2012 LIST OF AVAILABLE MATERIAL
ITEM NUMBERS 1889 – 1958
JANUARY - DECEMBER 2012

ABSENTEEISM

1922. District Court remand for testimony of the effect of the plaintiff's depression on her ability to work. The ALJ failed to include reference to the plaintiff's major depression in the RFC determination after finding it was a "severe impairment" at step 2. The ALJ only "obliquely referred to the plaintiff's mental function by describing her as able to perform simple repetitive tasks with simple instructions. The ALJ said she gave full weight to the opinion of a consulting psychologist, who diagnosed major depression, but then did not include the limitations it caused in her RFC findings. In addition, the VE, in response to a hypothetical from the ALJ, testified that a person who missed work three to four times a month because of depression would be unable to sustain full-time work. Margolius, Margolius, and Associates, Cleveland, OH.

Skobel v. Astrue, Case No. 1:11-CV-0748 (N.D.Ohio Apr. 27, 2012); 2012 US Dist. LEXIS 59015 – 30 pages

ADMINISTRATIVE HEARINGS – NON-ADVERSARIAL

1913. District Court remand with order to ALJ to conduct a non-adversarial hearing. The ALJ failed to properly weigh the opinion of the treating neurologist under the factors in 20 CFR § 404.1527(d)(2). The court was specifically "troubled by the ALJ's adversarial approach" at the hearing. The transcript showed a "disturbing pattern of interruption and testimony by the ALJ," leading to changed testimony by the ME after "aggressive persuasion by the ALJ." The ALJ also interrupted the plaintiff's witnesses and refused to accept their testimony, including the treating neurologist who testified at the hearing. "This adversarial approach has no place in a hearing to determine Social Security disability. . ." Max Leifer, Esq., New York, NY.

Mira v. Astrue, Case No. 09-CV-2012 (SLT)(E.D.N.Y. Sept 2, 2011); 2011 US Dist. LEXIS 98848 – 33 pages

ADMINISTRATIVE HEARINGS – TELEPHONIC TESTIMONY

1929. District court remand for VE testimony to be taken in-person or by video teleconference. The court held that the ALJ erred by taking the VE's testimony by telephone over the timely objection of plaintiff's counsel. Ivan Katz, Esq., New Haven CT.

Koutrakos v. Astrue, Case No. 3:11-cv-00306-CSH (D.Conn. Apr. 13, 2012); 2012 US Dist. LEXIS 52659; 177 SSRS 244 – 94 pages including District Court's Ruling on Defendant's Objection to Recommended Ruling of Magistrate Judge; Magistrate Judge's Recommended Ruling, Plaintiff's Memorandum in Support of his Motion to Reverse; Defendant's Objection to the Recommended Ruling, Plaintiff's Response to Defendant's Objection to Recommended Ruling

ALJ's DUTY – CREDIBILITY

1945.District court remand where the ALJ failed to follow the instructions of the earlier remand, where the court had instructed the Commissioner to credit as "true and credible"

the testimony of the claimant and his stepfather and mother. The first remand also required the ALJ to ask the VE specific hypothetical questions consistent with the credible and credited testimony. At the second hearing, the ALJ tried to "reinvent the wheel." The court held that the ALJ was not permitted to readdress credibility. "Contrary to defendant's argument, the court's prior order was not unclear and did in fact preclude re-evaluation of the evidence." Arthur W. Stevens, III, Esq., Medford, OR.
Adkison v. Commissioner of Social Security, Case No. 2:11-CV-1533-CMK (E.D.Cal. Sept 24, 2012); 2012 U.S. Dist. LEXIS 136592 – 5 pages

1901. Seventh Circuit remand, finding that the ALJ failed to explain why she rejected the Plaintiff's assertion that she must elevate her leg and why she found the plaintiff not credible. The ALJ failed to explain her reasoning, "building a so-called 'logical bridge' that connects the evidence and her decision." The ALJ also used boilerplate language that is "meaningless and unhelpful" to a reviewing court because it seems to determine ability to work first and then uses that RFC determination to assess credibility. "That gets things backwards." Barry Schultz, Esq., Evanston, IL.

Smith v. Astrue, No. 11-2838 (7th Cir. March 12, 2012); 467 Fed. Appx. 507; 2012 US App. LEXIS 5122 – 127 pages, including Slip Opinion, Brief for Plaintiff-Appellant, Reply Brief for the Plaintiff-Appellant. [Available in PDF format only]

1900. Seventh Circuit remand, finding that the boilerplate language in ALJ decision regarding credibility is "meaningless and unhelpful to a reviewing court." The language in question involves a variation on the following: "The claimant's statements concerning the intensity, persistence and limiting effects of her symptoms are not entirely credible to the extent that they are inconsistent with the above residual functional capacity (RFC) assessment. Barry Schultz, Esq. and James Schiff, Esq., Evanston, IL.

Bjornson v. Astrue, No. 11-2422 (7th Cir. Jan. 31, 2012) – 127 pages, including Slip Opinion, Brief for Plaintiff-Appellant, Reply Brief for the Plaintiff-Appellant. [Available in PDF format only]. *Published at 671 F.3d 640 (7th Cir. 2012).*

ALJ's DUTY - FAILURE TO FOLLOW REMAND ORDER

1945. District court remand where the ALJ failed to follow the instructions of the earlier remand, where the court had instructed the Commissioner to credit as "true and credible" the testimony of the claimant and his stepfather and mother. The first remand also required the ALJ to ask the VE specific hypothetical questions consistent with the credible and credited testimony. At the second hearing, the ALJ tried to "reinvent the wheel." The court held that the ALJ was not permitted to readdress credibility. "Contrary to defendant's argument, the court's prior order was not unclear and did in fact preclude re-evaluation of the evidence." Arthur W. Stevens, III, Esq., Medford, OR.

Adkison v. Commissioner of Social Security, Case No. 2:11-CV-1533-CMK (E.D.Cal. Sept 24, 2012); 2012 U.S. Dist. LEXIS 136592 – 5 pages

AGE- BORDERLINE

1927. District court remand when the ALJ failed to explain why he relied on the younger age category when the plaintiff was two months shy of his 50th birthday at the time of the ALJ's decision. The ALJ should have explained her decision to apply the age category

mechanically instead of the "leeway envisioned by [20 C.F.R.] § 404.1563(b)." Although circuit courts disagree about whether the regulations instruct ALJs to consider whether to use the older age in borderline situations, it is clear that ALJs must still provide enough explanation to assure the court that their findings are supported by substantial evidence. In this case, the ALJ was silent regarding her choice of age category. After reviewing other court decisions, the court holds that the ALJ should have considered placing the plaintiff in the "closely approaching advanced age" category. John Horn, Esq., Tinley Park, IL.

Figueroa v. Astrue, Case No. 11-cv-01381 (N.D.Ill. Mar. 12, 2012); Published at 848 F.Supp.2d 894 – 13 pages

1926. District court reversal and remand for an award of benefits. The court holds that a prior RFC finding applies to the subsequent application unless SSA shows substantial evidence of improvement. The issue was whether the plaintiff was disabled between August 1 2005 and June 21, 2007. The plaintiff has been found disabled as of a 2007 onset date. A prior claim was denied in 2004, based on a finding that the plaintiff had the RFC to perform sedentary work. However, in the second claim, now on appeal, the ALJ found that he was able to perform light work. This would be possible only if the plaintiff's condition had improved since the first ALJ's decision, and there is no evidence to support that conclusion. The court relied on AR 00-1(4) and the grids to find that the plaintiff would be found disabled on his 50th birthday in February 2006. As August 2005 "was a mere six months shy of his fiftieth birthday" the court found that the plaintiff was disabled as of that date. Larry Wittenberg, Esq., Durham, NC

Aldridge v. Astrue, No 5:11-CV-403-BO (E.D.N.C. July 16, 2012); Published at 880 F.Supp.2d 695– 31 pages

APPEALS COUNCIL: NEW EVIDENCE

1958. Fourth Circuit briefs for decision holding that 1) the ALJ must give retrospective consideration to psychological evidence created after the DLI when such evidence provides a sufficient linkage that may show a possible earlier and progressive degeneration. The court found a "sufficient linkage" in this case where there was corroborative lay evidence of the progression of the plaintiff's PTSD symptoms in the two VA psychological revaluations. 2) The ALJ must give substantial weight to a VA disability rating. The ALJ may give less weight to a VA disability rating when the record clearly demonstrates that such a deviation is appropriate. 3. The ALJ is required to consult a medical advisor under SSR 83-20 to determine the onset date of disability when the ALJ finds that the plaintiff was disabled at any time, including after his DLI, and the medical evidence of the date of onset is ambiguous. The court also explained that new evidence that was submitted to the Appeals Council was part of the record that the court will consider on appeal, as though it had been before the ALJ. Timothy Clardy, Esq., Greenville, SC

Bird v. Astrue, 699 F.3d 337 (4th Cir. 2012), Brief and Appellant, Reply Brief of Appellant – 91 pages

1897. District court remand for an additional consultative examination, with access to the plaintiff's prior medical records, and findings as to the onset date and impact of the

cardiac condition on his overall functioning. The decision provides factors to consider in finding that the additional evidence submitted to the Appeals Council did, in fact, relate to the period on or before the date of the ALJ decision. EAJA fees later awarded and paid to plaintiff, not to counsel, despite the assignment. If there are no debts owed, the fees may be paid to counsel. Ann Cerney, Esq., Stockton, CA.

Cuadras v. Astrue, Case No. 2:10-cv-2142 GGH (E.D.Cal. Dec. 30, 2011); 20110 US Dist LEXIS 149873 – 40 pages including Order and Plaintiff's Motion for Summary Judgment and Memorandum in Support.

1896. Fourth Circuit remand. The court resolved a conflict within the circuit over the summary denial of requests for review when new evidence is submitted to the Appeals Council. The court rejected arguments that the Appeals Council has a duty to articulate reasons for denying a request for review, but went on to reverse the Commissioner and remand the case for administrative findings of fact regarding new and material opinion evidence submitted to the Appeals Council. Robertson Wendt, Jr., Esq., North Charleston, SC.

Meyer v. Astrue, No. 10-1581 (4th Cir. Dec. 2, 2011); Published at 662 F.3d 700 (4th Cir. 2011) – 185 pages, including the slip opinion, Brief of Appellant, Brief of Appellee, Reply Brief of Appellant. [Available in PDF format only]

1882. Appeals Council remand to a new ALJ. Additional evidence submitted with the Request for Review indicates that, after the date of the ALJ decision, the claimant underwent an amputation of her left leg. Although these records are dated after the ALJ's decision, the Appeals Council "believes these records are material to determining the nature and severity of the claimant's impairments prior to the date of the decision." The ALJ committed several other errors including failing to follow the directives from a previous Appeals Council remand order. Thad Murphy, Esq., Davenport, IA.

Appeals Council remand on new and material evidence (Aug. 8, 2011) – 6 pages

ARTHRITIS

1955. Fully favorable ALJ decision, finding that *res judicata* did not apply to the issue of disability for the Title II claim because new and material evidence was submitted, which confirms that the claimant was more limited as of his alleged onset date, October 2003, than previously determined by another ALJ in a 2006 decision. The plaintiff's 2008 SSI application had been approved in 2010, but his Title II application was denied due to the expiration of his insured status. The current ALJ gave great weight to the opinion of the primary treating doctor who wrote that the plaintiff's limitations existed prior to 2004, his date last insured. The treating rheumatologist noted that the plaintiff is greatly limited by his gout flare-ups, which reduce his RFC. The claimant was two months shy of age 50 at the time of his DLI, so the ALJ applied the older age category. Based on the testimony of the VE and Grid Rule 201.14, the ALJ found the claimant disabled since 2003. Lawrence Wittenberg, Esq., Durham, NC.

