LIST OF AVAILABLE MATERIAL
ITEM NUMBERS – 1831 –1888
JANUARY - DECEMBER 2011

ABSENTEEISM

1886. Favorable ALJ decision, finding the claimant disabled since December 1998, his alleged onset date. The claimant filed his application in December 2009. His date last insured expired in June 2002. His claims were denied at the initial and reconsideration levels based on findings that he had engaged in SGA since 2002. The ALJ found that work on one of the jobs was an unsuccessful work attempt per SSR 84-25 and SSR 05-02. Work on another job was performed under "special condition," with the claimant working less than full-time and with help from someone to drive him around. When the special conditions were removed, he could not continue working. The ALJ found that the claimant had sever physical and mental limitations and would require frequent unscheduled breaks during the workday and would miss two days of work per month. The VE testified that there were no jobs the claimant could perform. David Harp, Esq., Fort Smith, AR.

Fully favorable ALJ decision (Dec. 6, 2011) – 11 pages

1845. Fully favorable ALJ decision after an Appeals Council remand. The remand directed the ALJ to pose a hypothetical question that reflected the specific limitations established by the record as a whole. In the earlier decision, the ALJ made contradictory findings when he made specific RFC findings that the claimant was capable of a limited range of light work but then found that the claimant could perform a full range of light work. In the decision following remand, the ALJ found that he claimant was limited to sedentary work. However, since the evidence shows she would miss more than three days of work per month due to fatigue, she lacks the RFC to perform even sedentary work. Fritzie Vammen, Esq., Conway, AR.

ALJ decision (April 6, 2011) – 36 pages including Notice of Decision, Notice of Order of Appeals Council Remanding Case to ALJ, Claimant's Appeal Brief, Original Unfavorable decision (Nov. 28. 2008)

ADMINISTRATIVE HEARINGS – LAY TESTIMONY

1861. Appeals Council remand where the ALJ failed to evaluate the third party statements submitted by the claimant's husband. Evidence from "other sources" including friends and relatives can be used to show the severity of the claimant's impairments per 20 CFR §§ 404.1513(d) and 416.913(d). SSR 06-3p states that the adjudicator should explain the weight given to opinions from "other sources." In addition, the ALJ erred in finding that the claimant could perform past relevant work. John Bowman, Esq., Davenport, IA.

Appeals Council remand (Jan. 13, 2011) – 3 pages

1858. District court remand where the ALJ failed to give any clear and convincing reason for questioning the plaintiff's credibility. The plaintiff alleged disability based on CFS and fibromyalgia. The ALJ reliance on the opinions of physicians who neither treated nor physically examined the plaintiff but believed that she was not credible was arbitrary and

capricious. There was no evidence that the plaintiff was a malingerer. The ALJ also erred in not giving a germane reason for rejecting the lay evidence offered by the plaintiff's mother regarding the extent of her fatigue and side-effects of medications. The court noted that that the two consulting examiners recommended further testing to determine if the plaintiff has a somatoform disorder and to address her depression, anxiety, and memory lapses. Arthur Stevens, III, Esq. Medford, OR.

Hansen v. Astrue, Civil No. 3:10-CV03061-MA (D.Ore. July 7, 2011); 2011 U.S. Dist LEXIS 73508; 167 SSRS 623 – 20 pages

ADMINISTRATIVE HEARINGS – TELEPHONIC TESTIMONY

1867. District court remand because the ALJ failed to notify the plaintiff that the medical expert would testify by telephone. This is an error of law and the court refused to adopt a harmless error analysis. 20 C.F.R. § 404.938(b) requires notice to the claimant if a witness will not be appearing in person at a hearing. Although HALLEX I-2-5-30 provides for telephone testimony by a medical expert (ME), the statute and regulations are silent. Proposed regulations were never finalized. The decision includes a discussion of other federal court cases finding that inclusion of ME telephonic evidence was legal error. The court did not go that far but did require that notice be given to the claimant, nothing that she "was harmed by the lack of notice. . ." With notice and the ability to prepare, it is possible that her cross-examination may have been more effective and the ME's testimony may have been found to be less persuasive. The court also noted the fundamental due process right to "confront" witnesses and that cross-examination is more effective when questions can be adjusted "based on the appearance and demeanor of the witness." Further, the quality of the phone connection was suspect, including many inaudible gaps in the transcript. Ivan Katz, Esq., New Haven, CT.

