No. 2070, Acceptable medical sources

The district court remanded for further proceedings. The ALJ failed to provide an explanation for rejecting the opinion of the treating therapist and assigning little weight to her opinions. Further, the ALJ failed to address the claimant's dystonia and its interaction with his mental impairments. With the growth of managed health care in recent years and the emphasis on containing medical costs, medical sources who are not "acceptable medical sources" such as nurse practitioners, physician assistants, and licensed clinical social workers, have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists. See SSR 06-03p. Here, the therapist treated the claimant since 2005 and submitted, on three different occasions, evidence that the claimant met or equaled Listings 12.04 and 12.06. The therapist further addressed claimant's dystonia under Listing 12.07. The ALJ improperly assigned little weight and noted the therapist was not an acceptable medical source, although she is a treating source with a longitudinal knowledge of the claimant's impairments. The claimant was represented by Brian M. Ricci, Esq., Greenville, NC.

***Rizor v. Colvin*, No. 7:13-CV-243-FL (E.D.N.C. Oct. 31, 2014), Memorandum and Recommendation – 16 pages

No. 2091, Age categories

The Appeals Council issued a partially favorable decision. The ALJ denied the claim in a decision dated December 13, 2013 (the claimant was insured through December 31, 2013). The claimant attained age 55, the day before his 55th birthday on April 18, 2013. Under regulations, an individual "attains" a certain age on the day prior to the anniversary of his or her birthday. 20 C.F.R. §§ 404.102 and 416.120(c)(4). The claimant could not return to his past work as a plumber (as found by the ALJ). Given the claimant's age (advanced age), high school education, and lack of transferable skills (as found by the Appeals Council in light of VE hearing testimony), he was found disabled beginning on April 18, 2013, within the framework of Rule 202.14. The claimant was represented by Luis Gracia, Esq., Port Orange, FL.

Partially favorable Appeals Council decision on age categories (June 8, 2015), Notice of Appeals Council Decision – Partially Favorable, Decision of the Appeals Council – 11 pages

No. 2113, ALJ dismissal for late appeal

The Appeals Council found good cause for the late filing of the request for hearing and remanded the case for further proceedings. The claimant, at the time unrepresented, filed a late request for hearing and did not respond to the ALJ's show cause order. The notices had been sent to the wrong address. The ALJ then dismissed the request for hearing, finding no good cause. The claimant then obtained counsel, John E. Horn, Esq., Tinley Park, IL. Mr. Horn filed a request with the ALJ to vacate the dismissal and, at the same time, filed an appeal to the Appeals Council. By filing the appeal, the Appeals Council had jurisdiction over the case. One week after the request sent to the ALJ and the appeal filed with the Appeals Council, the ALJ informed the Appeals Council of his intent to vacate the Order of Dismissal and proceed with a hearing pursuant to HALLEX I-2-4-10(A) and I-3-7-25. The Appeals Council remand order (dated September 22, 2015) was issued less than one month after the appeal was filed (August 27, 2015).

Appeals Council remand on ALJ dismissal for late appeal (Sept. 22, 2015), Notice of Order and Order of Appeals Council Remanding Case to Administrative Law Judge –3 pages

No. 2107, Cooperative Disability Investigation Units (CDIUs)

The district court remanded for further proceedings. The court held that the ALJ's discounting of the treating psychiatrist's report was not supported by substantial evidence, including the report from the CDIU investigator. The plaintiff was represented by David Waldfogel, Esq., Northampton, MA.

***Altman v. Colvin*, Case No. 14-cv-30190-KAR (D.Mass. Sept. 1, 2015),** Memorandum and Order Regarding Plaintiff's Motion to Reverse or Remand the Decision of the Commissioner and Defendant's Motion to Affirm the Decision of the Commissioner – 19 pages

No. 2076, Credibility

The court remanded because the ALJ erred in her credibility analysis. The ALJ cited to Plaintiff's statements but failed to evaluate them. The ALJ's summary finding that Plaintiff's allegations "were not credible to the extent they are not inconsistent with the above residual functional capacity assessment" is "little more than the kind of meaningless boilerplate that the Seventh Circuit has repeatedly, and quite severely, criticized." The ALJ found the plaintiff less than fully credible because he testified he had daily seizures while his wife described daily episodes of dizziness and loss of consciousness but did not use the word "seizures." The ALJ concluded that the wife's testimony was contradictory. The court rejected this. "Seizure" is a clinical description, not a statement of fact. Since the plaintiff had a limited ability to speak English, he might not have understood what a medical "seizure" is.

The uncertainty of whether the plaintiff was having seizures combined with his limited English ability "should have led the ALJ to question both Plaintiff and his wife about what they meant by their testimony related to seizures." The ALJ's only analysis of this issue was to note that the plaintiff had failed to provide medical documentation. But the plaintiff told the ALJ he had not had insurance for the prior four years. Under SSR 96-7p, "[a] credibility analysis must always consider why a claimant has not sought treatment," including lack of medical services. The plaintiff was represented by Ellen Hanson, Esq., Morris, IL.

***Euceda v. Colvin*, Case No. 1:13-cv-0223 (N.D.Ill. Sept. 24, 2014)**, Order – 11 pages

No. 2081, Credibility

The district court remanded the case. In the Ninth Circuit, long-standing precedent applies the clearing and convincing evidence standard to discount a claimant's testimony, absent affirmative evidence of malingering. Thus, the ALJ must state clear and convincing reasons to find a claimant not credible. First, performing minimal household activities or taking a dog for brief walks are not inconsistent with reports of severe limitations in activities of daily living. One need not be "utterly incapacitated" to be disabled. Also, use of a walker or wheelchair without a prescription is not an attempt to exaggerate the plaintiff's impairments. Further, the failure to submit records, which could not be procured before the hearing, was not a reason to impugn the plaintiff's credibility, especially since the records were submitted after the hearing and before the decision was issued. If the plaintiff "was not being forthright, [the ALJ] should have indicated as much and presented clear and convincing reasons for his opinion." The ALJ also discounted the plaintiff's testimony due to "ample evidence of secondary gain" and "no motivation to work." However, discussion of secondary gain is not prevalent in the record. The court's decision also includes a discussion of the weight given to opinions from treating and examining physicians, which the ALJ discounted and instead, gave more weight to the CE and non-examining state physician. The ALJ failed to provide adequate reasons for discounting the treating and examining physicians' opinions. The court found that the ALJ committed errors of law "in failing to provide deference to the treating physicians absent specific and legitimate rationales." The plaintiff was represented by Arthur Stevens, Esq., Medford, OR.

Wagner v. Colvin, Civil No. 6:13-cv-01851-CL (D.Ore. Apr. 8, 2015), Opinion and Order – 26 pages

No. 2095, Credibility

The district court remanded the case for further proceedings. The ALJ erred in finding the plaintiff's testimony less than fully credible. The ALJ discounted her testimony about the side effects of heart medication (dizziness and drowsiness) because "the medical evidence contained no reports of these side effects to her physician." The court relied on Seventh Circuit caselaw expressing "skeptic[ism] that a claimant's failure to identify side effects undermines her credibility – after all … some patients may not complain because the benefits of a particular drug outweigh its side effects." Slip Op. 3, *quoting Terry v. Astrue*, 580 F.3d 471, 477 (7th Cir. 2009). The court agreed that "a failure to report side effects is not a valid basis for discounting [the plaintiff's] credibility." The Commissioner argued

that even if the testimony had been credited, the side effects did not present a significant limitation. "The ALJ did not provide the rationale in her opinion, and the Commissioner cannot advance a post-hoc rationalization that the ALJ did not rely on in her own opinion." The court also rejected the ALJ's findings regarding activities of daily living and part-time work as reasons to diminish the plaintiff's credibility. John E. Horn, Esq., Tinley Park, IL, represented the plaintiff.

