 12, 2000. He states that Mr. Ruggiero was still having some pain over the medial collateral ligament ("MCL") of the right knee, with some posterior swelling in his knee. (R. 279.) On examination, Mr. Ruggiero exhibited tenderness over the MCL of the right knee with no instability.

There was excellent range of motion. He had NNV function with minimal swelling posteriorly. (R. 279.) His impression was that Mr. Ruggiero had made satisfactory progress and he recommended conservative treatment with Vioxx and ice. (R. 279.) The following month, Dr. Matza noted that Mr. Ruggiero had very little pain in his knee and that the medial collateral ligament pain had "all but dissipated." (R. 280.) On examination, Mr. Ruggiero exhibited minimal tenderness over the medial aspect of his knee with excellent range of motion. (R. 280.) The doctor's impression was that he had an "excellent result" and he recommended strengthening exercises and ice. (R. 280.) On December 20, 2000, Mr. Ruggiero was again described by Dr. Matza as doing "satisfactorily" with some soreness in his knee, "but not severe." He had swelling on standing and difficulty in standing in one place. (R. 281.) He described his progress as "excellent" and recommended strengthening exercises and reassessment in one year. (R. 281.)

On April 20, 2000, Mr. Ruggiero applied for Social Security disability benefits. (R. 80.) A vocational analysis performed by a State medical consultant, Dr. Khan, indicated that Mr. Ruggiero had the residual functional capacity to perform medium work with occasional postural limitations due to his knee condition and, thus, was able to return to his past relevant work as a toolmaker. (R. 119, 262.) His claim was denied on May 27,

2000. (R. 66.)

Mr. Ruggiero then sought reconsideration, stating that any standing or sitting for any period of time caused his knee to throb and swell. (R. 126.) Again the vocational analysis performed by the State medical consultant, Dr. Waldman, indicated that he could perform work at the medium level of exertion and could return to his customary occupation. (R. 128.) The functional capacity assessment dated July 12, 2000, showed no changes from the previous assessment, and indicated that Mr. Ruggiero could occasionally lift 50 pounds, frequently lift 25 pounds, could stand or walk about six hours and could sit about six hours in an eight-hour workday, and that his ability to push and/or pull was unlimited. (R. 271.) He had certain postural limitations, including no climbing, and occasional kneeling and stooping. (R. 272.) He had no manipulative, visual, communicative, or environmental limitations. (R. 273, 274.) On July 20, 2000, his claim was again denied at the reconsideration level. (R. 71.)

Mr. Ruggiero then requested a hearing. (R. 75, 129.) On March 22, 2001, Mr. Ruggiero, represented by counsel, and a vocational expert testified at the administrative hearing before ALJ Bruce H. Zwecker. (R. 42-63.)

Mr. Ruggiero testified that his last day of work had been December 13, 1999, and that he had not worked since then. (R.

47.) He had been working as a production toolmaker for the last nine years. (R. 47.)

He testified that he could not stand or sit for any length of time. (R. 52.) He had been at the hearing for two and one-half hours and stated that his leg was beginning to swell and that he could feel pain. (R. 52.) "I can't go any length of time, sitting or standing." (R. 52.) If he were to sit for five hours, something he never has done, he would have to ice his leg and would end up sitting on the couch or in bed the next day. (R. 52.) It would be impossible for him to sit any longer than five hours. (R. 52.) He could not sit for five days a week. (R. 53.) As for his ability to walk, in the past, he walked a mile a day with his wife, but at the time of the hearing, if he walked "[m]aybe half a mile, a quarter of a mile," he would feel excruciating pain. (R. 53.) If he went grocery shopping with his wife, oftentimes he would have to leave the store while she finished shopping. (R. 53.) He could go up and down stairs, but going down required him to take one step at a time. (R. 53.)

Mr. Ruggiero testified that he did not feel he could do his former job as a custodian because it required him to climb stairs and do a lot of walking. (R. 54.)

He described his daily routine as getting up at 9:00 a.m., making himself a cup of coffee, showering, and then sitting on the couch watching TV. (R. 54.) In terms of housework, he did

vacuuming, but that was about it. He did not cook because he did not know how to. (R. 55.) He stayed home alone while his wife worked. (R. 54.) He had no hobbies. He used to play golf but could no longer play. (R. 55.) He did go to church on Sunday, but could not kneel. (R. 55.) If he sat for long periods of time without his leg being elevated, the pain would increase and he would get a lump behind his kneecap from fluid build-up. (R. 56.) He testified that he could sit for two and one-half to three hours before he would have to elevate his leg. (R. 56.) He could stand in one place for about one-half hour. (R. 56.) He testified that he did not take any medications for his leg. (R. 57.)