Edwards v. Astrue, No. 3:10cv1017 (MRK) (D.Conn. Aug. 10, 2011); 2011 U.S. Dist LEXIS 88293; 168 SSRS 361 – 18 pages

ALJ's DUTY TO DEVELOP THE RECORD

1842. District Court remand where the ALJ failed in his "heightened duty" to fully develop the record for the plaintiff who was unrepresented at the hearing. This was not harmless error because the failure may have affected the ALJ's step 2 decision, and thus all remaining steps of the sequential evaluation. The ALJ did not follow up on the plaintiff's testimony that she suffered from depression and anxiety. He did not ask for copies of her prescription records and did not ask for the name of her treating psychiatrist. The records that were not requested by the ALJ might have supported the claimant's allegations. "The record is devoid of any evidence that the ALJ ever sought any medical evidence regarding [the plaintiff's] psychological condition or the effects it might have on her ability to work." Because the ALJ did not identify depression or anxiety as severe impairments at step 2, he did not address these impairments at step 3 or as part of the RFC determination at steps 4 and 5. Ashley Rose, Esq., Glen Ellyn, IL.

Daniels v. Astrue, Case No. 09 C 2252 (N.D.Ill. Mar. 10, 2011); 2011 U.S. Dist LEXIS 25836– 24 pages

ANXIETY DISORDERS

1843. Fully favorable decision by an Attorney Advisor, finding that the claimant's impairment meets listing 12.06 for anxiety disorders. The "paragraph A" criteria are met because she has a number of depressive symptoms and persistent anxiety symptoms. She meets the "paragraph B" criteria because she has marked difficulties in maintaining concentration, persistence or pace, and one to two episodes of decompensation, each of extended duration. The decision discusses the evidence which "amply supports" the attorney advisor's findings. The evidence includes reports from treating sources, several CEs, third party reports, and observations by SSA field office personnel. John Horn, Esq., Tinley Park, IL.

Fully favorable Attorney Advisor decision on anxiety disorders (Feb. 15, 2011) – 9 pages

APPEALS COUNCIL: NEW EVIDENCE

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

1878. Appeals Council remand for consideration of new and material evidence and for a proper evaluation of the claimant's obesity under SSR 02-1p. The ALJ denied the claim in July 2010. The new evidence related back to the alleged onset date of disability and includes records of medical treatment from 1982 to December 2010. The remote records document the knee injuries and the later records document a recent diagnosis of an autoimmune disease, myasthenia gravis. John Bowman, Esq., Davenport, IA.

Appeals Council remand (Aug. 19, 2011) – 4 pages

1833. Appeals Council remand in light of new and material evidence submitted to the Appeals Council. The ALJ found no treating source opinion evidence that the claimant has limitations affecting the ability to work. The plaintiff's attorney submitted a medical source statement form the treating physician that indicated an RFC for less than a full range of sedentary work. Specifically, the treating physician noted limits on the ability to sit for a prolonged period and the on the ability to reach. Other records submitted showed limited range of motion in the dominant right hand. On remand, the ALJ will consider the newly submitted evidence from the treating physician and explain the weight given to that opinion evidence. John Horn, Esq., Tinley Park, IL.

Appeals Council remand (Dec. 20, 2010) – 4 pages

ATTORNEYS FEES - § 406(b)

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 he 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

1865. District Court decision granting the Plaintiff's motion for $48,064.00 (less the EAJA fees previously awarded) in attorneys fees under 42 U.S.C. § 406 (b). This represented 25% of the plaintiff's past due benefit. The court disagreed with the government's argument that his amounted to a "windfall" for the 19.75 hours spent on the case. The Judge was very complimentary to the plaintiff's attorney, finding he "performed well, diligently, and with unusual efficiency in this Court." The attorney drafted a "detailed, case-specific (i.e. non-boilerplate) complaint" and "a moving brief," that was both "succinct" and "captivating" which led to an outright reversal and award of benefits from the court. The court found that the Commissioner's assertion about the per hour imputed rate points out "why imputed hourly rates are frequently misleading in these cases . . . Plaintiff's attorney should not, however be penalized for being efficient, which is exactly what I would be doing if I cut his requested fee. The plaintiff also submitted an affidavit supporting the fee application, "a point that should be considered." Douglas Brigandi, Esq., Bayside, NY.