***Coleman v. Colvin*, Case No. 13 C 7940** (N.D.Ill. July 28, 2015), Magistrate Judge's Order – 6 pages

No. 2099, Credibility

The district court reversed and remanded for immediate payment of benefits. First, there is no persuasive evidence that indicates drug-seeking behavior for pain medication. His treating source provided a refill of pain medication after the plaintiff went to the ER on two separate occasions. The ALJ erred to the extent that he discounted the plaintiff's credibility based on an ER visit; specifically, his rationale is not clear and convincing. Second, there is no evidence to support exaggeration of symptoms to obtain pain medication. Here, the evidence shows that the complaints were legitimate. Further, the ALJ erred in drawing inference that stabilizing of the plaintiff's condition (Crohn's Disease) equals the ability to work. The phrase "seemed relatively stable" does not mean the ability to perform regular work, particularly considering the plaintiff's ongoing symptoms requiring multiple breaks. In the context of the whole record, one doctor's mention that plaintiff "seemed" to be in remission is not convincing evidence of remission. The ALJ may not selectively rely on some entries and ignore many others. The court also rejected the ALJ's discounting of credibility based on the plaintiff's poor work history and failure to report income ($400 per month) while working for his father. Finally, the fact that the plaintiff is able to conduct some work and complete some household chores "does not necessarily translate to the ability to perform full-time work as defined by the [Social Security] Act." The plaintiff testified that although his Crohn's Disease is "stabilized," he is still using the bathroom 10-15 times per day. The ALJ did not make any findings that this part of his testimony was not credible. Arthur Stevens, Esq., Medford, OR, represented the plaintiff.

***Huffman v. Colvin*, Case No. 1:14-cv-00861-AC** (D.Ore. Aug. 25, 2015), Opinion and Order – 19 pages

No. 2105, Credibility

The district court remanded the case for further proceedings. The plaintiff is 64 years old and has received SSI since 1979. She alleged in her claim for disabled adult child benefits that she has been disabled since her teens but has not been able to obtain medical records from the time period in question between ages 18 to 22 (i.e., 1969 – 1973). The claim was only filed in 2008 (at age 57), after her father's retirement and death, because she was never made aware of these benefits. Her attorney, Andrew Sindler, Esq., Columbia, MD, has been representing her since 2008. After an initial Appeals Council remand, a second ALJ hearing occurred in 2012. The ALJ posed one hypothetical with the VE responding that there was no available work of any kind during the time period in question. The ALJ denied the claim and found the plaintiff not disabled before age 22, the Appeals Council denied review, and a civil action was filed in 2014. The district court found that the ALJ erred by failing to make any findings as to the effect of the plaintiff's limitations (due to shortness of breath, fatigue, and allergy-related symptoms) on her ability to perform work-related functions or her ability to perform them for a full workday. The plaintiff testified that during the relevant period, she needed to lie down 8 to 10 hours a day. If fully credited, this would preclude all work. In this case, the ALJ did not explain how he decided which of the plaintiff's statements to believe and which to discredit, other than the "vague (and circular) boilerplate statements. The court is left to guess about how the ALJ arrived at his conclusions about the plaintiff's ability to perform relevant functions.

***Landesburg v. Colvin*, Civil No. TMD 14-1265 (D.Md. Sept. 18, 2015)**, Memorandum Opinion Granting Plaintiff's Alternative Motion for Remand, Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings – 26 pages

No. 2111, Credibility

The district court remanded the case for the ALJ to hold further proceedings. The ALJ's credibility analysis was flawed because he mischaracterized the evidence in the record. The plaintiff testified that he suffered from fatigue as a side effect of his numerous medications. The ALJ discredited his testimony because, according to the ALJ, the plaintiff did not complain to his doctors about the side effects. In fact, the plaintiff had reported the side effects to his doctors. "Therefore, the ALJ was not accurate when he stated that" [the plaintiff] had never complained of fatigue to his physicians. The deference we afford to an ALJ's credibility determination is lessened where the ALJ's findings rest on an error of fact or logic." (internal citation omitted). The court rejected the Commissioner's argument that the ALJ's decision should be affirmed because on two occasions after complaining about fatigue, the plaintiff denied experiencing fatigue or other side effects. This "does not rectify the fact that the ALJ ignored relevant evidence in discrediting [the plaintiff's] testimony regarding fatigue." Because of the misstatement regarding relevant evidence, "it is impossible for us to determine whether [the ALJ] considered the entire record in making his determination, and this requires a remand." John E. Horn, Esq., Tinley Park, IL, represented the plaintiff.

***Davis v. Colvin*, No. 14 C 1260 (N.D.Ill. Oct. 29, 2015)**, Memorandum Opinion and Order – 24 pages

No. 2090b, Disability determination by another agency

The district court remanded the case on the recommendation of the Magistrate Judge, finding that the ALJ erred in failing to consider the long-term disability determination by the Disability Income Plan of North Carolina. Plaintiff was approved for long term disability through the state disability retirement system, covering her work as a teacher, which was part of the record. The ALJ did not mention the disability determination or cite to the exhibit containing it, nor did the ALJ mention or cite any of the application forms and other documents related to the award of long term disability benefits. The court has repeatedly held that where an ALJ fails to mention disability determinations by other governmental agencies, this constitutes error necessitating remand to the Commissioner for further consideration and explanation. Brian M. Ricci, Esq., Greenville, NC, represented the plaintiff.

***Taylor v. Colvin*, Case No. 4:14-CV-81-FL** (E.D.N.C. June 16, 2015), Memorandum and Recommendation – 19 pages

No. 2104, Failure to follow prescribed treatment

The district court adopted the U.S. Magistrate Judge's Report and Recommendation awarding benefits to the plaintiff, and rejected the government's objections that the case be remanded. The government objected to the Magistrate Judge's decision, arguing that he "reweighed" evidence in finding that the ALJ's statement that plaintiff's symptoms would improve if she took her medication as prescribed was not supported by substantial evidence. The government argued that under 20 C.F.R. §§ 404.1530 and 416.930, if a claimant does not follow prescribed treatment that would restore the ability to work, a finding of not disabled is warranted. The Magistrate Judge noted that the plaintiff's ability to take her medication was "deeply intertwined" with her mental health diagnoses, including bipolar disorder and schizoaffective disorder. The ALJ failed to discuss this issue and instead buttressed his finding that the Affective Disorders listing was not met with "unsupported inferences" that the plaintiff's symptoms resulted from substance abuse and failure to take prescribed medication. The court noted that the plaintiff filed her claim six years ago. Since the record and substantial evidence support a finding of disability, an award of benefits is warranted. The plaintiff was represented by Mark Segal, Esq., West Chester, PA.