Fully Favorable ALJ decision on *res judicata* (Nov. 27, 2012) – 13 pages

ATTORNEYS FEES - § 406(b)

1942. District court award of $18,629.25 in 406(b) fees. The court had previously awarded EAJA fees of $3476.00. SSA withheld $24,629.35, which is 25% of the past due award, for attorney's fees, and awarded counsel $6,000 in fees for work at the administrative level. Here, the court applied the factors in *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002) to find the fee request reasonable. First, the contingent fee agreement provided that plaintiff would pay counsel 25% of past due benefits if he prevailed. Second, there was no evidence of delay by counsel, with no continuances, "but rather efficiently [counsel] obtained a beneficial result for Plaintiff." Finally, counsel demonstrated "skilled legal research and analysis" in the plaintiff's memorandum of law and the efforts on behalf of the plaintiff "were clearly successful." The plaintiff received past due benefits of $98,517.00. Considering the deference to the agreement between the plaintiff and counsel, "the interest in assuring that attorneys continue to represent clients such as Plaintiff," and the Gisbrecht factors, the requested fees are reasonable and counsel is awarded $18,629.25 in fees. Counsel shall return the previously awarded $3476 EAJA fee to the plaintiff. Lawrence Wittenberg, Esq., Durham, NC.

Perrigo v. Astrue, No. 5:08-CV-626-FL (E.D.N.C. Sept 7, 2012); *2012 U.S. Dist. LEXIS 127467* – 12 pages

1934. District court award of fees under 42 U.S.C. 406(b) in the amount of #12,807.50, which is 25% of the plaintiff's past due benefits. The court rejects the Commissioner's argument that hours worked by outside counsel, who did not sign the contingent fee agreement, should be subtracted from the fee. The court holds, "counsel for the Plaintiff may hire outside counsel or a new associate to work on the plaintiff's file. The Court is reimbursing Plaintiff's counsel for reasonable fees, and not requiring that only the signatories on the fee agreement be the only attorneys to work on the file." In addition, he had no objection to the fees of the outside counsel. The court found that the fees requested, including those of outside counsel, were reasonable under Gisbrecht v. Barnhart, 535 U.S. 789 (2002). The court ordered that the EAJA fees previously received by the plaintiff's counsel be returned to the plaintiff. Carol Avard, Esq. Cape Coral, FL.

Torvik v. Commissioner of Social Security, Case No., 2:08-cv-DNF (M.D.FLa. Jan. 9, 2012) – 4 pages

1871. District court decision granting Plaintiff's Motion in full for attorneys fees under 42 U.S.C. § 406 (b) in the amount of $28, 726.50, less the EAJA fees previously awarded, which represented 25% of the plaintiff's past due benefits. The court disagreed with the government's argument that this amounted to a "windfall" for the 23.75 hours spent on the case. The court noted that there is "no clear set of criteria" for determining a fee windfall under section 406(b). While the 406(b) award is only for hours spent on the court case, the court "may also consider the 'time and effort the attorney expended at the administrative level' in assessing the complexity of the case, the skills necessary to handle the case, the risks involved and the significance of the federal court decision." The attorney assumed "significant risk" in agreeing to represent the plaintiff for a claim that had previously been denied twice at the ALJ level. The plaintiff also submitted an affidavit, recognizing the value of the attorney's representation and asking the court to authorize the fee. The court also noted the attorney's "expertise and efficiency" in handling the case. He developed a thorough record and was able to obtain a favorable

decision for the plaintiff after nearly 13 years of litigation. The large past due benefits was not caused by the attorney but was due to the "continual yo-yoing" of the claim through SSA. Douglas Brigandi, Esq., Bayside, NY.

King v. Astrue, Case No. 09-CV-1244 (JG)(RER) (E.D.N.Y Jan. 25, 2011) – 8 pages

ATTORNEYS' FEES – EAJA

1936. District court award of both EAJA fees and 406b fees. The Commissioner objected to the Magistrate Judge's recommendation that the Court deduct the EAJA fees from the 406b fees without consideration of whether the plaintiff owes a debt to the Federal government. If the plaintiff owed a debt, the EAJA fee could be offset to repay that debt. The District court does not decide whether the plaintiff has an outstanding debt and instead holds "the best practice is simply to award the EAJA fees directly to the Plaintiff as the prevailing party." The payment is delivered to plaintiff's counsel. Carol Avard, Esq., Cape Coral, FL.

Morris v. Astrue, Case No. 2:09-CV-595-CEH-SPC (M.D.Fla. Jan. 30, 2012); *2012 U.S. Dist. LEXIS 10559* – 4 pages

1909. District Court remand and award of EAJA fees in the amount of $6,603.38. After the Magistrate Judge affirmed the denial of benefits, the plaintiff filed objections, and the SSA Office of General Counsel agreed with the objections and filed an unopposed Motion for Entry of Judgment with Remand. The District Court did not agree and instead adopted the Magistrate Judge's Report and Recommendation, affirming the denial of benefits. Nevertheless, while declining to reverse the final decision of the Commissioner, the court ordered a sentence four remand "to take whatever action, if any the Commissioner feels is appropriate. The plaintiff then filed a Petition for EAJA Fees which the Commissioner did not oppose. The court granted the Petition. Carol Avard, Esq., Cape Coral, FL.

Ballard v. Astrue, Case No. 2:10-cv-765-JES-SPC (Jan. 18, 2012 and March 26, 2012) *2012 U.S. Dist. LEXIS 5451* - 48 pages including the Magistrate Judge Report & Recommendation, Plaintiff's Objections to Mag. Judge's R&R, Defendant's Unopposed Motion for Entry of Judgment and Memorandum in Support, District Court Opinion and Order (EAJA fee award), Cover letter.

1908. District Court award of EAJA fees in the amount of $7153.40 for 39 hours of work at $174.00 per hour, plus costs of $350. The government had opposed an hourly rate above $125.00, arguing that two other local attorneys had recently requested compensation at the $125.00 rate. The court rejected this argument. Without evidence that those two attorneys handled cases of similar difficulty or had equal reputations, this argument was not a ground for reducing the claimed fee so long as the plaintiff had met his or her burden to exceed the statutory rate. The court stated that plaintiff's counsel's reputation is "excellent" with 40 years of litigation experience and 20 years in the Social Security field. The number of hours was also challenged but the court agreed with the plaintiff that it is often more time consuming to write a short brief than a long one and that the additional hours were "well spent." As for payment, the court recommended that, if confirmed that the plaintiff contractually assigned any fee to the attorney and owes no

debt to the government, the Commissioner pay the fee award to counsel in accordance with any assignment agreement. Michael Mooney, Esq., Cincinnati, OH.

Russell o/b/o Roach v. Astrue, Case No 1:10-cv-746 (S.D. Ohio April 11, 2012); *2012 U.S. Dist. LEXIS 73223* – 7 pages

BACK IMPAIRMENTS

1935. Fully Favorable ALJ decision, finding that the combination of the claimant's degenerative disc disease, Hepatitis C and rheumatoid arthritis medically equaled Listing 1.04A: Disorders of the spine with nerve root compression. A medical expert testified at the hearing that the claimant's ongoing chronic low back pain was compounded by Hepatitis C and rheumatoid arthritis. These conditions add to the claimant's limitations and pain. In addition, the claimant continued to have lower extremity weakness and her back surgery did not provide pain relief. John Horn, Esq., Tinley Park, IL.

ALJ decision on listing 1.04A (May 10, 2012)

1933. District court remand for further proceedings when the ALJ erred in giving "little weight" to the chiropractor's opinion that the plaintiff had a disabling back injury. The chiropractor's opinion was not inconsistent with those of the plaintiff's treating physicians, including the treating orthopedic surgeon and neurological surgeon. The ALJ ignored the surgeon's diagnosis of chronic lumbar radiculopathy with strong back pain. Also, evidence of "good relief of symptoms" does not mean that the individual is able to work. In addition, the ALJ's finding that the chiropractor's opinion contradicts itself lacked substantial evidence. While the chiropractor's opinion could not be used to establish the impairment, it should have been considered as evidence of the severity of the plaintiff's impairments. John Horn, Esq., Tinley Park, IL.

Johnson v. Astrue, Case No. 11 C 3989 (N.D.Ill. Aug. 2, 2012); *2012 U.S. Dist. LEXIS 109317* – 22 pages

1905. District Court reversal and award of benefits. The ALJ erred in finding that the plaintiff's cervical spine impairments did not meet listing 1.04A. Because the objective medical evidence establishes that the plaintiff's impairment met listing 1.04A, a remand for additional proceedings would not be necessary. Gregory Davis, Esq., Grants Pass, OR.

Burlew v. Astrue, Case No. 3:11-CV-3031-BR (D.Ore. Apr. 3, 2012); *2012 U.S. Dist. LEXIS 46923* – 41 pages including Opinion and Order and Plaintiff's Briefs.

CROHN'S DISEASE

1956. District court remand where the ALJ determined that the plaintiff's daily activities were proof that he does not suffer from fatigue. However, the plaintiff had complained to his doctor about fatigue, and had testified that he has to take a four hour nap each day due to limitations caused by Crohn's Disease. The ALJ erred because is only considered the testimony about daily activities, but failed to consider the plaintiff's need for a daily nap. "[I]t appears that the ALJ impermissible 'cherry-picked' only portions of the testimony on daily activities that undercut the claim of fatigue while ignoring parts of that same testimony that supported it. Because the ALJ's finding that the plaintiff's Crohn's

Disease does not result in extreme fatigue is not supported by substantial evidence, the case must be remanded. Marcia Margolius, Esq., Cleveland, OH.

Gibbons v. Commissioner of Social Security, Case No. 5:11-cv-00737 (N.D.Ohio Sept. 24, 2012); *2012 U.S. Dist. LEXIS 136109* – 8 pages

CHRONIC FATIGUE SYNDROME

1921. District court reversal and award benefits in a case involving chronic fatigue syndrome. Benefits were awarded because the government conceded that the ALJ erred in the evaluation of evidence from the treating physician and in the evaluation of non-physician treating source evidence from a physical therapist. The ALJ erroneously found that chronic fatigue syndrome was not a severe impairment. The ALJ improperly rejected the opinion of a treating specialist who diagnosed lyme disease and CFS by relying on non-treating physicians who questioned the lyme disease diagnosis. However, the CFS diagnosis was supported by substantial evidence from the treating and non-treating physicians. The supporting evidence comports with the definition of CFS and the SSA's guidelines for evaluating CFS in SSR 99-2p. The ALJ also erred in rejecting the treating physician's opinion because he "sympathizes" with his patient. Citing Ninth Circuit case law, the court noted that the "Commissioner may not assume physicians routinely lie to help patients gain disability benefits." The court then credited this treating physician's findings and opinions and those of other treating physicians as "matter-of-law." By crediting the plaintiff's testimony and the improperly rejected medical opinions, the VE testified that the plaintiff's limitations would preclude employment. Since "additional proceedings would serve no useful purpose, the court reversed the denial and awarded benefits. Kenneth Isserlis, Esq., Spokane, WA.

Hicks v. Astrue, Case No. CV-11-063-CI (E.D.Wa. April 5, 2012); *2012 U.S. Dist. LEXIS 49015* -23 pages

COLLATERAL ESTOPPEL

1939. Appeals Council reversal and award of both title II and SSI benefits. The claimant had filed a concurrent application in 2007 and was found disabled as of June 22 2007 for SSI only, because SSA had erroneously found a DLI of 2005. However, because of work and earnings, he had two periods of insured status, April 1993 through March 2005 and July 2007 through June 2008. Since he is insured for Title II benefits though June 30, 2008, the Appeals Council applied collateral estoppel to find that he became disabled under title II on June 22, 2007 as well. The Appeals Council also found that the ALJ abused his discretion by reopening the 2007 initial level allowance in 2010 and reversing the finding of disability. The two year limit for reopening an SSI claim had passed and there was no evidence of fraud or similar fault. Thad Murphy, Esq., Davenport, IA.