Kazanjian v. Astrue, No 09 civ 3678 (BMC) (E.D.N.Y. July 15, 2011); 2011 U.S. Dist LEXIS 76661 – 5 pages

ATTORNEYS' FEES – EAJA

1885. District court award of $9370.45 in EAJA fees, finding that 53 hours of work was time "reasonable expended" on this case. The court disagreed with SSA's argument that the time spent was excessive finding that this was not a "simple case involving little analysis." While the legal arguments were based on well-settled law, the plaintiff's attorney was required to do a detailed analysis of the record. The plaintiff prevailed on every argument and the court issued a fully favorable decision, not a remand. "Thus, the results from counsel's briefing were extremely favorable to Plaintiff." Under Ratliff, the court rejected the plaintiff's request that the fee award be made out to the plaintiff's attorney. However, the Commissioner may chose to make the payment directly to the attorney if the plaintiff does not owe a debt to the government and assigns the right to receive fees to the attorney.

Stanberry v. Astrue, No. 09-cv-02261-WYD (D.Colo. Mar. 1, 2011); 2011 U.S. Dist LEXIS 25581– 23 pages, including Order, Plaintiff's Petition for Fees Under 28 USC § 2412, Defendant's Response to Plaintiff's Motion, Plaintiff's Reply to Defendant's Response.

BACK IMPAIRMENTS

1881. Fully favorable ALJ decision finding that the claimant's impairments of degenerative disc disease secondary to status post laminectomy with continuous back pain equaled the criteria of Listing 1.04A for a one year period ending June 30, 2010. For the period after that, she was able to perform sedentary work, but was unable to complete a normal workday without unscheduled breaks. The VE testified that she could not return to her former work. The ALJ found that her job skills did not transfer to other work. John Horn, Esq., Tinley Park, IL.

ALJ decision on listing 1.04A (July 1, 2011) – 12 pages

1856. Following remand by the Appeals Council, the ALJ issued a fully favorable decision, finding that the claimant's impairments medically equaled listing 1.04A, Disorders of the Spine with nerve root compression. The claimant had debilitating pain after two surgeries and multiple attempts at intensive pain management. The ALJ described the pain as "excruciating." The claimant must use a leg brace to ambulate without dragging her foot and she has left leg weakness. The medical expert at the hearing testified that the claimant's impairments medically equaled the listing. The ALJ also found that the claimant's statements about her pain were generally credible. The claimant was found disabled as of August 5, 2006. John E. Horn, Esq., Tinley Park, IL.

Fully Favorable ALJ decision on listing 1.04A (Feb. 23, 2011) – 8 pages

BURNS

1884. ALJ decision finding that the claimant's impairment met listing 8.08. Although the claimant's burns did not meet the criteria of listing 1.08, he had extensive skin lesions that result in very serious limitations as defined in listing 8.00C.1. The criteria of listing 8.08 were met because the claimant's extensive and ongoing skin lesions (burn scars) on his hands "very seriously" interfered with the motion of his joints and his ability to perform fine and gross movement. John Horn, Esq., Tinley Park, IL.

ALJ decision on listing 8.08 (Nov. 10, 2011) – 9 pages

CARDIOVASCULAR IMPAIRMENTS

1870. ALJ decision finding that the claimant met listing 4.04C. The medical expert testified that the listing was met because the claimant experienced severe coronary angina and displayed a 29% ejection fraction prior to surgical stenting. Tests showed 90% stenosis at the Mid LAD. Peripheral artery disease with claudication is documented by the evidence. The claimant testified that he experiences serious limitations in his ability to complete activities of daily living. The ALJ found that the impairments could reasonable by expected to produce the alleged symptoms and that the claimant was generally credible. John Horn, Esq., Tinley Park, IL.