***Emory v. Colvin*, Civil Action No. 13-522 (E.D.Pa. Apr. 9, 2015)**, Order, Report and Recommendation – 44 pages

No. 2088, Listing 1.04

The ALJ issued a fully favorable decision on remand from the district court. The court reversed and remanded, holding that the first ALJ decision finding the claimant capable of performing light work was not supported by substantial evidence. On remand, the ALJ issued a fully favorable decision and found that the claimant's impairments met the criteria of Listing 1.04C. The claimant has lumbar

spinal stenosis, a groin impairment, an implanted nerve stimulator, bone-on-bone degenerative arthritis of the hips, and multiple surgeries. The ALJ on remand found the claimant's testimony about his symptoms to be generally credible under SSR 96-7p. In addition to finding that the impairments met a listing, the ALJ also found that the claimant could not return to his past work and a finding of disabled would be warranted under Rule 201.06 given that he is limited to sedentary work and his adverse vocational characteristics of age, education, and no transferable skills. The claimant was found disabled since April 1, 2008, based on an application filed in February 2011. John E. Horn, Esq., Tinley Park, IL, represented the claimant.

Fully favorable ALJ decision on Listing 1.04C (May 15, 2015), Notice of Decision – Fully Favorable, Order of Administrative Law Judge, Decision – 8 pages

No. 2090a, Listing 1.04

The district court reversed since the record did not contain substantial evidence to support a decision denying coverage under the correct legal standard and reopening the record for more evidence would serve no purpose. Plaintiff alleged disability September 11, 2008 based on four previous back surgeries. In a subsequent application, Plaintiff was found disabled as of December 29, 2011. On appeal Plaintiff alleged she met/equaled Listing 1.04. "The ALJ's cursory dismissal of the listing is not supported by the record whatsoever, as it is abundantly clear that plaintiff meets the criteria for Listing 1.04A. In reversing the decision, the district court found that Plaintiff met 1.04 and that remand would serve no purpose. The plaintiff was represented by Brian M. Ricci, Esq., Greenville, NC.

***McKinney v. Colvin*, Case No. 4:14CV150 (E.D.N.C. June 2, 2015),** Order – 5 pages

No. 2086, Listing 11.03

The Appeals Council reversed the ALJ's unfavorable decision and issued a fully favorable decision. The medical evidence of record showed that the claimant began to complain of epileptic "spells" beginning in May 2011. He was diagnosed with epilepsy rather than pseudo seizures. Through the subsequent years, he had seizures with worsening concentration problems that interfered with daily activities, despite documented compliance with seizure medications. The claimant did note that medications helped his focus and functioning in August 2014. Despite the evidence, the ALJ found in a March 2015 decision that the claimant was not disabled because he could perform other work which exists in significant numbers despite the limitations caused by his medical impairments. The Appeals Council referred the record to a medical consultant to the Council who is a neurologist. Based on his professional medical opinion, he stated that the claimant's seizure disorder met the criteria of Listing 11.03. Finding no substantial conflicting information in the record, the Appeals Council issued a fully favorable decision, finding the claimant disabled since August 2011 when he no longer engaged in substantial gainful activity. Note that the Appeals Council issued its decision only three months after the ALJ decision. The claimant was represented by Luis Gracia, Esq., Port Orange, FL.

Fully favorable Appeals Council decision on Listing 11.03 (June 10, 2015), Notice of Appeals Council Fully Favorable, Decision of the Appeals Council – 7 pages

No. 2100, Listing 11.12B

The Attorney Advisor issued a fully favorable decision. The Attorney Advisor found that the claimant's impairments met the criteria of Listing 11.12B, Myasthenia Gravis. A medical expert (ME) responded to interrogatories and found that the evidence supported a finding that Listing 11.12B was met. The Listing is met when Myasthenia Gravis results in significant motor weakness of the extremities while on prescribed therapy, which existed in this case. The ME's more current opinion is given greater weight than the opinions of the state agency medical consultants who found that the claimant could perform medium work (initial level) and light work (reconsideration level). The ME agreed with the treating doctor who opined that the claimant's impairments met the criteria of Listing 11.12B. Her opinion was given "great weight." The CE, who found normal motor strength and a non-tender abdomen, was given less weight in light of the claimant's hospitalization two weeks later when she had generalized weakness and abdominal pain. The claimant's statements were also found to be

generally credible and consistent with the medical evidence. She was found disabled as of her alleged onset date in July 2013. The decision is significant since there are few fully favorable decisions issued by Attorney Advisors. The claimant was represented by John E. Horn, Esq., Tinley Park, IL.

Fully Favorable Attorney Advisor decision on Listing 11.12B (Sept. 2, 2015), Notice of Attorney Advisor Decision – Fully Favorable, Order of Attorney Advisor, Decision – 9 pages

No. 2077, Medical equivalence to a listing and SSR 96-6p

The court remanded the case because the ALJ failed to adequately explain why he found that the plaintiff's combination of impairments did not medically equal a listing. Under SSR 96-6p, expert opinion evidence is required, which can be satisfied by the state agency doctor's opinion. However, if the ALJ receives additional medical evidence that might change the state agency doctor's opinion, then SSR 96-6p requires an updated expert opinion on medical equivalence. The court found such additional evidence exists in this case. The plaintiff received additional MRIs on her left shoulder and spine. While the ALJ may ultimately find that the additional medical evidence would not change the initial finding of non-equivalence, the ALJ "must explicitly state the reasons for such an opinion." If the ALJ finds that the additional medical evidence may change the earlier finding, then an updated medical expert opinion must be obtained and the ALJ must make a new complete analysis of medical equivalence. The court also rejected the ALJ's RFC and credibility finding. The court noted that the boilerplate language regarding the claimant's statements of symptoms are not credible to the extent they are inconsistent with "the above RFC" implies that the ALJ "improperly decided the claimant's RFC first and determined the credibility of the claimant's testimony second based on that RFC." The ALJ also "fell far short" in explaining the evidence upon which his RFC determination rested. The court notes that the ALJ's use of more boilerplate language, in addition to the credibility boilerplate language, to pass over later submitted medical records, showing a significant worsening of impairments, was "troubling": "Such a perfunctory and mechanical analysis – if it can even be called that – simply will not do." Agnes S. Wladyka, Esq., Mountainside, NJ, represented the plaintiff.

***Belfiore v. Colvin*, Civil Action No. 12-4588 (D.N.J. Jan. 8, 2015)**, Opinion – 15 pages

No. 2108, Medical improvement and closed period

The district court remanded the case for further proceedings. In this case, the Appeals Council found, in the same decision, that the claimant was disabled for a closed period and that medical improvement had occurred. The Appeals Council, following a first remand back to the ALJ, vacated the ALJ's second decision on remand and found the plaintiff disabled as meeting Listing 1.07 (fracture of an upper extremity) from October 31, 2007, through May 9, 2010, but not disabled from May 10, 2010, through the date of the ALJ's decision on remand, April 4, 2013. It found that as of May 10, 2010, there was a decrease in severity of signs and symptoms, which resulted in an increase in functional capacity and that medical improvement was thus related to the ability to work. The plaintiff's discharge from physical therapy in May 2010 was due to his limited response to therapy and that he had not made functional gains. Further, on that date, he "did not demonstrate range of motion in his left hand necessary to perform functional grasp." The court found that substantial evidence did not support the Appeals Council's finding that functional use of the upper left extremity was restored on May 10, 2010. "The Appeals Council did not find that maximum benefit from therapy had been achieved on May 10, 2010 …." See Listing § 1.00(M)-(N). "[A] court may not guess at what an agency meant to say, but must instead restrict itself to what the agency actually did say." (internal citation omitted). Andrew N. Sindler, Esq., Columbia, MD, represented the plaintiff.

