

642 (2d Cir. 1983)(multiple citations omitted). In addition, the opinion given by a treating physician is entitled to considerable weight and in the absence of contradictory evidence, is binding on the Commissioner. See id. (multiple citations omitted).

IV. DISCUSSION

Following the five step evaluation process, ALJ Liberman found that plaintiff met the non-disability requirements for a period of disability and Disability Insurance Benefits and is insured for benefits through September 30, 2005 and the date of this decision.¹⁰ (See Tr. 20). The ALJ also found that plaintiff had not engaged in substantial gainful activity since the alleged onset of disability on January 9, 1999. (See Tr. 21, 15).¹¹ ALJ Liberman further concluded that plaintiff has carpal tunnel syndrome and nerve damage in the upper extremities considered "severe" based on the requirements in the Regulations 20 C.F.R. § 404.1520(b). (See Tr. 21). The ALJ then found that plaintiff did not have an impairment that met or equaled one of the impairments contained in the Listing. (Id.). The ALJ also found that plaintiff's allegation that he cannot lift heavy objects or use his hands repetitively for extended periods of time are "generally credible." (Id.). The ALJ also determined that plaintiff has the residual functional capacity to sit, stand, and walk without limitation, and perform occasional gross manipulation, although he is limited in repetitive use of his hands and in lifting and carrying more than five pounds. (Id.). This thus renders plaintiff, the ALJ concluded, unable to perform any of his past relevant work, which required lifting anywhere from 20 to 120

¹⁰A claimant's work history is a prerequisite to a determination of eligibility for disability benefits. Thus, in order for a claimant to qualify for disability benefits, in addition to proving disability under the statute, a claimant must have "insured status." See 20 C.F.R. § 404.130. For plaintiff to have disability insured status, plaintiff must satisfy the 20/40 test. See 20 C.F.R. § 401.130(b). The 20/40 test requires that plaintiff have at least 20 quarters of coverage in a 40 quarter period ending with the quarter that he or she allegedly became disabled. See 20 C.F.R. § 404.130(b)(2).

¹¹ ALJ Liberman concluded that plaintiff had not engaged in substantial gainful activity because his earnings since the alleged onset of disability were less than the statutory threshold amount. (See Tr. 21).

pounds. (Id.). ALJ Liberman found that although plaintiff's exertional limits do not allow him to perform the full range of work, there are jobs existing in significant numbers in the national economy that he could perform.¹² The ALJ further concluded that plaintiff was not under a "disability," as defined by the SSA, at any time through the date of his decision. (Id.).

Plaintiff seeks judgment as a matter of law on the grounds that there is no genuine issue as to any material fact that plaintiff is disabled and that the Commissioner's decision was in error. (Dkts. ##11-12). In the alternative, plaintiff seeks a remand of the case for a further hearing. (Id.). Plaintiff contends that the ALJ erred by finding that plaintiff was not disabled, because plaintiff is unable to perform the full range of sedentary work and where the capacity to perform sedentary work is in question, the Commissioner has the burden to prove plaintiff is capable of performing the exertional requirements of at least sedentary work. (Dkt. #12, at 1, 8-9). Plaintiff further claims that once an individual establishes by medical evidence that he does not have the residual functional capacity to perform sedentary work, absent medical evidence to the contrary, the testimony of the vocational expert is irrelevant. (Dkt. #12, at 9). The Commissioner contends that all of the medical evidence supports the finding that plaintiff has the residual functional capacity outlined by the ALJ and considered by the vocational expert and there is, thus, substantial evidence to support the ALJ's decision that plaintiff is not disabled within the meaning of the Social Security Act. (Dkt. #14, at 11, 13).

A. Listed Impairment 9.08A

Plaintiff asserts that the Commissioner erred in failing to consider whether he met or

¹² The ALJ used the Medical-Vocational Guidelines as a framework for his determination that plaintiff can perform a significant number of jobs in that national economy. Examples of such jobs were named by the vocational expert and included security officer and parking lot attendant. (See Tr. 21).

equaled § 9.08A of the Listing.¹³ (Dkt. #12, at 9). Plaintiff cites his history of diabetes, medical evidence in the record of his polyneuropathy, and Dr. Thomson's concern that he will only be able to do sedentary work with limited use of his upper extremities, as persuasive circumstances that should have prompted the ALJ to consider whether or not the Listing had been met.¹⁴ (See id.).

The Commissioner responds that plaintiff fails to offer supporting evidence in the record which shows that plaintiff has this condition. (Dkt. #14, at 9-13). The Commissioner notes that while the ALJ conceded that plaintiff has non-insulin dependent diabetes mellitus, he does not have all of the specified medical criteria, as is required. (Id. at 9).