James S. Cohen, Ph.D., a vocational expert, testified that although toolmaking was generally considered a medium duty position, Mr. Ruggiero had described his past work as a toolmaker as skilled, light duty; he described his work as a custodian as unskilled, light duty. (R. 59.) Dr. Cohen testified that toolmaking typically required "special ability" skills - "form, perception, motor coordination, . . . finger dexterity, eye, hand, foot, in some circumstances, coordination or skills and manual dexterity." (R. 59.) He then responded to a hypothetical question posed by the ALJ, which was premised on the functional capacity assessments performed by the state medical consultants.

> Q. If we were to assume an individual could occasionally lift and carry objects weighing

> up to 50 pounds and could frequently lift and carry objects weighing up to 25 pounds and could sit for six hours a day and could stand and walk for six hours a day but was unable to climb ladders, ropes and scaffolds, could occasionally climb ramps and stairs and could occasionally balance, stoop, kneel, crouch and crawl, first, could an individual with these limitations and capacities perform either of the claimant's past jobs?
>
> A. Yes.

(R. 59-60.) However, if he could only stand and walk for two hours a day and had to be able to alternate sitting and standing at will, Dr. Cohen testified that he could not perform either of his past relevant jobs. (R. 60.) And, if the individual were of advanced age with a high school education, he could perform unskilled work, which for the most part did not require transferrable skills, such as being an assembler, bench worker, or a dispatcher. (R. 60, 61.) Additionally, with some training, he could perform jobs such as bill collector. (R. 62.)

Following the hearing, on April 27, 2001, the ALJ rendered his decision denying Mr. Ruggeiro disability benefits. (R. 16.) The ALJ undertook the prescribed five-step analysis and found that, although Mr. Ruggiero satisfied the first three steps, he failed to meet the requirements of "disabled" at the fourth step. The ALJ found that he retained the residual functional capacity to perform the requirements of his past relevant work or other work existing in significant numbers in the national economy. In making this assessment, the ALJ considered the claimant's

symptoms, including pain, and the extent to which these symptoms could be reconciled with the objective medical evidence, as well as any medical opinions about the nature and severity of the impairment and resulting limitations. (R. 18, citing 20 C.F.R. §§ 404.1527, 404.1529, Soc. Sec. Rulings 96-2p, 96-6p, 96-7p.) The ALJ found that the claimant was not fully credible in his description of the limitations imposed by his impairment, considering the lack of objective medical findings in support of his allegations and his lack of medication usage and receipt of a disability pension. Instead, he gave controlling weight to the functional capacity assessments performed by the two State Agency's medical consultants, which he found to be well-supported by the medical records. (R. 19.) Although they did not examine Mr. Ruggiero, they provided specific reasons for their opinions concerning the claimant's residual functional capacity, which were based on the medical records, including the records of claimant's treating physician. (R. 19.) Based upon his residual functional capacity and the testimony of the vocational expert, whose opinion the ALJ found persuasive, the ALJ held that Mr. Ruggiero was able to perform the type of work that he had performed in the past both as a toolmaker and custodian. (R. 19.) Accordingly, it was not necessary to reach the fifth step in the sequential evaluation process, and the ALJ found that Mr. Ruggiero was not disabled, as defined in the Social Security Act,

at any time through the date of his decision. (R. 19.)

On June 14, 2001, Mr. Ruggiero requested review of the hearing decision. (R. 9.) Subsequently, his attorney forwarded to the Appeals Council a letter from Dr. Matza dated July 16, 2001, addressed to Attorney Avitabile, stating:

> This patient has been followed along by me for revision of the total knee replacement which is still quite painful and limits his activity to a great extent.
>
> He has a 45% (FORTY FIVE PERCENT) permanent partial disability of the right knee. He is clearly unable to work at this point in time and at any time in the future with reasonable medical probability.

(R. 10, 285.) This letter was made a part of the record, as well as a February 19, 2002 letter from Attorney Daddario, who was representing Mr. Ruggiero in connection with his appeal. (R. 7, 282-85.) On June 7, 2002, the Appeals Council issued its decision, concluding that there was no basis for granting the request for review. (R. 5.) This decision then became the final decision of the Commissioner.