***Sagastume v. Colvin*, Civil No. TMD 14-2712 (D.Md. Sept. 29, 2015),** Memorandum Opinion Granting Plaintiff's Alternative Motion for Remand, Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings – 34 pages

No. 2069, Mental impairments

The district court ordered remand on the recommendation of the Magistrate Judge. The court found that the ALJ improperly "pulled positive statements out of her mental health records, while ignoring statements indicating serious limitations from her mental illness." For example, the ALJ did not

mention auditory hallucinations described in the records of hospitalizations in June and October 2009 but did mention the claimant's denial of hallucinations on discharge in June 2009. The ALJ also mentioned only normal findings contained in therapy and medical management notes. The court found that the ALJ erred in failing to discuss GAF scores in the record, noting that this "was erroneous in that it did not permit any review of her use of the scores." The ALJ found that the claimant had moderate limitations in social functioning but failed include limitations in social functioning in the RFC. On remand, the ALJ was directed to further explain her failure to include a limitation in the RFC related to social functioning or, if warranted by the evidence, to include an appropriate limitation and obtain further testimony from the VE. The claimant was represented by Mike Silver, Esq. and Larry Weinstein, Esq., Ardmore, PA.

***Johnson v. Colvin*,** Civil Action No. 14-2385 (E.D.Pa. Oct. 29, 2014), Order, Report and Recommendation – 15 pages

No. 2078, Mental impairments

The court reversed and remanded for payment of benefits. The ALJ failed to provide sufficient rationale for rejecting the plaintiff's testimony and lay witness testimony about the limitations imposed by her mental impairments. "Although Plaintiff may have had the exertional ability to perform light work, the erroneously rejected evidence establishes that the symptoms and limitations related to Plaintiff's depression and anxiety disorder would include excessive absenteeism and the inability the stay on-task for extended periods of time. The ALJ picked an "isolated finding" of the examining psychologist's report to reject Plaintiff's testimony as "inconsistent." The ALJ did not account for other parts of the report that contradicted the ALJ's conclusion. While the psychologist did not observe evidence of depression during the examination, he described the plaintiff as having a history of serious mental impairments. "The fact that [the examining psychologist] did not observe any evidence of depression or anxiety during his examination does not contradict Plaintiff's testimony that she experienced episodic bouts of depression and anxiety." The court decision includes other examples of incorrect findings by the ALJ related to the plaintiff's mental impairments. Her attorney, Arthur W. Stevens III, Esq., Medford, OR, notes that this case provides a good example of the Ninth Circuit's "crediting as true: doctrine.

***Paredes v. Colvin*, Civil No. 1:13-cv-01570-AC (D.Ore. Mar. 16, 2015),** Opinion and Order – 20 pages

No. 2093, Mental impairments

The Appeals Council remanded the case for further evaluation of the claimant's mental impairments, as required by the special technique in 20 C.F.R. §§ 404.1520a and 416.920a. The ALJ found that the claimant's mental impairments were nonsevere due to lack of duration. However, the Appeals Council found no objective medical evidence to show that the mental impairments resolved or significantly improved within 12 months. "In fact, the medical evidence of record shows that the claimant's mental impairments have last at least 12 consecutive months." The Appeals Council relied on a 2012 report from a psychological CE finding moderate to significant limitations in some areas. A psychological report more than one year later noted a GAF score of 45 and fair to no ability to function in many work-related mental areas. In addition, the ALJ found "at no time" that the claimant was treated by an orthopedist. New and material evidence submitted with the request for review revealed that less than 3 months after the ALJ decision, the claimant had a lumbar fusion. On remand, the ALJ is required to also obtain updated medical evidence related to the back impairment. Douglas C. J. Brigandi, Esq., Bayside, NY, represented the claimant.

Appeals Council remand on mental impairments (Nov. 26, 2014), Notice of Order of Appeals Council Remanding Case to Administrative Law Judge, Order of Appeals Council Remanding Case to Administrative Law Judge – 5 pages

No. 2087, Nonexertional limitations and VE testimony

The Appeals Council remanded because the ALJ failed to obtain testimony from a vocational expert despite finding significant nonexertional limitations. The ALJ limited the claimant to unskilled light

work which is simple, routine and repetitive and "no customer service type work or work with the general public." These findings warranted evidence from a VE to determine if there are a significant number of jobs in the national economy. In addition, the ALJ's decision gave great weight to the opinion of the treating physician who marked boxes on a form that the claimant was "seriously limited" in several categories from psychological symptoms and that he would miss about four days of work per month. "…[T]he decision did not reconcile the significant limitations expressed in this opinion with the assessed residual functional capacity, as required by Social Security Ruling 96-8p." Further, the limitations in the ALJ's RFC were not consistent with the ALJ's finding to give great weight to the treating source opinion. Lynn M. Stevens, Esq., Atlanta, GA, represented the claimant.

Appeals Council remand on nonexertional limitations and VE testimony (Mar. 3, 2015), Notice of Order of Appeals Council Remanding Case to Administrative Law Judge, Order of Appeals Council Remanding Case to Administrative Law Judge – 4 pages

No. 2103, Obesity

The district court remanded for further proceedings. The ALJ erred by not adequately addressing the plaintiff's obesity at step 3. Third Circuit case law requires the ALJ to "meaningfully consider" a claimant's obesity at step 3 and subsequent steps and "clearly set forth the reasons for his decision." *Diaz v. Commissioner of Social Security*, 577 F.3d 500, 504 (3rd Cir. 2009). In this case, "the record is so bare" that the court cannot determine if the ALJ considered obesity at step 3. The ALJ only mentioned "obesity" as no longer having a specific listing but as being considered his RFC assessment. This "does not indicate if or how the ALJ considered [the plaintiff's] obesity during his step-three analysis." Apart from mentioning the plaintiff's height and weight and advise to lose weight, "almost nothing else the ALJ mentions relates specifically" to the plaintiff's obesity. The ALJ also improperly considered the combined effects of the plaintiff's other impairments and her obesity as required by SSR 02-1p. The case is remanded for further consideration of obesity at step 3. Agnes Wladyka, Esq., Mountainside, NJ, represented the plaintiff.

***Ward v. Colvin*, Civil Action No. 13-763 (ES) (D.N.J. Oct. 1, 2015)**, Opinion – 13 pages

No. 2109, Obesity

The district court remanded the case for further proceedings. The ALJ failed to properly consider the plaintiff's obesity at Step 3. The ALJ did not clearly set forth the reasons for his decision. The only time he mentioned obesity was when he "fully considered obesity in the context of the overall record evidence in making this decision." "The ALJ's statement that he 'fully considered obesity' does not satisfy [Third Circuit precedent] because it is conclusory and evades meaningful review." Further, the ALJ failed to follow the directives of SSR 02-1p, requiring meaningful consideration of a claimant's obesity, individually and in combination with other impairments, on workplace function at step 3. The ALJ merely stated in a conclusory statement that her impairment or combination of impairments did not meet or equal a listing. This statement also "precludes meaningful judicial review." The case is remanded for consideration of the plaintiff's obesity at step 3 and to consider whether the obesity, on its own or in combination with other impairments, is equal to a listing. Agnes Wladyka, Esq., Mountainside, NJ, represented the plaintiff.