Favorable Appeals Council decision (July 23, 2012) – 4 pages

CONSULTATIVE EXAMINATIONS

1892. District court decision granting the plaintiff's petition for mandamus, holding that SSA is required to disclose the names of the doctors who will be performing the consultative examination (CEs). The plaintiffs received notices of the CEs with the addresses of clinic and the appointment times, but not the names of the examining doctors. The plaintiffs alleged that the failure to provide the names violated 20 CFR sec.

404.1519j and that without the names, they could not make a reasoned objection. The court agreed rejecting the government's argument that the plaintiffs could have objected after the fact, "as it negates the purpose behind section 404.1519j which allows a claimant to object prior to an examination. The court ordered SSA to provide 30 days written notice to each plaintiff prior to any CR and to include the names of the evaluating doctor or other medical source, as defined in 20 CFR 404.1508. Michael D. Armstrong, Esq. and Francesca J, MacDowell, Esq., Albuquerque, NM.

Albers v. Social Security Administration, Case No. CIV 11-0092-WJ/KBM (D. Colo. Nov. 18, 2011) – 13 pages

CREDIBILITY

1952. Appeals Council remand after a sentence four remand by the district court. The Appeals Council remand order specifically states that the use of a checklist style form requested by the claimant "is an invalid rationale for discrediting the limitations stated in the forms. Social Security uses such checklists. . .This is not a valid reason to reject such specific limitations opined by treating sources, considering the medical evidence of record reflects treatments, medications, and other factors not considered by the Administrative Law Judge when finding the claimant less than credible." In addition, the ALJ erred in relying on a CE by a doctor who had surrendered his medical license in once state. Finally, the ALJ erred by classifying lumbosacral injections as "conservative" treatment, when in fact they are "invasive." Manual Serpa, Esq., San Bernardino, CA.

Appeals Council remand on credibility (Oct. 22, 2012) – 3 pages

1945.District court remand where the ALJ failed to follow the instructions of the earlier remand, where the court had instructed the Commissioner to credit as "true and credible" the testimony of the claimant and his stepfather and mother. The first remand also required the ALJ to ask the VE specific hypothetical questions consistent with the credible and credited testimony. At the second hearing, the ALJ tried to "reinvent the wheel." The court held that the ALJ was not permitted to readdress credibility. "Contrary to defendant's argument, the court's prior order was not unclear and did in fact preclude re-evaluation of the evidence." Arthur W. Stevens, III, Esq., Medford, OR.

Adkison v. Commissioner of Social Security, Case No. 2:11-CV-1533-CMK (E.D.Cal. Sept 24, 2012); 2012 U.S. Dist. LEXIS 136592 – 5 pages

1901. Seventh Circuit remand, finding that the ALJ failed to explain why she rejected the Plaintiff's assertion that she must elevate her leg and why she found the plaintiff not credible. The ALJ failed to explain her reasoning, "building a so-called 'logical bridge' that connects the evidence and her decision." The ALJ also used boilerplate language that is "meaningless and unhelpful" to a reviewing court because it seems to determine ability to work first and then uses that RFC determination to assess credibility. "That gets things backwards." Barry Schultz, Esq., Evanston, IL.

Smith v. Astrue, No. 11-2838 (7th Cir. March 12, 2012); *467 Fed. Appx. 507; 2012 U.S. App. LEXIS 5122* – 127 pages, including Slip Opinion, Brief for Plaintiff-Appellant, Reply Brief for the Plaintiff-Appellant. [Available in PDF format only]

1900. Seventh Circuit remand, finding that the boilerplate language in the ALJ decision regarding credibility is "meaningless and unhelpful to a reviewing court." The language in question involves a variation on the following: "The claimant's statements concerning the intensity, persistence and limiting effects of her symptoms are not entirely credible to the extent that they are inconsistent with the above residual functional capacity (RFC) assessment. Barry Schultz, Esq. and James Schiff, Esq., Evanston, IL.

Bjornson v. Astrue, No. 11-2422, (7th Cir. Jan. 31, 2012) – 127 pages, including Slip Opinion, Brief for Plaintiff-Appellant, Reply Brief for the Plaintiff-Appellant. [Available in PDF format only]. *Published at 671 F.3d 640 (7th Cir. 2012).*

CREDIBILITY – FAILURE TO SEEK TREATMENT

1907. District Court remand for further proceedings. The ALJ found that the claimant's congestive heart failure (CHF) was not a "severe impairment" at step 2. The plaintiff died of a heart attack while the appeal was pending. The court found that "the ALJ committed legal and factual error in discounting claimant's symptoms based upon his failure to obtain regular medical treatment." The claimant lacked the financial ability or insurance coverage necessary to obtain ongoing care after his employment ended. Under SSR 96-7p, the ALJ cannot draw adverse credibility inferences based on a failure to seek regular medical treatment without first considering the claimant's explanations. Medical reports in the record confirm how the lack of insurance negatively impacted the ability to obtain adequate medical care. There is no evidence that the ALJ considered the plaintiff's financial resources. Michael Mooney, Esq., Cincinnati, OH.

Russell o/b/o Roach v. Astrue, Case No 1:10-cv-746 (S.D.Ohio April 11, 2012); *2012 U.S. Dist. LEXIS 73223* – 44 pages including Magistrate Report & Recommendation, Plaintiff's Opening and Reply Briefs.

1895. District Court remand because the ALJ failed to properly assess the plaintiff's credibility consistent with SSR 96-7p. He failed to reconcile the contradictions in the evidence when assessing credibility. The plaintiff was diagnosed with sarcoidosis and asthma. The ALJ discusses some evidence that supported the conclusion that the plaintiff was not as limited as she claims. Other evidence supports the plaintiff's subjective complaints. When she went to the ER for breathing difficulties, she was given only a limited supply of medication and could not afford to purchase more. At her CE, she reported pain in her joints and the ability to sit for 40 minutes, stand for 30 minutes and walk for 10 minutes. The CE doctor found that her air entry was markedly diminished. The ALJ's finding that the sarcoidosis was controlled with Prednisone was "particularly disconcerting" since the plaintiff could not afford the treatment. When that occurs and the medication cannot be otherwise obtained, "then the impairment would be deemed disabling." Marcia Margolius, Esq., Cleveland, OH. EAJA fees are later awarded. (*Moore v. Astrue, 2012 U.S. Dist. LEXIS 18401*) Counsel is ordered to determine whether plaintiff owes a debt subject to offset. If there is no pre-existing debt or the debt is less than the amount of the EAJA fee award, the balance of the EAJA fee award shall be made payable to Plaintiff's counsel per the assignment in the record.

Moore v. Astrue, Case No. 1:10-cv-2913 (N.D.Ohio Nov. 30, 2011); *2011 U.S. Dist. LEXIS 137726* – 22 pages

DISABLED ADULT CHILDREN – SCHOOL RECORDS

1928. Appeals Council remand for consideration of the claimant's school records and subjective complaints. The claimant applied for disabled adult children's benefit. The ALJ incorrectly found that the record did not contain any school records from the relevant period prior to age 22. The record did include school records showing a special education curriculum, poor attendance, behavior problems and a low average cognitive ability. Another error is that the RFC finding did not account for all of the claimant's testimony, including his difficulty understanding what he reads, and completing applications. Thad Murphy, Esq., Davenport IA.

Appeals Council remand on DAC benefits (April 3, 2012) – 4 pages

FATIGUE

1956. District court remand where the ALJ determined that the plaintiff's daily activities were proof that he does not suffer from fatigue. However, the plaintiff had complained to his doctor about fatigue, and had testified that he has to take a four hour nap each day due to limitations caused by Crohn's Disease. The ALJ erred because is only considered the testimony about daily activities, but failed to consider the plaintiff's need for a daily nap. "[I]t appears that the ALJ impermissible 'cherry-picked' only portions of the testimony on daily activities that undercut the claim of fatigue while ignoring parts of that same testimony that supported it. Because the ALJ's finding that the plaintiff's Crohn's Disease does not result in extreme fatigue is not supported by substantial evidence, the case must be remanded. Marcia Margolius, Esq., Cleveland, OH.

Gibbons v. Commissioner of Social Security, Case No. 5:11-cv-00737 (N.D.Ohio Sept. 24, 2012); *2012 U.S. Dist. LEXIS 136109* – 8 pages

FRAUD

1923. An individual was charged with a proposed $39,000 civil penalty and an assessment in lieu of damages of $21,000, based in the OIG General Counsel's "determination that you omitted material facts about your earnings and resources that you knew, or should have known, you had a duty to report to SSA." The claimant had been paying back an overpayment on a payment plan. The proposed civil monetary penalty was dropped because the individual had proof that she had reported earnings to SSA years earlier. Stacy Cloyd, Esq., Washington, DC.

Documents submitted to the DHHS Departmental Appeals Board – 4 pages

FREEDOM OF INFORMATION ACT – MYSTERY ALJ POLICY

1946. Appeal filed to district court after the Freedom of Information Act request to receive the name of the assigned ALJ prior to the hearing was denied. David Camp, Creve Court, MO.

Sparks v. Social Security Administration, Case No. 4:12-cv-01604 (E.D.Mo. filed Sept. 7, 2012) – 41 pages including Complaint, FOIA request, Denial of the request, Appeal filed with Executive Director, SSA Office of Privacy and Disclosure; and Denial of Appeal.

JUDICIAL REVIEW – MANDAMUS

1892. District court decision granting the plaintiff's petition for mandamus, holding that SSA is required to disclose the names of the doctors who will be performing the consultative examination (CEs). The plaintiffs received notices of the CEs with the addresses of clinic and the appointment times, but not the names of the examining doctors. The plaintiffs alleged that the failure to provide the names violated 20 CFR sec. 404.1519j and that without the names, they could not make a reasoned objection. The court agreed rejecting the government's argument that the plaintiffs could have objected after the fact, "as it negates the purpose behind section 404.1519j which allows a claimant to object prior to an examination. The court ordered SSA to provide 30 days written notice to each plaintiff prior to any CR and to include the names of the evaluating doctor or other medical source, as defined in 20 CFR 404.1508. Michael D. Armstrong, Esq. and Francesca J, MacDowell, Esq., Albuquerque, NM.

Albers v. Social Security Administration, Case No. CIV 11-0092-WJ/KBM (D. Colo. Nov. 18, 2011) – 13 pages

LATE REQUEST FOR HEARING – GOOD CAUSE

1894. The Appeals Council vacated the January 2011 ALJ's dismissal of the request for hearing and remanded to the ALJ for a hearing. Contrary to the ALJ's finding, the Appeals Council found that good cause for late filing was established. The DDS state agency received the claimant's request for hearing on December 20, 2010. In her good cause statement, the claimant acknowledged the late filing, but said that she had received the reconsideration denial only two weeks before she filed the request for hearing. ON her request for hearing form, an SSA field office employee wrote that the reconsideration decision had been mailed on November 30, 2010. The SSA claims representative stated that the claimant did not receive the letter until the end of November and had contacted the SSA office within days of receipt. The claims representative asked that good cause be found. Michael Depree, Esq., Davenport, IA.

Appeals Council remand on good cause for late filing. (Dec. 9, 2011) – 3 pages

LAW OF THE CASE

1950. District court reversal and award of benefits to the plaintiff from February 1978 through January 1983, finding that the ALJ erred by failing to adhere to the law of the case. The plaintiff filed nine applications between 1978 and 1991, and failed to appeal any. In one of many earlier applications, the Commissioner had previously found that the plaintiff had a severe impairment of a borderline personality disorder and the plaintiff was awarded benefits as of 1983. In the present appeal, the ALJ did not mention this impairment at all in his findings. "This itself constituted reversible error." Had the ALJ properly considered this impairment, he could not have relied on the opinion of a consultative examiner who did not mention this diagnosis and who found that the plaintiff could perform simple tasks. The ALJ in a prior hearing gave great weight to a treating physician's opinion that the plaintiff's personality was both disabling and life-long. Since the Commissioner had already found the plaintiff presumptively disabled by this severe mental impairment and given the length of time that has passed and the current ALJ's hostility to the plaintiff, the court awarded benefits. Frederick W. Newall, Esq., Colorado Springs, CO. (since 1994).