III. Discussion

A. Standard of Review

Judicial review of the Commissioner's final decision denying social security benefits is limited. Yancey v. Apfel, 145 F.3d 106, 111 (2d Cir. 1998). It is not the Court's function to determine de novo whether the claimant was disabled. Schaal, 134 F.3d at 501. Rather, a district court must review the record to

determine first whether the correct legal standard was applied and then whether the record contains "substantial evidence" to support the decision of the Commissioner. 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."); see Bubnis v. Apfel, 150 F.3d 177, 181 (2d Cir. 1998); Balsamo v. Chater, 142 F.3d 75, 79 (2d Cir. 1998).

Substantial evidence is "more than a mere scintilla." Richardson v. Perales, 402 U.S. 389, 401 (1971) (internal citations and quotation marks omitted). It "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id.

Thus, the role of this Court is not to decide the facts anew, nor to reweigh the facts, nor to substitute its judgment for that of the ALJ, Appeals Council, or Commissioner. Rather, the decision of the Commissioner must be affirmed if it is based upon substantial evidence, even if the evidence would also support a decision for the plaintiff. Dobson v. Chater, 927 F. Supp. 1265, 1270 (D. Neb. 1996).

Plaintiff urges this Court to reverse the finding of the Commissioner on the ground that the ALJ failed to base his decision on substantial evidence and failed in his duty to develop the record. More specifically, she asserts that the ALJ failed to give the opinion of Dr. Matza, Mr. Ruggiero's treating

physician, controlling weight. Additionally, in light of the conflict between the claimant's testimony at the hearing and the opinions of the State Agency medical consultants, who never examined or treated Mr. Ruggiero, she argues that the ALJ neglected his duty to develop the record by either contacting Dr. Matza concerning Mr. Ruggiero's permanent limitations or requesting a consultative examination. She also argues that the Appeals Council erred in failing to remand the decision to the ALJ for further review and clarification in light of the substantial new evidence presented.

The Commissioner, on the other hand, asserts that the decision was supported by substantial evidence and urges this Court to affirm the decision.

B. Whether the Decision of the Commissioner Was Supported by Substantial Evidence

In finding that Mr. Ruggiero retained the residual functional capacity to perform his past relevant work, and thus was not "disabled" as that term is defined by the Social Security Act, the ALJ took into consideration the medical records of Dr. Matza, the Waterbury Hospital records, the claimant's testimony at the hearing, the medical opinions of the State Agency Medical Consultants, Dr. Khan and Dr. Waldman, and the testimony of the impartial vocational expert, Dr. Cohan.

As discussed above, the records of Dr. Matza, Mr. Ruggiero's only treating physician, indicate that he made excellent progress

following the revision of his total knee replacement. Two and one-half months after the surgery, Dr. Matza reported that Mr. Ruggiero was doing fine and that he had no instability, he had full extension and 110 degrees of flexion. The following month, Mr. Ruggiero showed even further improvement as his flexion improved to 115 degrees. There was soreness, but no swelling. Three months later, Dr. Matza reported that Mr. Ruggiero had very little pain, minimal tenderness, and excellent range of motion. Dr. Matza concluded that Mr. Ruggiero had achieved an "excellent result" from the surgery. And, in his last progress note in December, 2000, although Dr. Matza noted some soreness in the knee, swelling on standing and difficulty standing in one place, he described Mr. Ruggiero's progress as "excellent" and he recommended strengthening exercises and a reassessment in one year. The only evidence in the medical records before the ALJ that Mr. Ruggiero's limitations were more significant was the April 12, 2000 letter from Dr. Matza addressed "To Whom It May Concern," stating that Mr. Ruggiero had "limited ability to bend, kneel, climb and walk, which is permanent." (R. 260.) However, the limitations expressed in this letter were not consistent with Dr. Matza's office notes dated April 10, 2000, in which he states that Mr. Ruggiero will probably be able to return to work in one month (R. 258), as well as his report to the Social Security Administration following that same visit, in which he stated that

Mr. Ruggiero did not require an ambulation device and was able to bear weight without an assistive device. (R. 259.) And, as noted above, subsequent reports indicated that the pain had "all but dissipated," range of motion was "excellent," "no instability," an "excellent result" with no further medical visits for a year. (R. 280.)[6]