***Williams-Faison v. Colvin*, Civil Action No. 14-2511 (ES) (D.N.J. Sept. 30, 2015)**, Opinion – 11 pages

No. 2079. Onset date and SSR 83-20

The district court remanded the case on the recommendation of the Magistrate Judge, finding that the ALJ erred in failing to follow SSR 83-20 to determine the plaintiff's onset date. The plaintiff filed for Childhood Disability Benefits (CDB), which requires onset before age 22, December 21, 1998, in this case. The plaintiff was diagnosed with schizophrenia and the earliest medical evidence was a psychiatric report from January 2000, in which the psychiatrist discussed the history of mental problems, dating to the spring of 1998, prior to the December 1998 date. The plaintiff was approved for SSI in February 2000 and was SSI eligible at the time of the ALJ hearing. There was no medical expert (ME) and the ALJ rejected the psychiatrist's report. The Magistrate Judge noted that SSR 83-

20 requires the ALJ to call a ME to testify where the impairments are of nontraumatic origin and the onset date is ambiguous. He rejected the government's argument that SSR 83-20 does not apply when there is no prior disability finding because in this case, SSI was approved in 2000. The Magistrate Judge found that substantial evidence did not support the ALJ's denial and the court remanded the case for further proceedings and requiring the ALJ to secure the opinion of a ME to testify as to onset. The plaintiff was represented by Constance R. Somers, Esq., San Antonio, TX.

***Smith v. Colvin*, Civil Action No. SA-14-CA-533-XR (W.D.Tex. Feb. 3, 2015),** Order, Magistrate Judge's Memorandum and Recommendation, Plaintiff's Brief in Support of Reversal or Remand of Commissioner's Decision – 39 pages

No. 2110, Pain

The district court remanded for further administrative action consistent with the Opinion. The ALJ's reasons for discounting the plaintiff's allegations of pain were not supported by substantial evidence. First, the ALJ erred by relying on the plaintiff's alleged lack of treatment without expressly considering her explanations, i.e., a lack of insurance, no primary doctor, and limited beneficial results from pain medications. Second, in this case, "it is uncertain whether the ALJ accurately characterized Plaintiff's treatment as 'conservative.'" Third, allegations about the intensity and persistence of pain may not be disregarded solely because the objective medical evidence of record does not substantiate them. In addition, the ALJ erred by relying on an examination that did not show sensory deficits in the plaintiff's extremities to support his assertion that it was "suggestive of exaggeration." "There is no expert medical opinion in the record" to suggest this conclusion. "The ALJ is not qualified to offer such a conclusion without evidentiary support from a medical expert. An ALJ may not rely on his or her own lay opinion regarding medical matters." The court determined that remand was appropriate because "administrative review could remedy the ALJ's errors …." The plaintiff was represented by Monica Perales, Esq., Santa Fe Springs, CA.

***Smith v. Colvin*, No. ED CV 14-2473-E (C.D.Cal. Oct. 7, 2015)**, Memorandum Opinion and Order of Remand – 19 pages

No. 2075, Reopening

The Appeals Council reversed the ALJ and found the claimant entitled to SSI benefits as of April 28, 2011. On that date, the claimant filed applications for Title II and SSI disability benefits. His date last insured (DLI) was March 30, 2009. The state agency found him eligible for SSI but not for Title II benefits as he had worked hove the SGA level after his DLI. He appealed and was I represented before the ALJ. The ALJ not only denied the SSDI claim but also reopened and denied the SSI allowance by the state agency. The claimant eventually obtained counsel, Daniel Emery, Esq., Portland, ME, and received a court remand for the Appeals Council to reconsider the reopening of the SSI claim. The Appeals Council found that the ALJ erred in reopening the SSI allowance and even went on to apply the sequential analysis to find the claimant disabled under Rule 202.01.

While the SSI allowance could have been reopened for good cause, the ALJ failed to cite the relevant regulations, failed to provide notice of the revision as required by regulation, failed to send notice of the proposed reopening and less than favorable ruling as required by the HALLEX, and did not provide written notice of the opportunity for a hearing on the reopening.

Favorable Appeals Council decision on reopening (Feb. 19, 2015), Decision of the Appeals Council – 6 pages

No. 2101, Res judicata

The U.S. Magistrate remanded the case for further proceedings. In the Sixth Circuit, an ALJ is bound by the findings of a previous ALJ absent evidence of improvement. *Drummond v. Comm'r of Soc. Sec.,* 126 F.3d 837 (6th Cir. 1997). SSA acquiesced in this decision under SSAR 98-4(6). To avoid the *res judicata* effect of *Drummond*, a claimant must present new and material evidence that his/her condition has worsened. In this case, the first ALJ found the claimant could perform medium work but did not mention or discuss COPD. The plaintiff argued that the new evidence before the second

ALJ supports a diagnosis of COPD and the inability to perform a full range of medium work. The court found that new evidence, including x-rays and a treating physician opinion, was new and material evidence worthy of the second ALJ's consideration. However, the ALJ gave no weight to the opinion stating that there was no diagnostic evidence. However, there was x-ray evidence. The court remanded for further articulation of the ALJ's consideration of the new evidence and the ALJ's basis for applying *Drummond*. Margolius, Margolius and Associates represented the plaintiff.

***Thorne v. Commissioner of Social Security*, Case No. 1:14-cv-01696** (N.D.Ohio Aug. 24, 2015), Memorandum Opinion & Order – 21 pages

No. 2082, Residual functional capacity

The district court remanded the case, ordering the ALJ to consider whether contrary medical evidence regarding the plaintiff's conditions alters the limitations regarding the RFC, and if so, the ALJ must revisit the conclusion that the plaintiff could perform a sufficient number of jobs in the economy. At the hearing, the VE responded to the ALJ's first two hypothetical questions that a sufficient number of jobs existed in the local and national economies that the individual could perform. However, when the ALJ asked three additional questions but incorporating more limitations, the VE responded that any one of these additional limitations (concentrate 6 of 8 hours per workday, be absent from work 2 days per month, or not have any contact with supervisors) would result in no jobs the individual could perform. The ALJ's decision did not address the medical evidence that supports these three additional limitations. The ALJ neither included these limitations in her RFC nor explained the reasons why she was rejecting the evidence that the plaintiff had these limitations. "As such, the Court is unable to conduct a meaningful judicial review and this matter must be remanded." Agnes Wladyka, Esq., Mountainside, NJ, represented the plaintiff.

***White v. Colvin*,** Civil Action No. 13-3991 (MCA) (D.N.J. Apr. 2, 2015), Opinion – 10 pages

No. 2084, Residual functional capacity

The Appeals Council issued a fully favorable decision after a district court remand. The ALJ had denied the claim, finding that the claimant was limited to light work and relying on the assessment of the State agency's medical consultant. "The Appeals Council gives little weight to this opinion" as the conclusions are "not consistent with the medical evidence. The Appeals Council gives some weight" to the opinion of the treating primary physician. The plaintiff's spinal impairments, despite surgical interventions, "may not preclude postural maneuvers but they compromise the frequency that such maneuvers might be performed during an eight-hour workday. Thus, the Appeals Council concludes that the claimant cannot perform the postural maneuvers of balancing, stooping, kneeling, or crouching more than occasionally." The Appeals Council assessed the claimant's limitations and found that the claimant retains the RFC for sedentary work only. Under Rule 201.14, the claimant was found disabled since 2010. It is interesting to note that the Appeals Council did not send the case back to an ALJ for a rehearing but determined that the claimant was disabled. John E. Horn, Esq., Tinley Park, IL, represented the claimant.