Adamson v. Astrue, Civil Action No. 11-cv-01267-REB (D.Colo. Sept. 25, 2012); *2012 U.S. Dist. LEXIS 137528, *; 182 Soc. Sec. Rep. Service 497* – 9 pages

LISTING OF IMPAIRMENTS

1891. District court remand where the ALJ erroneously found that the plaintiff had degenerative disc disease when, in fact, she had a leg injury and trauma over a period of several years. Due to this error, it was reasonable for the court to conclude that the ALJ did not consider listing 1.02 at step 3. When an ALJ is specifically asked to consider a listing by number both during the hearing and in the post-hearing brief, the failure to do so requires remand because the court "cannot trace the path of reasoning." The ALJ also failed to properly analyze whether the plaintiff could "ambulate effectively" as required by the listing. Ellen C. Hanson, Esq., Morris, IL.

Blackburn v. Astrue, Case No. 10 C 5198 (N.D.Ill. Jan. 3, 2012); 2012 U.S. Dist. LEXIS 106 – 21 pages

LISTING OF IMPAIRMENTS – EQUIVALENCE

1932. District court remand because the ALJ failed to obtain a medical opinion on the question of whether the plaintiff's impairments medically equal a listing as required by SSR 96-6p. In the District of Colorado, an ALJ must receive into the record as expert opinion evidence of a state agency doctor's judgment on the issue of medical equivalence. (*Carbajal v. Astrue*, Case No. 10-cv-02025-PAB (D.Colo. June 23, 2011). The SSR provides that this requirement can be met by the signature of a DDS physician or a psychologist on the Disability Determination and Transmittal (DD&T) Form. In this case, there were two DD&T forms in the record but neither was signed by a physician. The disability examiner's signature was insufficient to meet the SSR requirement. Chris Noel, Esq., Bolder, CO

Hamblen v. Astrue, Civil Case No. 11-cv-01491-LTB (D.Colo. Aug. 13, 2012); 2012 U.S. Dist. LEXIS 113467 – 60 pages including Order, Plaintiff's Opening Brief, Plaintiff's Reply Brief, *Carbajal v. Astrue* slip opinion.

MEDICAL ADVISOR

1958. Fourth Circuit decision holding that 1) the ALJ must give retrospective consideration to psychological evidence created after the DLI when such evidence provides a sufficient linkage that may show a possible earlier and progressive degeneration. The court found a "sufficient linkage" in this case where there was corroborative lay evidence of the progression of the plaintiff's PTSD symptoms in the two VA psychological revaluations. 2) The ALJ must give substantial weight to a VA disability rating. The ALJ may give less weight to a VA disability rating when the record clearly demonstrates that such a deviation is appropriate. 3. The ALJ is required to consult a medical advisor under SSR 83-20 to determine the onset date of disability when the ALJ finds that the plaintiff was disabled at any time, including after his DLI, and the medical evidence of the date of onset is ambiguous. The court also explained that new evidence that was submitted to the Appeals Council was part of the record that the court will consider on appeal, as though it had been before the ALJ. Timothy Clardy, Esq., Greenville, SC.

Bird v. Astrue, 699 F.3d 337 (4th Cir. 2012), Brief and Appellant, Reply Brief of Appellant – 91 pages

MENTAL IMPAIRMENT – AFFECTIVE DISORDERS LISTING 12.04

1916. District court remand for further consideration of Listing 12.04C The ALJ erroneously found that the plaintiff did not meeting the criteria in both sections C2 and C3. The ALJ's limited analysis did not comply with Fourth Circuit case law that requires a comparison of each criteria in a listing to the evidence of the plaintiff's symptoms where there is ample evidence in the record that a listed impairment is met or equaled. Here, the ALJ erroneously found that the plaintiff resided in a community mental health program residence because she could not afford another residence, when, in fact her psychiatrist recommended she live there, and her community support advocate stated that she needed the support services provided. The ALJ erred in relying on SSR 06-3p to give the opinion of the community support advocate little weight because she is not a medical professional. The Ruling says that information from these medical sources is to be given some weight because of their personal knowledge of the claimant. In addition, Listing 12.00F addresses the effects of structured settings. The ALJ must consider the ability to function outside such a setting. In this case, the ALJ's analysis was "fundamentally flawed." Anthony Mignini, Esq., Bel Air, MD.

Handy v. Astrue, Civil Action No. TMD 11-1317M (D.Md. May 4, 2012); 2012 U.S. Dist. LEXIS 63894; 177 SSRS 554 – 8 pages

1902. ALJ decision, finding that the claimant's impairments and limitations met the criteria of Listing 12.04 and medically equaled listing 12.06. A medical expert (ME) testified at the hearing that the claimant's impairments met or equaled these two listings. In addition, the ME acknowledged the claimant's long history of alcohol abuse and how it exacerbated his mental impairments prior to the alleged onset date of January 1, 2011. Since that date, the ME noted that the claimant had abstained from alcohol use, yet he still has symptoms which meet and equal these listings. The ALJ found that the alcohol use was not a contributing factor material to the disability determination. John Horn, Esq., Tinley Park, IL.

Fully Favorable ALJ decision (Feb. 21, 2012) – 9 pages

MENTAL IMPAIRMENT – BI-POLAR DISORDER

1943. Fully favorable ALJ decision, based on an application filed thirteen years earlier, finding that the claimant met the criteria of listings 12.04 and 12.08. While there was evidence of drug and alcohol use, the primary cause of claimant's limitations was due to bi-polar disorder and personality disorder. There were 5 scheduled ALJ hearings, with 3 different ALJs, and one federal court remand. The ALJs committed the same errors after each Appeals Council remand. Josephine Gottesman, Esq., Lakewood, NJ.

Fully Favorable ALJ decision on listing 12.04 (Aug. 7, 2012) – 26 pages, including decision, Pre-Hearing Statement and Request for On-the-Record Decision.

1904. Fully favorable Appeals Council decision. The Appeals Council referred the case to its own medical consultant for review who found that the bipolar disorder met listing 12.04. The claimant's symptoms met the "A" criteria and the Appeals Council found that

the functional limitations caused by the bipolar disorder met the ”B” criteria, as he had marked limitations in social functioning and marked deficiencies of concentration and persistence. The claimant’s substance abuse was not a contributing factor material to the finding of disability because the medical consultant found that, “independently of all substances, the claimant will continue to remain significantly impaired by major psychopathology.” Frank G. Tuzzolino, Esq., Chicago, IL.

Appeals Council Decision (March 5, 2012) – 29 pages, including unfavorable ALJ decision, favorable Appeals Council decision and Letter Brief to Appeals Council

MENTAL IMPAIRMENT - DEPRESSION

1922. District Court remand for testimony of the effect of the plaintiff’s depression on her ability to work. The ALJ failed to include reference to the plaintiff’s major depression in the RFC determination after finding it was a “severe impairment” at step 2. The ALJ only “obliquely referred to the plaintiff’s mental function by describing her as able to perform simple repetitive tasks with simple instructions. The ALJ said she gave full weight to the opinion of a consulting psychologist, who diagnosed major depression, but then did not include the limitations it caused in her RFC findings. In addition, the VE, in response to a hypothetical from the ALJ, testified that a person who missed work three to four times a month because of depression would be unable to sustain full-time work. Margolius, Margolius, and Associates, Cleveland, OH.

Skobel v. Astrue, Case No. 1:11-CV-0748 (N.D.Ohio Apr. 27, 2012); 2012 U.S. Dist. LEXIS 59015 – 30 pages

MENTAL IMPAIRMENT - ORGANIC MENTAL DISORDERS-LISTING 12.02

1941. Fully favorable ALJ decision, finding that the claimant’s impairments met the criteria of listing 12.02C.3 (Organic Mental Disorders). The claimant’s documented memory impairment, mood disturbance, and emotional liability satisfy the paragraph “A” criteria. While he used alcohol and drugs in the past to deal with his emotions, he has not used these substances since September 2010, and the ALJ found that the substance use disorders are not a contributing factor material to the disability determination. IQ testing performed before his 22nd birthday indicate a full scale IQ of 64. The treating physician treats the claimant for depression and ADHD and opined that the claimant is incapable of several essential work-related activities. Work performed after the onset date was an unsuccessful work attempt. John Horn, Esq., Tinley Park, IL.

ALJ decision on listing 12.02C (Sept 21, 2012) – 10 pages

MENTAL IMPAIRMENT – PERSONALITY DISORDER - LISTING 12.08

1924. Fully favorable decision from the Appeals Council based on a finding that the claimant met Listing 12.08, Personality Disorders. A medical consultant to the Council found that the claimant’s dysfunction was caused by her personality disorder, not her pervious drug dependency. Substantial weight was given to the treating therapist’s opinion, which was consistent with the consultative psychologist and longitudinal medical evidence. The opinion stated that the claimant’s symptoms would preclude her from handling the ordinary stresses of work, attending consistently, working cooperatively with others, and interacting appropriately with the public. Stella L. Smetanka, Esq., Pittsburgh, PA.

Appeals Council decision – 16 pages including decision and letter brief to the Appeals Council.

MENTAL IMPAIRMENT – PSYCHIATRIC REVIEW TECHNIQUE

1944. District court remand where the ALJ failed to provide any explanation for giving "the greatest weight" to the opinion of the non-examining DDS psychologist who had completed a mental RFC form. The only rational was to state that the opinion was "consistent with the record as a whole" and was "not inconsistent" with the opinion of a psychologist who conducted a comprehensive neuropsychological evaluation of the plaintiff. Further, the ALJ failed to mention any areas in the RFC where the claimant had moderate limitations. The ALJ may not "pick and choose among medical reports . . ." The ALJ failed to articulate why the ultimate opinion was consistent with the conclusion regarding the claimant's limitations. Chris Noel, Esq., Boulder, CO.

Gorringe v. Astrue, Civil Action No. 11-cv-01160-PAB (D.Colo. Sept 30, 2012); 2012 U.S. Dist. LEXIS 141378 – 11 pages

1910. District Court remand for a proper evaluation of the plaintiff's mental impairments and their functional limitations. The ALJ erred in failing to include the plaintiff's depression, anxiety, and bipolar disorder as "severe" impairments at step 2. When a claimant asserts disability due to mental impairments, the ALJ is required to apply the Psychiatric Review Technique in the decision, incorporate the pertinent findings, and include a specific finding as to the degree of limitation in each of the four functional areas. Failure to document the application of the technique requires reversal if the plaintiff has a "colorable claim of mental impairment." In this case the ALJ did not follow the proper procedure. The ALJ summarized limited parts of the record without analysis and mischaracterized the record. He gave more weight to the findings of the state agency non-examining doctors than to the opinions of the treating physicians. Although the first diagnosis of the plaintiff's bipolar disorder accorded two weeks after the date last insured, "the existence of the diagnoses so close in time to plaintiff's date last insured allows a reasonable inference that the onset of the bipolar disorder occurred prior to the date of the first diagnosis." Art Stevens, III., Esq., Medford, OR.

Warren v. Astrue, Case No.: 2:10-cv-3102-SU (D.Ore. Mar. 13, 2012); 2012 U.S. Dist. LEXIS 33829 – 63 pages including decision, Plaintiff's Brief and Plaintiff's Reply Brief.

MENTAL IMPAIRMENT – VALIDITY OF IQ SCORE

1937. District Court remand where the ALJ erred in finding that the plaintiff's IQ was above 60. The consultative psychologist who performed IQ testing found that the plaintiff had a full scale IQ score of 55 but that her performance was probably higher than demonstrated and that she function is within the range of "borderline skills." The psychologist also noted that the lack of effort was probably secondary to her depression. The ALJ relied on this opinion to discount the IQ score, but failed in his responsibility to obtain a valid IQ score when the record contained evidence of her mental limitations. The ALJ has a duty to develop the record, even if the claimant is represented. In addition, the CE report included an opinion that the plaintiff would not be able to handle the stress and pressure of employment. Lawrence Wittenberg, Esq., Durham, NC.