Although Mr. Ruggiero testified at the hearing that his knee became painful after he sat for more than two and one-half to three hours or stood in one place for more than one-half hour, he testified that he took no pain medication whatsoever. He stated that he could perform household chores such as vacuuming. He attended church, although he could not kneel. He could go up and down stairs, although he had to take the stairs one at a time going down. He could go grocery shopping with his wife, although often he would have to go to the car before they were finished. He could walk, but would experience "excruciating pain" after a quarter to half a mile. The ALJ considered Mr. Ruggiero's testimony concerning his limitations, which he found "not fully credible" (R. 18), a finding that plaintiff has not challenged on appeal.

Additionally, the State Agency Medical Consultants, who

[6] Dr. Matza's July 16, 2001, letter was not before the ALJ and, as discussed below, the Court finds no error in the Appeals Council's decision not to remand the case to the ALJ in light of this letter.

performed RFC assessments of the claimant in May and then July 2000, were entirely consistent in their conclusions as to his residual functional capabilities.[7] Their opinions are considered "expert opinions" under SSR 96-6p,[8] and were afforded "controlling weight" by the ALJ, who found that their opinions were based on the evidence in the record, including treating source opinion and the claimant's allegations about his symptoms and limitations. (R. 19.)

The ALJ also found persuasive the testimony of the impartial vocational expert, Dr. Cohen, who testified that based upon Mr. Ruggiero's own description of his work as a toolmaker and custodian, these jobs would be classified as light duty. In

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[7] Like the ALJ, Dr. Waldman concluded that the claimant's statements of limitation were only "partially credible. The objective evidence does not support his statements. He may have some residual limitations, but not to the degree alleged." (R. 275.)

[8] Social Security Ruling 96-6p provides in relevant part:

> 1. Findings of fact made by State agency medical . . . consultants and other program physicians . . . regarding the nature and severity of an individual's impairment(s) must be treated as expert opinion evidence of nonexamining sources at the administrative law judge and Appeals Council levels of administrative review.
>
> 2. Administrative law judges and the Appeals Council may not ignore these opinions and must explain the weight given to these opinions in their decisions.

(Emphasis added).

response to a hypothetical question posed by the ALJ based upon functional capacities taken from the RFC assessments performed in May and July 2000, Dr. Cohen stated that Mr. Ruggiero should be able to perform his past relevant work as a toolmaker and custodian.

After a thorough review of the record in this case, the Court finds there is substantial evidence to support the finding of the ALJ that Mr. Ruggiero retained the residual functional capacity to perform his past work as a toolmaker and custodian and, thus, was not disabled.

C. Whether the ALJ Afforded Proper Weight to the Opinion of the Decedent's Treating Physician

Plaintiff, however, invokes what is commonly referred to as the "treating physician rule" in arguing that the ALJ and Appeals Council failed to give controlling weight to the opinion of Dr. Matza that Mr. Ruggiero was unable to work and would not be able to work in the future.

The regulations promulgated by the Social Security Administration provide that a treating physician's opinion on the issues of the nature and severity of a claimant's impairments will be given controlling weight if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.927(d)(2); see Green-Younger, 335 F.3d at 106; Shaw, 221 F.3d at 134-35. However,

"[a] statement by a medical source that [a claimant is] 'disabled' or 'unable to work' does not mean that [the Commissioner] will determine that [the claimant is] disabled." 20 C.F.R. § 404.1527(e); see Shaw, 221 F.3d at 134. The regulations specifically provide that the determination of whether a claimant is disabled is a determination to be made by the Commissioner. 20 C.F.R. § 404.1527(e). Because the ultimate determination of disability is for the Commissioner, a treating physician's statement that a claimant is disabled is not determinative, and the Commissioner is not bound by that opinion. See Jordan v. Barnhart, 29 Fed. Appx. 790, 793-94, 2002 WL 448643, at *3 (2d Cir. Mar. 22, 2002)(unpublished decision); Bond v. Social Security Administration, 20 Fed. Appx. 20, 21, 2001 WL 1168333, at *2 (2d Cir. Sept. 27, 2001)(unpublished decision); Parker v. Callahan, 31 F. Supp. 2d 74, 77 (D. Conn. 1998).