Fully favorable Appeals Council decision on residual functional capacity (July 29, 2014), Notice of Appeals Council Decision Fully Favorable, Decision of the Appeals Council – 9 pages

No. 2114, Residual functional capacity

The district court remanded for further proceedings. Substantial evidence did not support the ALJ's RFC determination because he did not include restrictions arising from feet, ankles, and skin impairments. The court rejected the government's argument that the ALJ's finding was harmless error because none of the jobs cited by the ALJ included exposure to environmental conditions, citing to the DOT for those occupations; however, the DOT excerpts were not evidence in the record. "The Court has substantial difficulty accepting … the Commissioner's argument for several reasons." First, the DOT is not a source whose accuracy cannot be reasonably questioned since an ALJ may also take administrative notice of other publications and adopt a VE's testimony that conflicts with the DOT. Second, the DOT provisions cited by the Commissioner refer to environmental conditions, not skin irritants. Third, the VE testified that someone who could stand only four hours total in a work day

could not do any of the jobs cited by the ALJ. "… [T]his issue alone supports a remand." The plaintiff was represented by Margolius, Margolius and Associates, Cleveland, OH.

***Fowler v. Commissioner of Social Security*, Case No. 2:14-cv-277 (S.D.Ohio Sept. 23, 2015)**, Opinion and Order – 11 pages

No. 2073, Seizure disorder

The district court remanded the case. The ALJ erred by failing to consider whether the plaintiff's noncompliance was the precipitating factor for her seizures and whether her sub-therapeutic medication levels were due to noncompliance or metabolic absorption of the medication. "The ALJ had a duty to not only resolve these issues in determining Plaintiff's RFC, but to also consider these factors in determining whether her epilepsy qualified as a listed impairment. Instead, the ALJ considered only the Plaintiff's mental impairments at step three and neglected to mention her seizures in conjunction with the Listings. The Court finds that this was in error." The plaintiff had a history of alcohol and drug abuse. However, the medical record evidence demonstrated that the plaintiff continued to have seizures even during sobriety. On remand, the ALJ is to investigate "whether Plaintiff's lack of compliance and alcohol and/or drug use from 2009 forward were the main precipitating factors in causing her seizures." In addition, the court found that the ALJ was required to recontact the treating physician to fill gaps in the medical record. The court also rejected the government's argument that *res judicata* because the plaintiff successfully alleged "new or changed circumstances." Benjamin Burton, Esq., Sevierville, TN, represented the plaintiff.

***Ownby v. Colvin*,** Case No. 3:13-cv-00722 (E.D.Tenn. Jan. 14, 2015), Report and Recommendation, Order – 30 pages

No. 2106, Sit-stand option

The district court remanded for further proceedings and rejected the recommendation of the Magistrate Judge based on objections raised by the plaintiff's attorney, Brian M. Ricci, Esq., Greenville, NC. The ALJ failed to explain why he gave the opinions of the treating neurologist and treating physician less weight. The treating neurologist opined that the plaintiff could stand or walk for less than 2 hours in an 8-hour workday and that he must periodically alternate between sitting and standing. The ALJ failed to explain why the clinical findings were sufficient to not include these restrictions in his RFC. He focused on the ability to walk normally but "in no way" addressed plaintiff's requested sit-stand option. "It is not apparent that the ability to walk normally, or the presence of lower body strength, either alone or in combination, has any bearing on the frequency with which plaintiff needs to change position." The ALJ also failed to provide any reasoning connecting the ability to stand or walk with the ability to stand or sit for a specified time. The lack of explanation precludes meaningful review by the court, thus requiring remand.

***Ebison v. Colvin*, No. 4:14-cv-135-FL (E.D.N.C. Sept. 30, 2015)**, Order – 11 pages

No. 2094, Subsidies and Listing 11.07

The ALJ issued a fully favorable decision. Before finding that the claimant met the criteria of Listing 11.07 for cerebral palsy, the ALJ had to address the step 1 issue that the claimant worked after the onset date of March 2013 and continued to work at the time of the hearing and decision. A work activity questionnaire from a manager at an auto body shop showed that since August 2013, the claimant worked there as a janitor, 9 hours per week at $10.00 per hour. The manager reported that this was more than what another employee in a similar position would earn ($7.25 per hour). The manager also reported that the claimant does not complete all the usual duties required and needs special assistance. He also has lower production standards, extra help/supervision, and lower quality standards. The manager rated the productivity at about 60% of other employees in a similar position. "This report shows that the claimant's current work is accommodated and does not rise to the level of substantial gainful activity." John E. Horn, Esq., Tinley Park, IL, represented the claimant.

Fully favorable ALJ decision on subsidies and Listing 11.07 (July 9, 2015), Notice of Decision – Fully Favorable, Order of Administrative Law Judge, Decision – 9 pages

No. 2072, Treating physician opinion

The district court remanded the case. The ALJ's finding to give the treating physician's opinion less than controlling weight was not supported by substantial evidence. The record showed that the doctor's conclusions were consistent with MRI results showing lumbar nerve root impingement and treatment with steroid injections and medication. "It is clear that the ALJ failed to fully consider the parts of the record which support [the treating doctor's] opinion and as such the ALJ's decision to afford it limited weight is not supported by substantial evidence. [His] opinion should be given controlling weight." The ALJ also erred in finding that the plaintiff could return to past semi-skilled work since the ALJ's hypothetical limited her to simple, routine, repetitive work. The plaintiff was represented by Lawrence Wittenberg, Esq., Durham, NC.

***Kaltenegger v. Colvin*, No. 5:14-cv-65-BO (E.D.N.C. Jan. 27, 2015), Order – 6 pages**

No. 2085, Treating physician opinion

The district court remanded the case because the ALJ failed to follow the treating physician rule by failing to provide "clearly sufficient reasons for only affording 'some weight' to the treating physicians' opinions…." The ALJ did not provide good reasons "or in fact any reason for the weight he assigns" the opinions. In his decision, the ALJ only stated that he "gave consideration" to the opinions and "some weight." The error was not harmless as neither treating doctor's opinion was "patently deficient" nor was there discussion elsewhere in the ALJ's decision where he made clear the basis for rejecting the opinions. The defendant argued that it was reasonable for the ALJ to not include the treating doctor's limitation of poor ability to maintain concentration for two hour segments because the ALJ was more restrictive in other areas of functioning. "[T]his argument is not well-taken." To find harmless error, all of the treating physician's opinion must be adopted. "Limiting someone to jobs that do not require strict production quotas does not fully address the issue of poor concentration." "Piecemeal adoption" of the treating doctor's opinion does not constitute harmless error. "Harmless error is not available when an ALJ finds limitations less severe than those described by the treating physician." Margolius, Margolius and Associates, Cleveland, OH represented the plaintiff.