Harris v. Astrue, Case No. 2:11-cv-18-BO (E.D.N.C. Aug. 31, 2012) – 22 pages

MENTAL RETARDATION – LISTING 12.05C

1938. District Court remand because the ALJ did not conduct the mandatory analysis to determine whether the plaintiff met Listing 12.05C. In the Sixth Circuit, there is a mandatory procedural requirement that an ALJ provide a discussion in the record why a claimant with an IQ score below 70 does not meet Listing 12.05. The plaintiff has two IQ scores below 70, with one 59. These scores should have triggered an analysis under both listings 12.05B and 12.05C. Further in terms of addressing evidence of manifestation of deficits in adaptive functioning before age 22, the ALJ did not discuss school records showing that the plaintiff was in special education classes, with third grade level reading and math skills when in high school. The court rejected the government's arguments that the IQ scores were not valid; that a childhood IQ score is not a valid measure of current IQ; that the plaintiff did not raise listing 12.05C in the hearing; and that the error was harmless because the ALJ's RFC limited the claimant to o more than three step instructions. Marcia Margolius, Esq., Cleveland, OH

Roberson v. Commissioner of Social Security, Case No. 1:10-cv-2884 (N.D.Ohio Mar. 30, 2012) – 11 pages

1889. District Court award of benefits. Contrary to the ALJ's finding, there was "abundant evidence" that the plaintiff had deficits of adaptive functioning prior to age 22. The plaintiff's attorney obtained a letter from the special education teacher who remembered teaching the plaintiff and confirmed her learning difficulties. "Plaintiff's extremely low IQ scores [between 59 and 63], coupled with her lack of literacy and history of special education, are sufficient to establish the requisite manifestations of deficits in adaptive functioning before the age of 22." The ALJ's finding of "only" moderate limitations in social functioning is not supported by substantial evidence, as demonstrated by the plaintiff's own hearing testimony and a psychological evaluation, noting a GAF of 25. EAJA fees are later awarded. (2012 U.S. Dist. LEXIS 63681) The Commissioner is ordered to inform counsel whether the plaintiff owes an offsetable debt to the Government. If there is no debt, the Commissioner shall honor the assignment of fees. If there is a debt, the Commissioner shall pay any attorney's fees remaining after such offset to the Plaintiff instead of to her attorney. Samuel F. Furgiuele, Jr. Esq., Boone, NC.

Holtsclaw v. Astrue, Case No. 1:10cv199 (W.D.N.C. Dec. 30, 2011); 2011 U.S. Dist. LEXIS 150118; 173 SSRS 528 – 45 pages including decision and Memorandum in Support of Plaintiff's Motion for Summary Judgment.

MIGRAINE HEADACHES

1893. Favorable ALJ decision, finding that the severity of the claimant's migraine headaches medically equals listing 11.03. The ME's hearing testimony supported the treating neurologists' opinion. The ALJ found the claimant's testimony to be credible. The claimant had sustained a closed head injury during a motor vehicle accident in 2003. Since then her headaches had worsened. The ALJ found that she was disabled since her

alleged onset date in 2003, based on the application filed in 2009. James L. Noel., Esq. Lakewood, CO.

Favorable ALJ decision (Nov 15, 2011) – 10 pages include ALJ decision, supporting letter from treating neurologist, SSA National Q&A 09-036: Guidance regarding the evaluation of migraine headaches.

MULTIPLE SCLEROSIS

1906. District court remand for further proceedings where the ALJ erred in disregarding the treating physician's opinion, finding the claimant not credible, and erroneously stating that he was diagnosed with relapsing and remitting MS. The plaintiff was diagnosed with progressive relapsing multiple sclerosis in 1996 and has seen the same neurologist since 1996. The ALJ found that the plaintiff had the RFC for light would with some limitations and could return to his former work as a gas station attendant and a bus driver. On remand, the ALJ must re-examine the plaintiff's RFC and ability to return to past work. Frank G. Tuzzolino, Esq., Chicago, IL.

Beamon v. Astrue, Case No. 10 C 50102 (N.D.Ill. Mar. 13, 2012); 2012 U.S. Dist. LEXIS 34052 - 49 pages including District Court Opinion, Plaintiff's Briefs.

MUSCULOSKELETAL IMPAIRMENTS

1891. District court remand where the ALJ erroneously found that the plaintiff had degenerative disc disease when, in fact, she had a leg injury and trauma over a period of several years. Due to this error, it was reasonable for the court to conclude that the ALJ did not consider the listings at step 3. When an ALJ is specifically asked to consider a listing by number both during the hearing and in the post-hearing brief, the failure to do so requires remand because the court "cannot trace the path of reasoning." The ALJ also failed to properly analyze whether the plaintiff could "ambulate effectively" as required by the listing. Ellen C. Hanson, Morris, IL.

Blackburn v. Astrue, Case No. 10 C 5198 (N.D.Ill. Jan. 3, 2012); 2012 U.S. Dist. LEXIS 106 – 21 pages

MYSTERY ALJ POLICY

1946. Appeal filed to district court after the Freedom of Information Act request to receive the name of the assigned ALJ prior to the hearing was denied. David Camp, Creve Court, MO.

Sparks v. Social Security Administration, Case No. 4:12-cv-01604 (E.D.Mo. filed Sept. 7, 2012) – 41 pages including Complaint, FOIA request, Denial of the request, Appeal filed with Executive Director, SSA Office of Privacy and Disclosure; and Denial of Appeal.

NONCOMPLIANCE

1895. District Court remand because the ALJ failed to properly assess the plaintiff's credibility consistent with SSR 96-7p. He failed to reconcile the contradictions in the evidence when assessing credibility. The plaintiff was diagnosed with sarcoidosis and asthma. When the plaintiff went to the ER for breathing difficulties, she was given only a limited supply of medication and could not afford to purchase more. The ALJ's finding that the sarcoidosis was controlled with Prednisone was "particularly disconcerting" since

the plaintiff could not afford the treatment. When that occurs and the medication cannot be otherwise obtained, "then the impairment would be deemed disabling." Marcia Margolius, Esq., Cleveland, OH. . EAJA fees are later awarded. (*Moore v. Astrue, 2012 U.S. Dist. LEXIS 18401*) Counsel is ordered to determine whether plaintiff owes a debt subject to offset. If there is no pre-existing debt or the debt is less than the amount of the EAJA fee award, the balance of the EAJA fee award shall be made payable to Plaintiff's counsel per the assignment in the record.

Moore v. Astrue, Case No. 1:10-cv-2913 (N.D.Ohio, Nov. 30, 2011); *2011 U.S. Dist. LEXIS 137726* – 22 pages

OBESITY

1890. District Court remand due to the ALJ's failure to consider the plaintiff's obesity as required by SSR 02-1p. The court held that the ALJ is required to consider the plaintiff's obesity even if the plaintiff did not use that term. Her hearing testimony described symptoms associated with obesity and there was abundant medical evidence of obesity in the record, including a BMI showing morbid obesity, and physical limitations and other ailments listed in SSR 02-1p. Nine months after the ALJ decision on the first claim the plaintiff filed an SSI only association that was approved at the ALJ level, when the ALJ considered obesity. The government refused to remand the prior claim based on the subsequent allowance because of the time between the two decisions. The court holds that the ALJ erred by not considering the plaintiff's obesity, by failing to give the treating doctor's opinion proper weight, and by making an improper credibility finding. Leah Broker, Esq., Asheville, NC.

McHone v. Astrue, case No. 1:10-cv-00273-MR (W.D.N.C. Dec. 20, 2011); 2011 U.S. Dist. LEXIS 146618 - 66 pages including Decision, Plaintiff's brief and Commissioner's Brief.

ONSET DATE – RETROACTIVE

1958. Fourth Circuit decision holding that 1) the ALJ must give retrospective consideration to psychological evidence created after the DLI when such evidence provides a sufficient linkage that may show a possible earlier and progressive degeneration. The court found a "sufficient linkage" in this case where there was corroborative lay evidence of the progression of the plaintiff's PTSD symptoms in the two VA psychological revaluations. 2) The ALJ must give substantial weight to a VA disability rating. The ALJ may give less weight to a VA disability rating when the record clearly demonstrates that such a deviation is appropriate. 3. The ALJ is required to consult a medical advisor under SSR 83-20 to determine the onset date of disability when the ALJ finds that the plaintiff was disabled at any time, including after his DLI, and the medical evidence of the date of onset is ambiguous. The court also explained that new evidence that was submitted to the Appeals Council was part of the record that the court will consider on appeal, as though it had been before the ALJ. Timothy Clardy, Esq., Greenville, SC

Bird v. Astrue, 699 F.3d 337 (4th Cir. 2012), Brief and Appellant, Reply Brief of Appellant – 91 pages

1910. District Court remand for a proper evaluation of the plaintiff's mental impairments and their functional limitations. The ALJ failed to apply the Psychiatric Review Technique in the decision, incorporate the pertinent findings, and include a specific finding as to the degree of limitation in each of the four functional areas. Although the first diagnosis of the plaintiff's bipolar disorder accorded two weeks after the date last insured, "the existence of the diagnoses so close in time to plaintiff's date last insured allows a reasonable inference that the onset of the bipolar disorder occurred prior to the date of the first diagnosis." Art Stevens, III., Esq., Medford, OR.

Warren v. Astrue, Case No.: 2:10-cv-3102-SU (D.Ore. Mar. 13, 2012); 2012 U.S. Dist. LEXIS 33829 – 63 pages including decision, Plaintiff's Brief and Plaintiff's Reply Brief.

OVERPAYMENT – CIVIL MONETARY PENALTIES

1923. An individual was charged with a proposed $39,000 civil penalty and an assessment in lieu of damages of $21,000, based in the OIG General Counsel's "determination that you omitted material facts about your earnings and resources that you knew, or should have known, you had a duty to report to SSA." The claimant had been paying back an overpayment on a payment plan. The proposed civil monetary penalty was dropped because the individual had proof that she had reported earnings to SSA years earlier. Stacy Cloyd, Esq., Washington, DC.

Documents submitted to the DHHS Departmental Appeals Board. – 4 pages

OVERPAYMENT – WAIVER

1903. Fully favorable ALJ decision, waiving an overpayment of over $43,000, caused by earnings. Although the plaintiff failed to notify SSA that she had returned to work, she was not completely at fault in causing the overpayment. She received disability benefits based on dementia, and thus SSA had knowledge of that condition. SSA was also on notice that she had returned to work, as she received benefit notices increases due to her wages. Recovery would also be against equity and good conscience, give that her current monthly income is less than her expenses. Steven Stepper, Esq., West Palm Beach, FL.

Fully Favorable ALJ decision (Feb. 24, 2012) – 11 pages including Counsel's Cover Letter and Decision

PAST RELEVANT WORK – SGA ISSUES

1930. Fully favorable Appeals Council decision. The ALJ erred in finding that the claimant could perform her past relevant work as a housekeeper/cleaner. Her work at this job was below the SGA level. Thus it does not meet the requirements for "past relevant work" under 20 CFR §§ 404.1565 and 416.965. Her other work as a laundry worker was unskilled and medium but the ALJ had limited the plaintiff to light work, and therefore she cannot perform this past work. The Appeals Council found the claimant disabled under Medical-Vocation Rule 202.01. Thad Murphy, Esq., Davenport, IA.

Appeals Council award of benefits. July 26, 2012 – 7 pages

REMAND: GOOD CAUSE/ NEW EVIDENCE

1949. District Court remand under sentence six of 42 U.S.C. sec. 405(g) for consideration of new and material evidence. The plaintiff had back surgery less than four months after

the date of the ALJ decision. The Commissioner argued that the evidence was not material because it was evidence of new symptoms or a worsening of the condition, and thus did not relate to the period before the date of the ALJ decision, warranting a new application, not a remand. The court disagreed. "Because the surgery appears to closely relate to the treatment plaintiff was receiving prior to the ALJ's decision, we find that it is new and material objective evidence that is related to the plaintiff's original DIB application. Therefore, the ALJ should consider this new and material evidence on remand." John E. Horn, Esq., Tinley Park, IL.