The evidence in the record clearly indicates that plaintiff has diabetes. (See Tr. 169, 251, 416-17). The record also shows that plaintiff has multiple compression neuropathies. (See Tr. 169, 400, 417). In his report, dated December 5, 1998, Dr. Chicarilli specifically noted that in his consultation with Dr. Jonathan Goldstein regarding plaintiff's EMG, Dr. Goldstein felt both neuropathies were a result of compression and there was no evidence of diabetic polyneuropathy. (See Tr. at 169). This conclusion, however, goes to the cause of the

¹³Section 9.08A requires that the claimant have diabetes mellitus with neuropathy demonstrated by significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station. See 20 C.F.R. Part 404, Subpart P, Appendix 1, 9.08(A).

¹⁴In his decision, ALJ Liberman noted that

The medical evidence indicates that the claimant has carpal tunnel syndrome and nerve damage in upper extremities, impairments that are severe within the meaning of the Regulations. Mr. Smith also has non-insulin dependent diabetes mellitus, hyperlipidemia and diverticular disease, status post sigmoid resection. The severity of the claimant's impairments, individually and in combination, does not meet or medically equal one of the impairments listed in Appendix 1, Subpart P, Regulations No. 4.

(See Tr. 16)(citations omitted).

Notwithstanding this finding, the medical evidence shows that plaintiff does not have an impairment which meets or equals § 9.08A of the Listing.

polyneuropathy and does not undermine the fact that plaintiff has been diagnosed with both diabetes and polyneuropathy. The requirements of §9.08A of the Listing require "diabetes mellitus with neuropathy". There is no requirement that the neuropathy be derived from the diabetes, there is only the requirement that the two coexist within the claimant. Thus, because plaintiff has diabetes, along with neuropathy, plaintiff can be said to have diabetes mellitus with neuropathy.

Section 9.08A of the Listing, however, also requires that the neuropathy be "demonstrated by significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dextrous movements." As noted by Dr. Halpern, plaintiff has "fairly good fine and gross manipulation." (See Tr. 400). Additionally, there is no evidence from the record which indicates otherwise. Thus, because plaintiff has not succeeded in meeting all of the requirements of this listing, the ALJ was correct in his conclusion that plaintiff's impairments, either individually or in combination, did not meet or medically equal one of the listed impairments.

B. Residual Functional Capacity

Plaintiff also asserts that the ALJ erred in his conclusion that plaintiff is capable of performing "a significant range of work" because he erroneously found Dr. Thomson's opinion that plaintiff was restricted to sedentary work to be unpersuasive. (Dkt. #12, at 7). Plaintiff alleges that the ALJ found Dr. Thomson's opinion unpersuasive for lack of medical evidence of a restriction on claimant's ability to sit, stand, walk, and use his feet for repetitive action. (Dkt. #12, at 7-8). Plaintiff argues that the ability to lift goes to the "very nature" of what sedentary work requires and notes that there is ample evidence in the record asserting that plaintiff can lift no more than five pounds. (See Dkt. #12, at 8). Plaintiff further contends that once an individual establishes by medical evidence that he does not have the residual functional capacity to perform sedentary work, absent medical evidence to the contrary, the

testimony of the vocational expert is irrelevant. (Dkt. #12, at 9). Contrary to plaintiff's argument, this conclusion is irrelevant since there is ample medical evidence in the record to show that plaintiff has the residual functional capacity to perform sedentary work.

The Commissioner argues that there is substantial evidence which supports the ALJ's residual functional capacity assessment. (Dkt. #14, at 10-12). The Commissioner does not dispute that a person restricted to lifting only five pounds is not able to perform the full range of sedentary work. However, the Commissioner asserts that all of the medical evidence supports the finding that plaintiff has the residual functional capacity outlined by the ALJ and considered by the vocational expert, *i.e.* the ability, to sit, stand or walk. (See Dkt. #14, at 11). The Commissioner cites the reports of both Dr. Thomson and Dr. Chicarelli to show that plaintiff's treating physicians were of the opinion that plaintiff could work, albeit work that did not involve lifting more than five pounds, nor required repetitive use of his hands or upper extremities. (Dkt. #14, at 11-12).

On December 5, 1998, plaintiff was evaluated by Dr. Chicarilli who concluded that plaintiff had a 10% permanent disability of each upper extremity and recommended that he could return to work with a five pound lifting limit. (See Tr. 170-71). On January 26, 1999 plaintiff was terminated from Yale-New Haven Hospital for inability to perform his job duties. (See Tr. 446, 412). Thereafter, plaintiff worked part-time as a sales person at Kohl's Department Store in Hamden, Connecticut from February 2000 through October 2000. (See Tr. 442, 412, 462). Plaintiff then ceased working at Kohl's in October 2000 because, as he testified, "[he] needed more surgery on [his] arms." (See Tr. 443). Plaintiff has not worked since October 2000. (See Tr. 412, 445).