ALJ decision on listing 4.04C (July 11, 2011) – 8 pages

CREDIBILITY

1879. Decision of the Decision Review Board (DRB), reversing the ALJ's unfavorable decision (The DRB no longer reviews cases in Region I states. Instead the Appeals Council reviews unfavorable decisions). The DRB considered the criteria in SSR 96-7p and found the claimant's subjective complaints to be fully credible. In addition, the ALJ erred in finding that the claimant could return to past work as a café attendant. The VE testified that the job was unskilled with a SVP of 2. The DOT describes the job with an SVP of 3. The claimant is limited to simple, routine repetitive tasks with short, simple instructions, precluding the ability to perform this job. Since she cannot return to past work, as finding of disabled is warranted by Rule 202.04. Wanda L. Justesen, Esq., Hartford, CT.

Decision of the Decision Review Board on credibility and SVP – 25 pages including the decision, Claimant's Brief to the DRB, unfavorable ALJ decision.

1858. District court remand where the ALJ failed to give any clear and convincing reason for questioning the plaintiff's credibility. The plaintiff alleged disability based on CFS and fibromyalgia. The ALJ reliance on the opinions of physicians who neither treated nor physically examined the plaintiff but believed that she was not credible was arbitrary and capricious. There was no evidence that the plaintiff was a malingerer. The ALJ also erred in not giving a germane reason for rejecting the lay evidence offered by the plaintiff's mother regarding the extent of her fatigue and side-effects of medications. The court noted that that the two consulting examiners recommended further testing to determine if the plaintiff has a somatoform disorder and to address her depression, anxiety, and memory lapses. Arthur Stevens, III, Esq. Medford, OR.

Hansen v. Astrue, Civil No. 3:10-CV03061-MA (D.Ore. July 7, 2011); 2011 U.S. Dist LEXIS 73508; 167 SSRS 623 – 20 pages

1836. District court decision remanding the case to reevaluate both credibility and the RFC with regard to work in a lighted environment. The plaintiff had a cornea problem that led to surgery, which resulted in the loss of useful vision in the right eye. The iris basically lost its ability to open and close in response to light, so the pupil was always wide open. This made it difficult for the plaintiff to work in normal light. The VE testified that if he were limited to working in "movie theater" darkness, the plaintiff could not do any jobs in the competitive workforce. But the VE also testified, in response to a question from the ALJ, that jobs did exist if the plaintiff worked in "reduced lighting, such as a library-type setting." The Appeals Council declined to review the "library level" of light, despite an argument that libraries are relatively quiet, but not relatively dark places. The court held that the ALJ's credibility assessment was defective in its handling of the post-surgical pain and the photophobia documented in the file. And it held that no evidence existed to support the "library" standard for the level of lighting. Thomas Geelhoed, Esq., Grand Rapids, MI.

Thompson v. Commissioner of Social Security, Case No. 1:100-cv-2 (W.D.Mich. Feb 4, 2011); 2011 U.S. Dist LEXIS 18957 Report and Recommendation – 14 pages

GAF SCORES

1838. District Court remand due, in part, to the ALJ's misinterpretation of the treating psychiatrist's opinion regarding the meaning of the plaintiff's Global Assessment of Functioning (GAF) score. The treating psychiatrist provided a letter explaining that the GAF scores above 50 that he assigned to the plaintiff did not mean that she was capable of sustaining work activity. The court noted that in a recent case involving the same psychiatrist, the court found that the ALJ committed harmless error in failing to address a mental error when there were similar high GAF scores. In this case, the plaintiff's attorney obtained a letter from the treating psychiatrist specific to the plaintiff. Also enclosed is a generic letter from the same psychiatrist explaining how he uses the GAF score. The attorney has not yet had to submit the generic letter, and the weight to be given the generic letter has not yet been addressed. Stephen Hogg, Esq., Carlisle, PA.