Dr. Matza's July 16, 2001, letter to counsel, opining that Mr. Ruggiero was unable to work at that time or at any time in the future was in effect a statement that he believed Mr. Ruggiero to be disabled. That opinion was not entitled to controlling weight under the treating physician rule, since, as discussed above, that determination is reserved for the Commissioner.

Additionally, his opinion that Mr. Ruggiero will not be able to work at any time in the future stands in stark contrast to his

treatment notes that repeatedly portray Mr. Ruggiero's progress as "excellent," with the implant in perfect position, and with "excellent range of motion" in his knee and only "minimal" swelling and tenderness and "very little pain." His progress notes hardly paint a picture of an individual who will never be able to work again.

Moreover, nothing in the letter of July 2001, or anywhere in the record, suggests that Dr. Matza had seen or had any contact with Mr. Ruggiero since his last appointment seven months earlier, at which time Dr. Matza reported that Mr. Ruggiero had made "excellent progress" and was not to return for a year. (R. 281.)

Thus, the Court finds no error in the Appeals Council's failure to remand the case to the ALJ for further hearings in light of this letter, or in the Appeals Council's failure to attribute "controlling weight" to the opinion of Dr. Matza.

D. Whether the ALJ Failed to Develop the Record

Additionally, plaintiff argues that the ALJ failed to adequately develop the record. She states that he should have written Dr. Matza for clarification of Mr. Ruggiero's limitations or requested an examination by a consulting physician.

Because a hearing on disability benefits is a non-adversarial proceeding, the ALJ generally has an affirmative duty to develop the administrative record. Melville v. Apfel, 198

F.3d 45, 51 (2d Cir. 1999). Where there are deficiencies in the record, an ALJ has an affirmative obligation to develop the claimant's medical history even when the claimant is represented by counsel. Rosa v. Callahan, 168 F.3d 72, 79 (2d Cir. 1999); Perez, 77 F.3d at 47. Where an ALJ fails to adequately complete the record, the Court should vacate his decision and remand for further administrative proceedings. Green v. Apfel, 25 Fed. Appx. 54, 2002 WL 4566, at **2 (2d Cir. 2001)(summary order).

The difficulty the Court has with plaintiff's argument in this case is that there were no gaps or deficiencies in the record. See Swanick v. Barnhart, 62 Fed. Appx. 403, 404, 2003 WL 21047140, at **1 (2d Cir. 2003)(summary order). The ALJ had before him all of the records concerning the care and treatment of Mr. Ruggiero's knee. His only treating physician was Dr. Matza. His only hospitalizations were at Waterbury Hospital. Moreover, Dr. Matza's records were consistent, with the exception of the letter written to Mr. Ruggiero's attorney.

This case is distinguishable from Rosa, which involved a non-English speaking claimant, represented by only a "legal assistant," where there were numerous gaps in the administrative record. The ALJ had only sparse notes from one treating physician, which did not cover all of the claimant's visits, and he did not have the records of a number of physicians identified by the claimant. Rosa, 168 F.3d at 79-80. The Second Circuit

found that the "scant record" in that case revealed "a host of lost opportunities" for the ALJ to develop the record. Id. at 80 (internal citations omitted); see also Atkinson v. Barnhart, 87 Fed. Appx. 766, 2004 WL 206324 (2d Cir. 2004)(summary order)(holding that the ALJ did not adequately fulfill his duty to develop the record where records were never obtained from hospitals where the plaintiff had been treated, and to which she had testified at the hearing).

Here, however, all of the medical records that existed were before the ALJ. The Court is unable to identify a "lost opportunity" caused by the ALJ's failure to develop an already complete record, such as that identified in Rosa. Thus, the Court finds no error in this regard.

IV. Conclusion

Accordingly, because the Court finds that the decision of the Commissioner was supported by substantial evidence, the Court recommends granting the Commissioner's Motion to Affirm **[Doc. # 15]** and denying the Plaintiff's Motion for Summary Judgment **[Doc. # 13]**.

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); Fed. R. Civ. P. 72; D. Conn. L. Civ. R. 72 for Magistrate Judges; FDIC v. Hillcrest

Assocs., 66 F.3d 566, 569 (2d Cir. 1995).

SO ORDERED, this 28th day of April, 2005, at Bridgeport, Connecticut.

/s/ William I. Garfinkel
WILLIAM I. GARFINKEL,
United States Magistrate Judge