Plaintiff was evaluated by several doctors, all of whom noted his restricted use of his hands. Dr. Staub gave plaintiff a 10% permanent disability to the right upper extremity and a 10% permanent partial disability to the left upper extremity. (See Tr. 421). Dr. Halpern

concluded that plaintiff had a "limitation of range of motion" and concluded that although plaintiff had fairly good fine and gross manipulation, when manipulation against force is used, plaintiff had significant discomfort. (See Tr. 400). On May 8, 2002, Dr. Thomson noted plaintiff had been rated as being capable of "medium" work and that "it is necessary for him to take frequent breaks throughout the day," and on January 19, 2003, he gave plaintiff a 53% impairment for his right upper extremity, which can be converted for a total right hand impairment of 59%. (See Tr. 426, 431). On June 19, 2003, Dr. Chicarilli re-evaluated plaintiff and gave him a 38% permanent disability rating to the right hand and a 30% permanent disability to the right upper extremity. (See Tr. 434-35). The medical evidence clearly shows that plaintiff is not capable of performing his past relevant work.

Once the ALJ determines that plaintiff is unable to perform any of his past relevant work, the burden shifts to the Commissioner to show that plaintiff has the residual functional capacity to perform other substantial gainful activity in the national economy. The remaining issue, therefore, is whether the ALJ properly found that the Commissioner satisfied her burden. The record clearly reflects plaintiff's continued ability to sit, stand, and walk. While this ability is expressly put forth in the Physical Capacities Evaluation performed by Dr. Thomson (see Tr. 427), the lack of medical evidence to the contrary furthers the notion that plaintiff is fully capable of performing work dependent on these functions.

As previously indicated, the vocational expert, Dr. Olds, initially opined that plaintiff is able to do certain other jobs, such as a security officer, a parking lot attendant and possibly a light driving job. (See Tr. 465-66). After plaintiff testified that he does drive a car but after an hour of driving his hands will go numb; "what happens is that I'll just pull over to the side of the road . . . [for] about fifteen minutes," (see Tr. 441-42, 469), Dr. Olds agreed that if plaintiff were incapable of using his right hand, the light driving job would be unsuitable. (See Tr. 467). Regarding a job as a parking lot attendant, Dr. Olds testified that there may be

some difficulty for plaintiff if he could not use a cash register at all and if he had to park manual transmission cars. (See Tr. 470-72).

Having eliminated those two positions,¹⁵ regarding the last job, namely a security officer, Dr. Olds envisioned "an entry level job" that "doesn't really involve use of the upper extremities," with limited "walking around," but rather merely "being a presence, maybe checking people in and out of a building or observing at a location." (See Tr. 465-66, 472-76). He testified that there are 1,200 of such jobs in Connecticut and 75,000 in the national economy. (Id.). In response to questioning by the ALJ on plaintiff's specific limitations, Dr. Olds indicated that the security job "might, occasionally, involve some writing – not a great deal of writing," possibly ten to fifteen minutes worth of writing. (See Tr. 467). Dr. Olds acknowledged, "[I]f he couldn't use his right hand, at all, that would be a problem working in that job." (Id.). When plaintiff was questioned by the ALJ immediately thereafter, he responded that he cannot write "for very long," only a few minutes, "enough to write out . . . my bills." (See Tr. 468). The record is thus unclear whether plaintiff's inability to write "for very long," only a few minutes, "enough to write out . . . my bills," is less than what would be required for the circumscribed security job envisioned by Dr. Olds, which possibility could require ten to fifteen minutes worth of writing. Despite the thorough analysis of ALJ Liberman and Dr. Olds, this sole question was left unresolved. Therefore, a remand is necessary in order for Dr. Olds to testify whether given plaintiff's physical limitations – limitations in the repetitive use of his hands, restrictions against lifting more than five pounds, and numbness in his right hand after only a few minutes of writing – plaintiff would be able to perform the entry level security job with the parameters described by the vocational expert, namely no use of the upper extremities, limited walking around, merely being a presence who checks people in and out of a building or observes at a location.

¹⁵See note 9 supra.

V. CONCLUSION

For the reasons stated above, plaintiff's Motion for Summary Judgment (Dkt. #14) is **granted in part to the extent that a limited remand is ordered** and defendant's Motion for Order Affirming the Decision of the Commissioner (Dkt. #14) is **denied**.

The parties are free to seek the district judge's review of this recommended ruling. **See 28 U.S.C. §636(b)(written objection to ruling must be filed within ten days after service of same); FED. R. CIV. P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; Small v. Secretary of HHS, 892 F.2d 15, 16 (2d Cir. 1989)(failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit.)**

Dated this 26th day of July, 2005, at New Haven, Connecticut.

JOAN GLAZER MARGOLIS
UNITED STATES MAGISTRATE JUDGE