Pagano v. Astrue, Case No. 4:10-CV-00042 (M.D.Pa. Sept. 20, 2010); 2010 U.S. Dist LEXIS 71109; 154 SSRS 780 – 38 pages

IMPAIRMENT RELATED WORK EXPENSES

1866. Appeals Council remand because the ALJ incorrect considered the claimant's work activity instead of considering whether the claimant's impairment related work expenses (IRWEs) significantly affected her earnings, and whether her work was done under special conditions. These factors would affect whether an overpayment actually occurred. SSA found an alleged overpayment of over $300,000 for SSDI benefits paid from 1996 through 2007. The claimant submitted additional information showing that neither the district office nor the ALJ considered numerous IRWEs, including payments to an assistant, and medical expenses. On remand, if the ALJ decides that an overpayment exists, he must determine whether waiver is appropriate. Given the size of the alleged overpayment, the Appeals Council notes that "the claimant reported her work activity to the Social Security Administration on numerous occasions" and was repeatedly told to "keep the checks." Albert Carrozza, Esq., Olney, MD.

Appeals Council remand (July 27, 2011) - 26 pages included Remand Order of Appeals Council, and Claimant's Brief to the Appeals Council

LACK OF COUNSEL

1842. District Court remand where the ALJ failed in his "heightened duty" to fully develop the record for the plaintiff who was unrepresented at the hearing. This was not harmless error because the failure may have affected the ALJ's step 2 decision, and thus all remaining steps of the sequential evaluation. The ALJ did not follow up on the plaintiff's testimony that she suffered from depression and anxiety. He did not ask for copies of her prescription records and did not ask for the name of her treating psychiatrist. The records that were not requested by the ALJ might have supported the claimant's allegations. "The record is devoid of any evidence that the ALJ ever sought any medical evidence regarding [the plaintiff's] psychological condition or the effects it might have on her ability to work." Because the ALJ did not identify depression or anxiety as severe impairments at step 2, he did not address these impairments at step 3 or as part of the RFC determination at steps 4 and 5. Ashley Rose, Esq., Glen Ellyn, IL.

Daniels v. Astrue, Case No. 09 C 2252 (N.D.Ill. Mar. 10, 2011); 2011 U.S. Dist LEXIS 25836 – 24 pages

LOSS OF HEARING

1862. District Court remand for further proceedings because the medical evidence was insufficient to support the ALJ's finding that the plaintiff's hearing impairment did not meet or medically equal listing 2.08. The ALJ had to duty to obtain updated medical evidence of the plaintiff's hearing because the outdated evidence in the record showed that her impairment was deteriorating and had been close to meeting listing 2.08 at that time. The ALJ erred in finding that the treating physicians and other third parties did not report that the plaintiff's hearing impairments caused undue difficulty in interacting with others. During the hearing, the ALJ allowed the plaintiff's attorney to question her because her impairment prevented her from adequately interacting with the ALJ. The ALJ's conclusion that the plaintiff's testimony and demeanor at the hearing indicated that she could perform a wide range of work when using hearing aids and if given appropriate accommodations was "puzzling" since the ALJ did not explain the basis for this conclusion. Marcia Margolius, Esq., Cleveland, OH.

Garcia v. Astrue, Case No. 4:10-cv-56 (N.D.Ohio Mar. 14, 2011); 2011 U.S. Dist LEXIS 25338; 163 SSRS 684 – 25 pages

MEDICAL EXPERT TESTIMONY

1867. District court remand because the ALJ failed to notify the plaintiff that the medical expert would testify by telephone. This is an error of law and the court refused to adopt a harmless error analysis. 20 C.F.R. § 404.938(b) requires notice to the claimant if a witness will not be appearing in person at a hearing. Although HALLEX I-2-5-30 provides for telephone testimony by a medical expert (ME), the statute and regulations are silent. Proposed regulations were never finalized. The decision includes a discussion of other federal court cases finding that inclusion of ME telephonic evidence was legal error. The court did not go that far but did require that notice be given to the claimant, nothing that she "was harmed by the lack of notice. . ." With notice and the ability to prepare, it is possible that her cross-examination may have been more effective and the ME's testimony may have been found to be less persuasive. The court also noted the fundamental due process right to "confront" witnesses and that cross-examination is more effective when questions can be adjusted "based on the appearance and demeanor of the witness." Further, the quality of the phone connection was suspect, including many inaudible gaps in the transcript. Ivan Katz, Esq., New Haven, CT.