Roper v. Astrue, No. 11 C 3628 (N.D.Ill. Aug. 21, 2012); 2012 U.S. Dist. LEXIS 118779 – 22 pages

REMAND v. REVERSAL

1950. District court reversal and award of benefits to the plaintiff from February 1978 through January 1983, finding that the ALJ erred by failing to adhere to the law of the case. The plaintiff filed nine applications between 1978 and 1991, and failed to appeal any. In one of many earlier applications, the Commissioner had previously found that the plaintiff had a severe impairment of a borderline personality disorder and the plaintiff was awarded benefits as of 1983. In the present appeal, the ALJ did not mention this impairment at all in his findings. "This itself constituted reversible error." Had the ALJ properly considered this impairment, he could not have relied on the opinion of a consultative examiner who did not mention this diagnosis and who found that the plaintiff could perform simple tasks. The ALJ in a prior hearing gave great weight to a treating physician's opinion that the plaintiff's personality was both disabling and life-long. Since the Commissioner had already found the plaintiff presumptively disabled by this severe mental impairment and given the length of time that has passed and the current ALJ's hostility to the plaintiff, the court awarded benefits. Frederick W. Newall, Esq., Colorado Springs, CO. (since 1994)

Adamson v. Astrue, Civil Action No. 11-cv-01267-REB (D.Colo. Sept. 25, 2012); *2012 U.S. Dist. LEXIS 137528; 182 SSRS 497* – 9 pages

1947. District court reversal and remand for an award of benefits. Since her original application, filed in 2000, the clamant has been administratively denied at 4 hearings by 3 different ALJs. The decisions denying the claimant's application were remanded one by the Appeals Council and twice by the district court. The Commissioner's most recent motion for remand conceded that the ALJ's decisions were not supported by substantial evidence and the ALJ failed to comply with the federal court's clear directives after remand. The court determined that a remand for further proceedings was inappropriate, and stated that the ALJ's continued failure to properly adjudicate the claim after such a long period of time had resulted in a miscarriage of justice for the plaintiff. Citing *Seavy v. Barnhart*, 276 F.3d 1 (1st Cir. 2001) the Judge stated that "the Commissioner is not entitled to endless opportunities to get it right." Luis R. Garcia, Esq., and Edward S. Rue, Esq., Port Orange, FL.

Jusick v. Commissioner of Social Security, Case No. 6:12-cv-175-GJK (M.D.Fla. Nov. 13, 2012); 2012 U.S. Dist. LEXIS 161528 – 31 pages including Decision, Plaintiff's Memorandum in Opposition to Commissioner's Decision

1921. District court reversal and award benefits in a case involving chronic fatigue syndrome. Benefits were awarded because the government conceded that the ALJ erred in the evaluation of evidence from the treating physician and in the evaluation of non-physician treating source evidence from a physical therapist. The ALJ erroneously found that chronic fatigue syndrome was not a severe impairment. The ALJ improperly rejected the opinion of a treating specialist who diagnosed lyme disease and CFS by relying on non-treating physicians who questioned the lyme disease diagnosis. However, the CFS diagnosis was supported by substantial evidence from the treating and non-treating physicians. The supporting evidence comports with the definition of CFS and the SSA's guidelines for evaluating CFS in SSR 99-2p. The ALJ also erred in rejecting the treating physician's opinion because he "sympathizes" with his patient. Citing Ninth Circuit case law, the court noted that the "Commissioner may not assume physicians routinely lie to help patients gain disability benefits." The court then credited this treating physician's findings and opinions and those of other treating physicians as "matter-of-law." By crediting the plaintiff's testimony and the improperly rejected medical opinions, the VE testified that the plaintiff's limitations would preclude employment. Since "additional proceedings would serve no useful purpose, the court reversed the denial and awarded benefits. Kenneth Isserlis, Esq., Spokane, WA.

Hicks v. Astrue, Case No. CV-11-063-CI (E.D.Wa. April 5, 2012); 2012 U.S. Dist. LEXIS 49015 - 23 pages

1912. District court remand for an award of benefits because there was not a significant number of jobs that the plaintiff could perform. "Whether a particular number of jobs is 'significant' is not an issue determinable by raw numbers, but is dependent upon the context, e.g. the Plaintiff's level of impairment, the reliability of her testimony, and the reliability of the vocational expert's testimony." The Magistrate Judge agreed with the plaintiff that 239 jobs in Tennessee and 16.900 jobs in the United States 'does not meet the standard for significant.'" On average, each state would have 338 jobs available for the plaintiff. "[I]t is not clear that Plaintiff could live *anywhere* and have a significant number of jobs available to her." The case was remanded for an award of benefits because there was no essential factual issue to be resolved. Since testimony establishes that there is no significant number of jobs, "[f]urther proceedings would not, therefore, serve a useful purpose. Michael Williamson, Esq., Nashville, TN.

Malone v. Astrue, Case No, 3:10-cv-01137(M.D.Tenn. May 14, 2012 – 39 pages

REMEDIABILITY

1907. District Court remand for further proceedings. The ALJ found that the claimant's congestive heart failure (CHF) was not a "severe impairment" at step 2. The plaintiff died of a heart attack while the appeal was pending. The court found that "the ALJ committed legal and factual error in discounting claimant's symptoms based upon his failure to obtain regular medical treatment." The claimant lacked the financial ability or insurance coverage necessary to obtain ongoing care after his employment ended. Under SSR 96-7p, the ALJ cannot draw adverse credibility inferences based on a failure to seek regular medical treatment without first considering the claimant's explanations. Medical reports in the record confirm how the lack of insurance negatively impacted the ability to obtain

adequate medical care. There is no evidence that the ALJ considered the plaintiff's financial resources. Michael Mooney, Esq., Cincinnati, OH.

Russell o/b/o Roach v. Astrue, Case No 1:10-cv-746 (S.D. Ohio April 11, 2012); *2012 U.S. Dist. LEXIS 73223* – 44 pages including Magistrate Report & Recommendation, Plaintiff's Opening and Reply Briefs.

1895. District Court remand because the ALJ failed to properly assess the plaintiff's credibility consistent with SSR 96-7p. He failed to reconcile the contradictions in the evidence when assessing credibility. The plaintiff was diagnosed with sarcoidosis and asthma. The ALJ discuses some evidence that supported the conclusion that the plaintiff was not as limited as she claims. Other evidence supports the plaintiff's subjective complaints. When she went to the ER for breathing difficulties, she was given only a limited supply of medication and could not afford to purchase more. At her CE, she reported pain in her joints and the ability to sit for 40 minutes, stand for 30 minutes and walk for 10 minutes. The CE doctor found that her air entry was markedly diminished. The ALJ's finding that the sarcoidosis was controlled with Prednisone was "particularly disconcerting" since the plaintiff could not afford the treatment. When that occurs and the medication cannot be otherwise obtained, "then the impairment would be deemed disabling." Marcia Margolius, Esq., Cleveland, OH. EAJA fees are later awarded.(*Moore v. Astrue, 2012 U.S. Dist. LEXIS 18401*) Counsel is ordered to determine whether plaintiff owes a debt subject to offset. If there is no pre-existing debt or the debt is less than the amount of the EAJA fee award, the balance of the EAJA fee award shall be made payable to Plaintiff's counsel per the assignment in the record.

Moore v. Astrue, Case No. 1:10-cv-2913 (N.D.Ohio Nov. 30, 2011); *2011 U.S. Dist. LEXIS 137726* – 22 pages

REOPENING - SSI

1939. Appeals Council reversal and award of both title II and SSI benefits. The claimant had filed a concurrent application in 2007 and was found disabled as of June 22 2007 for SSI only, because SSA had erroneously found a DLI of 2005. However, because of work and earnings, he had two periods of insured status, April 1993 through March 2005 and July 2007 through June 2008. Since he is insured for Title II benefits though June 30, 2008, the Appeals Council applied collateral estoppel to find that he became disabled under title II on June 22, 2007 as well. The Appeals Council also found that the ALJ abused his discretion by reopening the 2007 initial level allowance in 2010 and reversing the finding of disability. The two year limit for reopening an SSI claim had passed and there was no evidence of fraud or similar fault. Thad Murphy, Esq., Davenport, IA.

Favorable Appeals Council decision (July 23, 2012) – 4 pages

REOPENING – SSR 91-5p

1919. Appeals Council reopening of an ALJ denial dated March 25, 2009 under SSR 91-5p. The claimant has a limited education and borderline intellectual functioning. He was not represented for this claim and did not understand that he could have appealed the denial. He later reapplied and was found disabled by an ALJ. The Appeals Council found that the borderline intellectual functioning and lack of representation prevented the claimant from filing a timely appeal or from understanding or knowing about the need to

file a timely appeal. Based on the medical evidence of record, The Appeals Council found the claimant disabled since the date of the application. Fritzie Vammen, Esq., Conway, AR.

Favorable Appeals Council Decision (May 20, 2012) – 3 pages

RES JUDICATA

1955. Fully favorable ALJ decision, finding that *res judicata* did not apply to the issue of disability for the Title II claim because new and material evidence was submitted, which confirms that the claimant was more limited as of his alleged onset date, October 2003, than previously determined by another ALJ in a 2006 decision. The plaintiff's 2008 SSI application had been approved in 2010, but his Title II application was denied due to the expiration of his insured status. The current ALJ gave great weight to the opinion of the primary treating doctor who wrote that the plaintiff's limitations existed prior to 2004, his date last insured. The treating rheumatologist noted that the plaintiff is greatly limited by his gout flare-ups, which reduce his RFC. The claimant was two months shy of age 50 at the time of his DLI, so the ALJ applied the older age category. Based on the testimony of the VE and Grid Rule 201.14, the ALJ found the claimant disabled since 2003. Lawrence Wittenberg, Esq., Durham, NC.

Fully Favorable ALJ decision on *res judicata* (Nov. 27, 2012) – 13 pages

RESIDUAL FUNCTIONAL CAPACITY – CHECK LIST FORMS

1952. Appeals Council remand after a sentence four remand by the district court. The Appeals Council remand order specifically states that the use of a checklist style form requested by the claimant "is an invalid rationale for discrediting the limitations stated in the forms. Social Security uses such checklists. . .This is not a valid reason to reject such specific limitations opined by treating sources, considering the medical evidence of record reflects treatments, medications, and other factors not considered by the Administrative Law Judge when finding the claimant less than credible." In addition, the ALJ erred in relying on a CE by a doctor who had surrendered his medical license in once state. Finally, the ALJ erred by classifying lumbosacral injections as "conservative" treatment, when in fact they are "invasive." Manual Serpa, Esq., San Bernardino, CA.

Appeals Council remand on credibility (Oct. 22, 2012) – 3 pages

RESIDUAL FUNCTIONAL CAPACITY – FINDING FROM A PRIOR DECISION

1926. District court reversal and remand for an award of benefits. The court holds that a prior RFC finding applies to the subsequent application unless SSA shows substantial evidence of improvement. The issue was whether the plaintiff was disabled between August 1 2005 and June 21, 2007. The plaintiff has been found disabled as of a 2007 onset date. A prior claim was denied in 2004, based on a finding that the plaintiff had the RFC to perform sedentary work. However, in the second claim, now on appeal, the ALJ found that he was able to perform light work. This would be possible only if the plaintiff's condition had improved since the first ALJ's decision, and there is no evidence to support that conclusion. The court relied on AR 00-1(4) and the grids to find that the plaintiff would be found disabled on his 50th birthday in February 2006. As August 2005 "was a mere six months shy of his fiftieth birthday" the court found that the plaintiff was disabled as of that date. Larry Wittenberg, Esq., Durham, NC

Aldridge v. Astrue, No 5:11-CV-403-BO (E.D.N.C. July 16, 2012). *Published at 880 F.Supp.2d 695*– 31 pages

RESIDUAL FUNCTIONAL CAPACITY – FULL RANGE OF LIGHT WORK

1925. District court remand where the ALJ failed to provide any reasons for the weight he gave the treating physician's opinion. The plaintiff was in an accident and continued to experience pain, swelling and discoloration of her left foot. Her treating doctor concluded that she was unable to work because she could not climb, stand, or carry for any length of time. The ALJ found that the plaintiff could perform "light" work which did not involve climbing or using foot controls. However, light work requires standing or walking for 6 hours each day. As a result, the ALJ's RFC "inherently conflicted with [the treating doctor's] opinion. The failure to provide "good reasons" for the weight given the treating doctor's opinion "alone necessitates remand." The court also rejected the government's argument that the ALJ's failure amounted to harmless error. Had the ALJ fully credited [the doctor's] findings, he could have concluded that the plaintiff was unable to work. Marcia Margolius, Esq. Cleveland, OH.