***Mays v. Commissioner of Social Security*, Case No. 1:14 CV 800** (N.D.Ohio Apr. 21, 2015), Memorandum Opinion and Order – 13 pages

No. 2089, Treating physician opinion

The district court remanded the case because the ALJ failed to provide "good reasons" for rejecting the treating psychiatrist's opinions. The ALJ must provide "good reasons" for discounting the treating physician's opinion, "reasons that are 'sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight.'" *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 242 (6th Cir. 2007) (quoting SSR 96-2p). In *Rogers*, the Sixth Circuit held that "the failure to articulate 'good reasons' for discounting a treating physician's opinion 'denotes a lack of substantial evidence, even where the conclusion of the ALJ may be justified based upon the record.'" Slip Op. at 27, quoting *Rogers*, 486 F.3d at 243. In this case, the ALJ rejected the opinion in one sentence: "The undersigned notes that during a mental assessment …, the claimant's appearance was reported as being well groomed." The ALJ provided little discussion of the treatment notes. Being well groomed "is simply not a sufficient reason, in and of itself, for rejecting [the treating psychiatrist's] assessment of [the plaintiff's] numerous functional mental health limitations. The treating doctor treated the plaintiff on a monthly basis (apart for a one year gap due to incarceration). He noted hallucinations, nightmares, flashbacks, panic attacks, and thoughts of hurting others. The plaintiff consistently complained of increased anxiety, depression, and anger. The doctor prescribed numerous psychiatric medications. The ALJ failed to discuss the lengthy treating relationship as required by the regulations. The court finds that remand is necessary so that the ALJ can "sufficiently explain the weight ascribed to the functional limitations assessed by [the treating psychiatrist]." The plaintiff was represented by Margolius, Margolius and Associates, Cleveland, OH.

***Jenkins v. Colvin*, Case No. 4:14CV1110 (N.D.Ohio May 13, 2015),** Memorandum Opinion & Order – 30 pages

No. 2092, Treating physician opinion

The district court remanded because the ALJ failed to give proper weight to the treating psychiatrist's opinion. The treating psychiatrist has treated the plaintiff for 21 years. As a treating physician, controlling weight should have been given or the ALJ should have provided good reasons why the opinions did not deserve controlling weight. Under Sixth Circuit precedent, *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004), remand is warranted where the ALJ did not provide "good reasons" for the weight given to a treating physician's opinion. The reasons given by the ALJ for providing less than controlling weight, i.e., that medical evidence did not support the treating psychiatrist's conclusions and that the conclusions were exaggerated, "are not specific enough to constitute good reasons for not providing the Opinions [sic] controlling weight." The ALJ's reliance on a single assertion that the plaintiff's condition stabilized, where the record is lengthy, "fails to rise to the level of analysis necessary to overcome the presumption that the opinions of the treating physician(s) are provided controlling weight." The plaintiff was represented by Margolius, Margolius, and Associates, Cleveland, OH.

***Harper v. Colvin*, Case No. 1:14CV1101** (N.D.Ohio June 17, 2015), Report and Recommendation of Magistrate Judge, Memorandum of Opinion and Order – 12 pages

No. 2112, Treating physician opinion

The district court issued a bench decision and remanded the case. The plaintiff is 58 years old diagnosed with mental impairments. The court reversed the step 5 denial, finding that the ALJ failed to properly evaluate the treating psychiatrist's opinion in determining whether controlling weight was appropriate and that his reasons were not supported by substantial evidence. The ALJ substituted his lay opinion for the expert medical opinions and made an RFC finding that was contrary to the medical expert opinions in the case. The court found that the treating psychiatrist's opinion and consultative examiner's opinion were largely in agreement but that the ALJ's RFC finding conflicted with those opinions and he did not explain why. The court further found that the treating psychiatrist's referral of the claimant to vocational rehabilitation was not inconsistent with disability. The court also criticized the ALJ's reliance on opinions formed before the plaintiff had a second, inpatient psychiatric hospitalization. Paul E. Radosevich, Esq., Denver, CO, represented the plaintiff.

***Denton v. Colvin*, Civil Action No. 14-cv-01394-MSK (D.Colo. Oct. 1, 2015)**, Transcription of proceedings, including bench decision – 26 pages

No. 2083, Trial work period

The district court remanded for a rehearing by the ALJ to determine whether the plaintiff is entitled to a trail work period (TWP) and, if so and it has ended, whether the Commissioner may consider whether her attempts to return to work demonstrate that the alleged disability ended after the TWP. The plaintiff alleged an onset date of July 1, 2009. The plaintiff returned to work at least part-time in July 2010 for several months and again in 2011, but for less than a total of nine months. The ALJ relied on the work efforts as evidence that she was not disabled. The regulations only allow the ALJ to rely on work efforts after the TWP has ended but a claimant is not entitled to a TWP within the first 12 months of the alleged onset of disability. 20 C.F.R. § 404.1582(d)(2)(iii). In this case, the ALJ did not make any determination "whatsoever" as to whether any of the plaintiff's attempts to work either did or did not qualify as a TWP. "[T]his failure is significant" because the ALJ appeared to rely on the work efforts. And this failure is not harmless error because the ALJ's "discussion of [the plaintiff's] attempts to return to work are an integral part of his determination that [the plaintiff] was not disabled. If his consideration of the issue was contrary to the regulations, then his ultimate conclusion is in question." The plaintiff was represented by Thomas Krause, Esq., Des Moines, IA.

***Allwood v. Colvin*, Civ. No. 14-3113 (PAM/TNL)** (D.Minn. Apr. 24, 2015), Memorandum and Order – 9 pages

No. 2074, Unemployment benefits

The court remanded the case because the ALJ's credibility finding was not supported by substantial evidence. First, the ALJ noted that the plaintiff did not use a cane at her CE, but she testified that

she began to use it more a month or two before the hearing. Also, a the fact that she did some heavy lifting at work after her alleged onset date does not necessarily negate her testimony of limited activities. In addition, the ALJ improperly considered the plaintiff's receipt of unemployment benefits. The ALJ is permitted to consider this as a factor. However, "[a]ttributing a lack of credibility to such action is a step that must be taken with significant care and circumspection." *Scrogham v. Colvin*, 765 F.3d 685, 699 (7th Cir. 2014). There was no careful analysis in this case. And even the ALJ found that the plaintiff could perform sedentary work, which would have led to a "disabled" finding under the Grids. The plaintiff was represented by John Horn, Esq., Tinley Park, IL.

***Olsen v. Colvin*, Case No. 1:13-cv-05384 (N.D.Ill. Jan. 20, 2015)**, Memorandum Opinion and Order – 21 pages

No. 2102, VA disability rating

The district court remanded the case for further proceedings. The plaintiff has had a VA disability rating of 100% since 2006 for PTSD. The VA found "moderate to severe occupational impairment with total social impairment due to [her] service connected PTSD. The court found that the ALJ's assessment of the VA disability rating ran afoul of *Bird v. Commissioner of Social Security Administration*, 699 F.3d 337 (4th Cir. 2012). First, the ALJ disregarded *Bird*'s holding when she stated she was "not bound by" the VA rating. This "disregards *Bird*'s holding to the contrary" because the purpose and methodology of both the programs are closely related so that "a disability rating by one of the two agencies is highly relevant to the disability determination of the other agency." The ALJ's rejection of the VA rating was "particularly erroneous" since both SSA and VA were reviewing the same condition and same evidence. Second, the ALJ "failed to identify *any* ground … for affording the VA ratings less than substantial weight." The court rejected the government's reliance on an unpublished district court case since the facts were different and the ALJ carefully explained why *Bird* did not apply, "precisely what is lacking from the ALJ's decision in the instant case." The plaintiff was represented by Lawrence Wittenberg, Esq., Durham, NC.