Edwards v. Astrue, No. 3:10cv1017 (MRK) (D.Conn. Aug. 10, 2011) – 18 pages

MEDICATIONS

1855. The Appeals Council remanded for the ALJ to further evaluate the claimant's mental impairments, including the effects of her numerous psychotropic medications. She was diagnosed with bipolar disorder and a history of post-traumatic stress disorder. The ALJ found that the mental impairments were not "severe" at step 2 and that the claimant retained the RFC to perform the full range of light work, including her past relevant work. The ALJ gave little weight to the treating doctor's opinion that the medication's side effects could be expected to be severe and to limit the claimant's effectiveness due to distraction, inattention, and drowsiness. The Appeals Council also noted that the ALJ's decision did not include a function-by-function assessment and failed to consider

numerous third party statements and a report from her counselor. Gilbert B. Laden, Esq., Mobile, AL.

Appeals Council remand on mental impairments (undated) 11 pages including the Notice of Order of Appeals Council, Order of Appeals Council Remanding Case to ALJ, Counsel's Letter Brief to Appeals Council

MENTAL IMPAIRMENT – AFFECTIVE DISORDERS LISTING 12.04

1850. ALJ decision, finding that the claimant met listing 12.04 and that his substance abuse disorder was not a contributing factor material to the determination of disability. The claimant had struggled with alcoholism through most of his adult life, while managing to compile a good earnings record. He had periods of abstinence but was hospitalized with liver disease on multiple occasions, and achieved sobriety in September 2010. The claimant's treating gastroenterologist diagnosed hepatic encephalopathy due to alcoholic cirrhosis and stated that the damage was permanent. A CE rated the claimant's mental functioning when sober as a 45, or "serious functional improvement." Michael Perry, Esq., Ellwood City, PA.

Fully favorable ALJ decision (March 30, 2011) – 6 pages

1849. Fully favorable Appeals Council decision based on the opinion of an Appeals Council medical consultant who found that the claimant met the criteria of listing 12.04. The Appeals Council considered the additional evidence from hospitalizations and treating sources, with some dated after the date of the ALJ decision. The Appeals Council disregarded an earlier request to amend the onset date to January 2008, and found the claimant to be disabled as of April 1, 2005. Chris Noel, Esq., Boulder, CO.

Fully Favorable Appeals Council decision (May 17, 2011) – 6 pages

MENTAL IMPAIRMENT – BI-POLAR DISORDER

1855. The Appeals Council remanded for the ALJ to further evaluate the claimant's mental impairments, including the effects of her numerous psychotropic medications. She was diagnosed with bipolar disorder and a history of post-traumatic stress disorder. The ALJ found that the mental impairments were not "severe" at step 2 and that the claimant retained the RFC to perform the full range of light work, including her past relevant work. The ALJ gave little weight to the treating doctor's opinion that the medication's side effects could be expected to be severe and to limit the claimant's effectiveness due to distraction, inattention, and drowsiness. The Appeals Council also noted that the ALJ's decision did not include a function-by-function assessment and failed to consider numerous third party statements and a report from her counselor. Gilbert B. Laden, Esq., Mobile, AL.

Appeals Council remand on mental impairments (undated) 11 pages including the Notice of Order of Appeals Council, Order of Appeals Council Remanding Case to ALJ, Counsel's Letter Brief to Appeals Council

MENTAL IMPAIRMENT - NONCOMPLIANCE

1868. District court reversal and award of benefits because the ALJ failed to provide legally sufficient reasons for rejecting testimony of the plaintiff and lay witnesses and the

medical opinions. The plaintiff was diagnosed with schizophrenia and a panic disorder and was described by her doctor as a "fairly complex psychiatric patient." The ALJ erred in finding her not credible because she failed to follow prescribed treatment. The court criticized the ALJ's finding to reject mental complaints because mental illness is underreported and "it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation." Regennitter v. Comm'r, 166 F.3d 1294, 1299-1300 (9th Cir 1999). The plaintiff consistently sought treatment but was inconsistent in attending appointments and completing programs. She was not stable when using anti-psychotic medications. Given here severe mental impairments, this failure "is not a clear and convincing reason to doubt her credibility." The ALJ erred in rejecting the treating doctor's opinion, and evidence from other treating sources, i.e. the plaintiff's therapist. The court remanded for the sole purpose of calculating benefits as the ALJ would be required to find the plaintiff disabled if the evidence was credited. The VE had testified that an individual with the limitations in the examining psychologist's report would be unable to perform SGA. Arthur Stevens, III, Esq., Medford. OR.