Neeld v. Commissioner of Social Security, Case No. 4:11CV1168 (N.D.Ohio, May 25, 2012); 2012 U.S. Dist. LEXIS 72980 – 20 pages

RESIDUAL FUNCTIONAL CAPACITY – FULL TIME WORK

1914. Appeals Council decision, finding on an onset date of June 2004, based on an application filed in January 2006. The claimant has a history of chronic daily migraine headaches and cervical disc disease. She has been treated by the same neurologist since 2000. He concluded that she would be precluded for even basic work activities, needing a minimum break of two to four hours , and would be absent from work more than four times a month. The Appeals Council gave his opinion controlling weight, finding it well-supported and not inconsistent with other substantial evidence of record. The Appeals Council also gave controlling weight to the opinion of the treating anesthesiologist who stated that the claimant's prognosis was poor. The claimant's subjective complaints were also found to be credible. The Appeals Council noted that under SSR 96-8p, the ability to work on a regular and continuing basis is necessary at step five. "A work restriction substantially less than full time does not satisfy this requirement." Lynn Stevens, Esq., Atlanta, GA.

Appeals Council decision (Sept. 22, 2011) – 12 pages including decision and brief.

RESIDUAL FUNCTIONAL CAPACITY – LESS THAN SEDENTARY

1953. Fully favorable ALJ decision based on an application filed in 1983, finding that the claimant (who died in 2009) was under a disability from March 1982 through March 1998 and March 1989 until the date of his death. His date last insured was in 1985. The claimant's application was reopened as a class member in *Dixon v. Shalala* and *Stieberger v. Sullivan*. In 2012, the ALJ found that the claimant's RFC was limited to less than sedentary work. He gave great weight to the opinion of the treating physicians, who had treated the claimant during the entire period in question and whose opinions are supported by the overall evidence. As a result of the RFC, the claimant could not return to his past work as a police detective and because of his "markedly reduced" RFC< there

were no transferable skills. A finding of disabled is warranted, resulting in past due benefits of over $250,000 for the widow. Douglas, C.J. Brigandi, Esq., Bayside, NY.

ALJ decision on less than the full range of sedentary work (July 24, 2012) – 16 pages.

RESIDUAL FUNCTIONAL CAPACITY – MEDICAL ISSUES

1931. Ninth Circuit remand to clarify the Appellant's residual functional capacity and to determine whether he can perform SGA. There was no evidence to support the ALJ's finding that the plaintiff was able to sit, walk and stand six hours in an eight hour day and was only limited the ability to squat, kneel, or bend/stoop. The ALJ did not explain why he rejected a physical capabilities evaluation in the file that did not support the ALJ's findings on sitting, walking and standing, and said that the claimant could never squat, kneel, or bend/stoop. As a result of the erroneous RFC finding, the ALJ's hypothetical to the VE was flawed. In addition, the plaintiff's attorney asked the VE if adding that he needed to elevate legs at unpredictable times would affect the ability to perform the jobs named by the VE. The VE responded that it would erode the "competitive base." This unclear response is another reason to remand for further proceedings. Arthur W. Stevens III, Esq., Medford, OR.

Koepke v. Commissioner of Social Security Administration, No. 11-35381 (July 25, 2012); 2012 U.S. App. LEXIS 15373 – 93 pages including Memorandum Opinion (unpublished) Appellants Brief, Appellant's Reply Brief.

SEVERITY

1910. District Court remand for a proper evaluation of the plaintiff's mental impairments and their functional limitations. The ALJ erred in failing to include the plaintiff's depression, anxiety, and bipolar disorder as "severe" impairments at step 2. When a claimant asserts disability due to mental impairments, the ALJ is required to apply the Psychiatric Review Technique in the decision, incorporate the pertinent findings, and include a specific finding as to the degree of limitation in each of the four functional areas. Failure to document the application of the technique requires reversal if the plaintiff has a "colorable claim of mental impairment." In this case the ALJ did not follow the proper procedure. The ALJ summarized limited parts of the record without analysis and mischaracterized the record. He gave more weight to the findings of the state agency non-examining doctors than to the opinions of the treating physicians. Although the first diagnosis of the plaintiff's bipolar disorder accorded two weeks after the date last insured, "the existence of the diagnoses so close in time to plaintiff's date last insured allows a reasonable inference that the onset of the bipolar disorder occurred prior to the date of the first diagnosis." Art Stevens, III., Esq., Medford, OR.

Warren v. Astrue, Case No.: 2:10-cv-3102-SU (D.Ore. Mar. 13, 2012); 2012 U.S. Dist. LEXIS 33829 – 63 pages including decision, Plaintiff's Brief and Plaintiff's Reply Brief.

SIGNIFICANT NUMBER OF JOBS

1912. District court remand for an award of benefits because there was not a significant number of jobs that the plaintiff could perform. "Whether a particular number of jobs is 'significant' is not an issue determinable by raw numbers, but is dependent upon the

context, e.g. the Plaintiff's level of impairment, the reliability of her testimony, and the reliability of the vocational expert's testimony." The Magistrate Judge agreed with the plaintiff that 239 jobs in Tennessee and 16.900 jobs in the United States 'does not meet the standard for significant.'" On average, each state would have 338 jobs available for the plaintiff. "[I]t is not clear that Plaintiff could live *anywhere* and have a significant number of jobs available to her." The case was remanded for an award of benefits because there was no essential factual issue to be resolved. Since testimony establishes that there is no significant number of jobs, "[f]urther proceedings would not, therefore, serve a useful purpose. Michael Williamson, Esq., Nashville, TN.

Malone v. Astrue, Case No, 3:10-cv-01137(M.D.Tenn. May 14, 2012) – 39 pages

SSI: DISABLED CHILD – NARCOLEPSY

1954. Fully favorable ALJ decision for a 7 year old child who has "severe" impairments of narcolepsy, asthma, and ADHD. The claimant's impairments functionally equal the severity of the listings, since he has marked limitations in two domains: 1) interacting and relating to others, and 2) health and physical well-being. In assessing the health and well-being domain, a Teacher Questionnaire indicated that he falls asleep at random during school activities. An examining doctor reported that the claimant is on a nap schedule to manage his daytime sleepiness and that accommodations, such as providing extra time for testing and allowing breaks during period of activity, may be necessary. Michael Matthews, Esq., Maitland, FL.

ALJ decision on SSI childhood disability (Nov. 6, 2012) – 9 pages

SUBSTANCE ABUSE

1918. Appeals Council remand because the ALJ improperly relied on circuit court precedent regarding the plaintiff's burden in a substance abuse case, when the Commissioner has not acquiesced in these court decisions. After the medical expert testified at the hearing that it was difficult to separate the functional limitations caused by DA&A from those caused by her other mental impairments, the ALJ found that the plaintiff's DA&A was material. When the plaintiff appealed to federal court, SSA proposed a remand for a new hearing. The Appeals Council remand order states that the Ninth Circuit case cited by the ALJ [*Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007)] that the claimant has the burden of showing DA&A is not material does not apply because SSA has not acquiesced in that decision. Even in the Ninth Circuit SSA policy regarding the inability to separate the effects of various impairments remains governed by EM 96200. D. James Tree, Esq. Yakima, WA.

Appeals Council remand order (March 23, 2011) – 8 pages including Appeals Council Remand and cover letter from claimant's attorney.

1904. Fully favorable Appeals Council decision. The Appeals Council referred the case to its own medical consultant for review who found that the bipolar disorder met listing 12.04. The claimant's symptoms met the "A" criteria and the Appeals Council found that the functional limitations caused by the bipolar disorder met the "B" criteria, as he had marked limitations in social functioning and marked deficiencies of concentration and persistence. The claimant's substance abuse was not a contributing factor material to the finding of disability because the medical consultant found that, "independently of all

substances, the claimant will continue to remain significantly impaired by major psychopathology." Frank G. Tuzzolino, Esq., Chicago, IL.

Appeals Council Decision (March 5, 2012) – 29 pages, including unfavorable ALJ decision, favorable Appeals Council decision and Letter Brief to Appeals Council

1902. Favorable ALJ decision, finding that the claimant's impairments and limitations met the criteria of Listing 12.04 and medically equaled listing 12.06. The ME acknowledged the claimant's long history of alcohol abuse and how it exacerbated his mental impairments prior to the alleged onset date of January 1, 2011. Since that date, the ME noted that the claimant had abstained from alcohol use, yet he still has symptoms which meet and equal these listings. The ALJ found that the alcohol use was not a contributing factor material to the disability determination. John Horn, Esq., Tinley Park, IL.

Fully Favorable ALJ decision (Feb. 21, 2012) – 9 pages

SUBSTANTIAL GAINFUL ACTIVITY- SELF-EMPLOYMENT

1911. District Court remand because the ALJ did not follow the requirements in SSR 83-34 for evaluating whether self-employment income constitutes substantial gainful activity. Thomas Bothwell, Esq., Cory Brandt, Esq., Yakima, WA.

Weber v. Astrue, Case No. CV-10-3112-JPH (E.D.Wash. Jan. 31, 2012); 2012 U.S. Dist. LEXIS 11033 – 47 pages including Decision, Plaintiff's Memo and Reply Memo.

SURVIVORS' BENEFITS

1898. ALJ decision finding that, under 20 CFR 404.345, the claimant met the relationship requirement to be eligible for benefits as the "deemed" surviving divorced spouse of the deceased worker. The claimant would have been protected under the community property laws of Nevada and would have been eligible to inherit if the insured worker, her former husband, had died intestate. Even though they were divorced and were married for less than 10 years before the wage-earner's death, they held themselves out as married both in their business and personal lives. Susan Holm, Esq., Renton, WA.

ALJ decision (Nov. 25, 2011) – 9 pages including ALJ decision and Claimant's Pre-hearing Brief.

SSI RESOURCES

1957. Fully favorable ALJ decision finding that the claimant was eligible for SSI and did not have excess resources. His only resource at the time he applied for SSI was a 1991 car. His brother bought vehicles to fix up and sell. Because his brother lacked a driver's license, the claimant registered all the cars under his name. His SSI application was denied based on a long list of cars, resulting in resources over the $2,000 limit. The ALJ found that the resources did not belong to the claimant. His brother bought, fixed-up, and sold the cars. The claimant never paid for any of the vehicle and was not involved in their repair. The claimant's brother held equitable title to all of the vehicles since the claimant never held any equitable interest in them and never held any equitable right to their value. As a result, the vehicles are not the claimant's resources. Thad J. Murphy, Esq., Davenport, IA.