***Hildreth v. Colvin*, Case No. 1:14CV660 (M.D.N.C. Sept. 22, 2015),** Memorandum Opinion and Order – 12 pages

No. 2096, Vocational expert testimony: mental limitations

The district court reversed and remanded for computation of benefits. The ALJ based his finding of "not disabled" on an incomplete hypothetical to the vocational expert (VE), which did not include nonexertional limitations, specifically those caused by her mental illness. The ALJ disregarded the VE's "clear opinion" that the plaintiff could not perform any jobs in light of the combination of limitations caused by her mental and physical impairments. The plaintiff had a history of being treated for Major Depression, with anxiety. Her testimony at the hearing "describes a mentally disturbed person" with hallucinations. "This is not simply a matter of whether we 'give credibility to a claimant's testimony.' There is substantial medical evidence on record of the psychiatric treatment that plaintiff has received to treat her mental illness." The ALJ did ask the VE a hypothetical that included the plaintiff's testimony about her mental impairment. The VE responded that she could not perform any occupation. When her attorney added other mental limitations to the hypothetical, as set forth in the treating psychiatrist's opinions, the VE replied that the plaintiff "would be out of the labor force." In light of these VE answers, the court reversed for computation of benefits, based on an application filed in 2006, with a last insured date of December 31, 2007. Pedro G. Cruz-Sanchez, Esq., Cayey, Puerto Rico, represented the plaintiff.

***Pagan-Morales v. Astrue*, Civil No. 11-1958CCC** (D.P.R. June 29, 2015), Memorandum Opinion and Order – 11 pages

No. 2097, Vocational expert testimony: use of cane

The district court remanded the case for further proceedings. The ALJ erred by failing to include the plaintiff's use of a cane in his hypothetical to the VE. The Sixth Circuit has held that a cane must be medically necessary to be considered a restriction or limitation. This must be more than a "subjective desire" of the claimant. In this case, the treating physician prescribed a cane after the plaintiff

experienced severe pain while walking and felt like he would fall without it. The prescription amounts to more than a "subjective desire." The ALJ appeared to accept the plaintiff's testimony that he needed a cane. At the hearing, the plaintiff's attorney asked the VE how a hypothetical individual with plaintiff's limitations for sedentary work could perform those jobs while using a cane. The VE responded that the three sedentary jobs he described could not be performed because they require the need to carry items with both hands. The VE reduced by 90% the number of sedentary jobs the hypothetical individual could perform, if a cane was necessary. The ALJ "was required either to include the use of a cane in his hypothetical to the VE or to explain his reasons for not including such a limitation. The ALJ's failure to do either was error." The plaintiff was represented by Margolius, Margolius, and Associates, Cleveland, OH.

***Shultz v. Commissioner of Social Security Administration*, Case No. 1:14CV1587** (N.D.Ohio June 25, 2015), Memorandum Opinion and Order – 35 pages

No. 2098, Vocational expert testimony and intellectual functioning

The district court remanded the case for further proceedings. The VE testified that an individual falling in the bottom 10% of "general learning ability" would be unable to perform all work activity and would "eliminate all work." The ALJ rejected this testimony finding it "beyond the expertise of the vocational expert, who is not a psychiatric specialist." The court found that the ALJ's reasoning in rejecting this part of the VE's testimony was in error. First, the testimony was "clearly within the scope of a vocational expert's expertise; the vocational expert gave an opinion about whether there were available jobs in the national economy for a person with specific characteristics, not about whether the claimant actually exhibited any particular characteristic. This was not psychiatric testimony." Second, the hypothetical posed by the plaintiff's attorney was not vague and the VE understood the question. The ALJ did not clarify further about the effects of IQ or general learning ability on job availability. Further, this was not a case where clarification was required under SSR 00-4p because the VE's testimony conflicted with the DOT or SSA policy. The ALJ stated that it did not conflict and the testimony was not inherently self-contradictory – the VE testified that a person with the limitations in the ALJ's hypotheticals could perform three jobs, but a person with those limitations **and** in the bottom10% of intellectual functioning could not. The court disagreed with the U.S. Magistrate Judge's recommended decision upholding the Commissioner's decision and remanded the case. The plaintiff was represented by Francis Jackson, Esq., South Portland, ME.

***Jenkins v. Colvin*, Case No. 1:14-cv-285-DBH** (D.Me. Aug. 28, 2015), Order Vacating the Decision of the Commissioner of Social Security and Remanding for Rehearing – 9 pages

No. 2071, Weight of medical evidence

The Appeals Council remanded the case. The ALJ erred by evaluating the VE's testimony as medical evidence. The VE, a Ph.D. psychologist, testified that the claimant was limited to modified unskilled light work. The ALJ gave "great weight" to this testimony because the VE "had the opportunity to review the entire updated medical file … and his opinion is generally consistent with the record as a whole …." However, a VE is not a medical expert and an ALJ may not ask a VE to provide an opinion on medical matters even if the VE is a certified mental health professional. See HALLEX I-2-5-48. In addition, the claimant had a 100% VA disability rating. While not binding on SSA, the regulations and SSR 06-3p require that the ALJ consider the VA decision and explain the consideration given. The claimant's attorney, Micki Beth Stiller, Esq., Montgomery, AL, points out that the Appeals Council reviewed the case within four months of the ALJ decision and before she filed a letter brief.

Appeals Council remand on weight of medical evidence (Nov. 17, 2014), Notice of Order of Appeals Council Remanding Case to Administrative Law Judge, Order of Appeals Council – 4 pages

No. 2080, Weight of medical evidence

The district court remanded for further proceedings. The ALJ failed to provide a proper explanation for not giving appropriate weight to the treating source's opinion and the opinion of the consultative examiner (CE) and nurse practitioner (NP). The treating physician opinion was consistent with the CE. Further the ALJ placed little weight on the CE's opinion because the CE only examined the

plaintiff twice. The court did not find this explanation sufficient, particularly since a CE as a non-treating physician does not examine a claimant multiple times. On remand, the Commissioner is to consider the opinions of the treating physician, CE and NP as controlling and formulate an RFC of sedentary or less. The plaintiff was represented by Meredith Hinton Esq., Greenville NC.

***McNeil v. Colvin*,** Case 5:14-cv-00251-BO (E.D.N.C. Apr. 21, 2015), Order – 6 pages

No. 2115, Weight of medical evidence

The district court remanded for further proceedings. The ALJ failed to adequately weigh and evaluate the opinions of the plaintiff's treating orthopedic surgeons. One treating surgeon limited the plaintiff to no more than sedentary work, yet the ALJ found the plaintiff able to perform light work. While the treating opinion did not specifically state how long the plaintiff could stand or walk in an 8-hour day, "the requisite 6 hours of standing for light work is well in excess of an 'inability to stand or walk for extended periods of time" as the treating surgeon stated. The ALJ thus rejected the opinion "and was required to give good reasons for doing so." The ALJ's conclusory statement that the opinion was not supported by the objective evidence was legally insufficient. "Such a terse and conclusory explanation does not, in and of itself, constitute a 'good reason' for rejecting a treating physician's opinion." The court rejected the Commissioner's argument that the ALJ's statement was harmless error because no reasonable ALJ could have credited the treating surgeon's opinion. However, the opinion did not meet any of the three Sixth Circuit criteria for concluding that the failure to give good reasons can be deemed harmless error. Specifically in this case, the opinion was not "patently deficient." *See Johnson-Hunt v. Comm'r of Soc. Sec.*, 500 Fed. App'x. 411, 419 (6th Cir. 2012). Even if the ALJ's rejection of the treating surgeon's opinion was justified, "failure to give good reasons still requires remand." Marcia W. Margolius, Esq., Cleveland, OH, represented the plaintiff.

***Minyard v. Colvin*, Case No. 5:14-cv-02128 (N.D.Ohio Sept. 1, 2015)**, Memorandum Opinion & Order – 21 pages