ALJ decision (Nov. 29, 2012) – 8 pages

TRANSFERABLE SKILLS

1917. Appeals Council remand where the ALJ did not specify which computer skills the claimant acquired and how they would transfer to the jobs cited by the VE. In addition, the jobs cited by the VE were both unskilled jobs. "As such, the claimant is not able to transfer skills to these unskilled job [sic]." Since transferability of skills is material to the step 5 analysis for this claimant, further evaluation may be necessary. John Horn, Esq., Tinley Park, IL

Appeals Council Remand (May 21, 2012) – 5 pages

UNSUCCESSFUL WORK ATTEMPTS

1915. Appeals Council remand when the ALJ improperly discounted a consultative examination because it was conducted on a referral by the claimant's attorney. In addition, the ALJ's decision does not properly apportion weight to the treating and non-treating sources, and he failed to properly develop the record as to repeated work attempts, which were in fact unsuccessful work attempts. The ALJ discounted the claimant's credibility because, according to the ALJ, the repeated work attempts showed a capacity to perform at least some basic work activities. Randolph Baltz, Esq., Little Rock, AR.

Appeals Council remand on consultative examination (April 3, 2012) – 5 pages

VETERANS DISABILITY DETERMINATION

1958. Fourth Circuit decision holding that, 1) the ALJ must give retrospective consideration to psychological evidence created after the DLI when such evidence provides a sufficient linkage that may show a possible earlier and progressive degeneration. The court found a "sufficient linkage" in this case where there was corroborative lay evidence of the progression of the plaintiff's PTSD symptoms in the two VA psychological revaluations. 2) The ALJ must give substantial weight to a VA disability rating. The ALJ may give less weight to a VA disability rating when the record clearly demonstrates that such a deviation is appropriate. 3. The ALJ is required to consult a medical advisor under SSR 83-20 to determine the onset date of disability when the ALJ finds that the plaintiff was disabled at any time, including after his DLI, and the medical evidence of the date of onset is ambiguous. The court also explained that new evidence that was submitted to the Appeals Council was part of the record that the court will consider on appeal, as though it had been before the ALJ. Timothy Clardy, Esq., Greenville, SC

Bird v. Astrue, 699 F.3d 337 (4th Cir. 2012), Brief and Appellant, Reply Brief of Appellant – 91 pages

VOCATIONAL EXPERT TESTIMONY- ACCOMMODATIONS

1920. District court remand based on a joint motion by the parties due to errors in the VE's testimony. The VE's responses were based on accommodations provided by employers. The numbers were not based on data from the regions where the plaintiff lived, but rather from a different region. Irwin Portnoy, Esq., New Windsor, NY.

Bertoldi v. Astrue, Case No. 11-C-1149 (DNH/RFT)(N.D.N.Y. (May 9, 2012) – 41 pages including Consent Order to Remand and Plaintiff's Memorandum of Law in Support of the Complaint

VOCATIONAL EXPERT TESTIMONY: TESTIMONY REQUIRED

1951. District Court remand to obtain VE testimony. The ALJ erred by including a non exertional limitation in the RFC but then relying on the grids to deny benefits. In the absence of reliable evidence showing that non exertional limitations do not significantly erode the occupational base at the plaintiff's RFC level, "the ALJ may not rely on the grids." Here, the ALJ's RFC included non-exertional limitations secondary to the plaintiff's affective disorder. Without explanation or citing to specific evidence, the ALJ found the non-exertional limitations "had little or no effect" on the unskilled, light work occupational base, and did not rely on VE testimony. The plaintiff's social difficulties can have a significant impact on the ability to perform unskilled work per SSR 85-15. Marcia Margolius, Esq., Cleveland OH.

Anthony v. Commissioner of Social Security, Case No. 1:11 CV 1400 (N.D.Ohio Sept 27, 2012); 2012 U.S. Dist. LEXIS 139082 – 46 pages

1940. Plaintiff's brief in case where the government then agreed to a sentence four voluntary remand. The plaintiff argued that the ALJ erred in relying on a "vocational consultant's form" completed by the DDS disability examiner, to find that the plaintiff could perform other work. The ALJ did not obtain testimony from the vocational expert who was present during the hearing. Patrick A. Cruise, Esq., Chattanooga, TN.

Arnold v. Commissioner of Social Security, Case No. 1:12-CV-154 (E.D.Tenn. 2012), Plaintiff's Brief on the Merits – 19 pages

WEIGHT OF MEDICAL EVIDENCE – ATTORNEY REFERRAL FOR CONSULTATIVE EXAMINATION

1915. Appeals Council remand when the ALJ improperly discounted a consultative examination because it was conducted on a referral by the claimant's attorney. The ALJ's finding that the doctor's "opinion is 'somewhat diminished because the saw the claimant on a referral from her representative' is not a satisfactory rationale for rejecting medical opinion per SSR 96-2p." In addition, the ALJ's decision does not properly apportion weight to the treating and non-treating sources, and he failed to properly develop the record as to repeated work attempts, which were in fact unsuccessful work attempts. Randolph Baltz, Esq., Little Rock, AR.

Appeals Council remand on consultative examination (April 3, 2012) – 5 pages

WEIGHT OF MEDICAL EVIDENCE – CHIROPRACTOR

1933. District court remand for further proceedings when the ALJ erred in giving "little weight" to the chiropractor's opinion that the plaintiff had a disabling back injury. The chiropractor's opinion was not inconsistent with those of the plaintiff's treating physicians, including the treating orthopedic surgeon and neurological surgeon. The ALJ ignored the surgeon's diagnosis of chronic lumbar radiculopathy with strong back pain. Also, evidence of "good relief of symptoms" does not mean that the individual is able to work. In addition, the ALJ's finding that the chiropractor's opinion contradicts itself

lacked substantial evidence. While the chiropractor's opinion could not be used to establish the impairment, it should have been considered as evidence of the severity of the plaintiff's impairments. John Horn, Esq., Tinley Park, IL.

Johnson v. Astrue, Case No. 11 C 3989 (N.D.Ill. Aug. 2, 2012); 2012 U.S. Dist. LEXIS 109317 – 22 pages

WEIGHT OF MEDICAL EVIDENCE – NEUROLOGIST

1914. Appeals Council decision, finding on an onset date of June 2004, based on an application filed in January 2006. The claimant has a history of chronic daily migraine headaches and cervical disc disease. She has been treated by the same neurologist since 2000. He concluded that she would be precluded for even basic work activities, needing a minimum break of two to four hours , and would be absent from work more than four times a month. The Appeals Council gave his opinion controlling weight, finding it well-supported and not inconsistent with other substantial evidence of record. The Appeals Council also gave controlling weight to the opinion of the treating anesthesiologist who stated that the claimant's prognosis was poor. The claimant's subjective complaints were also found to be credible. The Appeals Council noted that under SSR 96-8p, the ability to work on a regular and continuing basis is necessary at step five. "A work restriction substantially less than full time does not satisfy this requirement." Lynn Stevens, Esq., Atlanta, GA.

Appeals Council decision (Sept. 22, 2011) – 12 pages including decision and brief.

1913. District Court remand with order to ALJ to conduct a non-adversarial hearing. The ALJ failed to properly weigh the treating physician's opinion under the factors in 20 CFR § 404.1527(d)(2). The board certified neurologist had seen the plaintiff since the early 1990s. The ALJ improperly discounted the doctor's findings because "he has not provided documentary evidence for every single quantifiable finding during his examinations." The ALJ failed to identify the missing findings and explain how they outweighed the existing evidence. The ALJ also gave the treating neurologist's opinion on the plaintiff's mental capacity no weight because he is not a psychologist or psychiatrist; however the ALJ failed to follow the factors in the regulation. The court was specifically "troubled by the ALJ's adversarial approach" at the hearing. ." The ALJ also interrupted the plaintiff's witnesses and refused to accept their testimony, including the treating neurologist who testified at the hearing. "This adversarial approach has no place in a hearing to determine Social Security disability. . ." Max Leifer, Esq., New York, NY.

Mira v. Astrue, Case No. 09-CV-2012 (SLT)(E.D.N.Y. Sept 2, 2011); 2011 U.S. Dist. LEXIS 98848 – 33 pages

WEIGHT OF MEDICAL EVIDENCE – RFC

1899. District court remand holding that the opinion of the examining psychologist cannot be discounted because it conflicts with the ALJ's RFC assessment, because the RFC assessment is not evidence. Daniel Parmele, Esq., and Kathleen Overton, Esq., Liberty, MO.

Brooke v. Astrue, Case No. 11-3152-CV-S-ODS (W.D.Mo. Dec. 22, 2011); 2011 U.S. Dist. LEXIS 147113 – 27 pages including Order and Plaintiff's Social Security Brief.

WEIGHT OF MEDICAL EVIDENCE- 2nd Circuit

1948. District Court remand for further development. The plaintiff had appealed the onset date of the partially favorable state agency decision, which was almost 2 years after his alleged onset date. The ALJ and Appeals Council denied his appeals. The district court decision includes a detailed discussion of the treating physician rule and how to weigh the evidence from non-treating examining physicians and non-examining physicians against evidence from the treating physicians. ". . . [I]t is not sufficient for the ALJ simply to secure raw data from the treating physician . . . It is the *opinion* of the treating physician as to the existence and severity of a disability that is to be given deference." (emphasis in original). The court remanded because the plaintiff made statements on his application that were inconsistent with the treating physicians' opinions concerning his limitations. ON remand, the ALJ should clarify these inconsistencies. Ivan M. Katz, Esq., New Haven, CT.

Hallett v. Astrue, Civil No. 3:11-cv-01181-VLB (D.Conn. Sept. 24, 2012); 2012 U.S. Dist. LEXIS 136406 – 64 pages including Magistrate Judge's Opinion, Memorandum of Decision, Memorandum in Support of Plaintiff's Motion to Reverse the Decision of the Commissioner – 64 pages.

WEIGHT OF MEDICAL EVIDENCE – 6th CIRCUIT

1925. District court remand where the ALJ failed to provide any reasons for the weight he gave the treating physician's opinion. The plaintiff was in an accident and continued to experience pain, swelling and discoloration of her left foot. Her treating doctor concluded that she was unable to work because she could not climb, stand, or carry for any length of time. The ALJ found that the plaintiff could perform "light" work which did not involve climbing or using foot controls. However, light work requires standing or walking for 6 hours each day. As a result, the ALJ's RFC "inherently conflicted with [the treating doctor's] opinion. The failure to provide "good reasons" for the weight given the treating doctor's opinion "alone necessitates remand." The court also rejected the government's argument that the ALJ's failure amounted to harmless error. Had the ALJ fully credited [the doctor's] findings, he could have concluded that the plaintiff was unable to work. Marcia Margolius, Esq. Cleveland, Ohio.

Neeld v. Commissioner of Social Security, Case No. 4:11CV1168 (N.D.Ohio, May 25, 2012); 2012 U.S. Dist. LEXIS 72980 – 20 pages

WEIGHT OF MEDICAL EVIDENCE – 9th Circuit

1921. District court reversal and award benefits in a case involving chronic fatigue syndrome. Benefits were awarded because the government conceded that the ALJ erred in the evaluation of evidence from the treating physician and in the evaluation of non-physician treating source evidence from a physical therapist. The ALJ erroneously found that chronic fatigue syndrome was not a severe impairment. The ALJ improperly rejected the opinion of a treating specialist who diagnosed lyme disease and CFS by relying on non-treating physicians who questioned the lyme disease diagnosis. However, the CFS

diagnosis was supported by substantial evidence from the treating and non-treating physicians. The supporting evidence comports with the definition of CFS and the SSA's guidelines for evaluating CFS in SSR 99-2p. The ALJ also erred in rejecting the treating physician's opinion because he "sympathizes" with his patient. Citing Ninth Circuit case law, the court noted that the "Commissioner may not assume physicians routinely lie to help patients gain disability benefits." The court then credited this treating physician's findings and opinions and those of other treating physicians as "matter-of-law." By crediting the plaintiff's testimony and the improperly rejected medical opinions, the VE testified that the plaintiff's limitations would preclude employment. Since "additional proceedings would serve no useful purpose, the court reversed the denial and awarded benefits. Kenneth Isserlis, Esq., Spokane, WA.

Hicks v. Astrue, Case No. CV-11-063-CI (E.D.Wa. April 5, 2012); 2012 U.S. Dist. LEXIS 49015 - 23 pages