Thom v. Astrue, No. 10-CV-3069-ST (D.Ore. July 26, 2011); 2011 U.S. Dist LEXIS 81892 – 32 pages.

MENTAL IMPAIRMENT – TRAUMATIC BRAIN INJURY

1841. The Appeals Council grants the request for review under the substantial evidence provision (20 CFR 404.970 and 426.1470), finding that further assessment of the claimant's mental impairment is warranted. The claimant suffers from a traumatic brain injury and depression. A newly submitted neurological report dated 2009 indicates that he also has dementia due to head trauma, a mood disorder, full scale IQ score of 82, and a GAF of 45. On remand, the ALJ is ordered to obtain any additional medical evidence concerning the claimant's mental impairments, including, if needed, a consultative psychiatric examination, a medical expert's opinion and vocational expert testimony. The ALJ must give further consideration to the claimant's maximum RFC, consider treating and nontreating source opinion, and use the special technique (20 CFR §404.1520a and 416.920a) when evaluating the claimant's mental impairments. John Bowman, Esq., Davenport, IA represented the claimant.

Appeals Council remand (Jan. 22 2011) – 5 pages

MENTAL RETARDATION – LISTING 12.05C

1863. Fully favorable decision issued after the ALJ had issued after the ALJ had issued a partially favorable decision. The ALJ found that the claimant was disabled as of September 2010, because his RFC to perform light work was not reduced by his full scale IQ of 63 until that date. The Appeals Council gave substantial weight to the opinion of the examining psychologist who found that the plaintiff's mild mental retardation and full scale IQ of 63 were life-long. The psychologist had talked with the claimant's sister who reported academic difficulties in school. The Appeals Council concluded that the academic problems and lifetime history of unskilled wok indicated significant life-long deficits in adaptive functioning. This satisfied the introductory paragraph and first prong of Listing 12.05C. The other severe impairments of cirrhosis, ascites, anemia, and syphilis limited the claimant to light work and satisfied the second prong. Gilbert Laden, Esq., Mobile, AL.

Fully Favorable Appeals Council decision (July 28, 2011) and Counsel's Letter Brief to the Appeals Council – 9 pages.

1848. Fully favorable Appeals Council decision after a remand from the district court, finding that the claimant met the criteria of listing 12.05C since at least June 21, 2006, the claimant's initial alleged onset date. The plaintiff had filed a subsequent application while the appeal of his first application was pending. In 2010, a different ALJ considered the second application and found the claimant disabled by meeting listing 12.05C beginning November 2008. The claimant had been evaluated by a psychologist and found to have a verbal IQ of 63. The score was consistent with treatment he received during childhood and a verbal IQ score of 69 in testing administered when he was a child. The claimant has numerous other physical and mental impairments. Thus the Appeals Council found that listing 12.05C was met. Irwin Portnoy, Esq., New Windsor. NY.

Fully Favorable Appeals Council decision (Feb 9, 2011) – 5 pages

NONCOMPLIANCE

1868. District court reversal and award of benefits because the ALJ failed to provide legally sufficient reasons for rejecting testimony of the plaintiff and lay witnesses and the medical opinions. The plaintiff was diagnosed with schizophrenia and a panic disorder and was described by her doctor as a "fairly complex psychiatric patient." The ALJ erred in finding her not credible because she failed to follow prescribed treatment. The court criticized the ALJ's finding to reject mental complaints because mental illness is underreported and "it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation." Regennitter v. Comm'r, 166 F.3d 1294, 1299-1300 (9th Cir 1999). The plaintiff consistently sought treatment but was inconsistent in attending appointments and completing programs. She was not stable when using anti-psychotic medications. Given here severe mental impairments, this failure "is not a clear and convincing reason to doubt her credibility." The ALJ erred in rejecting the treating doctor's opinion, and evidence form other treating sources, i.e. the plaintiff's therapist. The court remanded for the sole purpose of calculating benefits as the ALJ would be required to find the plaintiff disabled if the evidence was credited. The VE had testified that an individual with the limitations in the examining psychologist's report would be unable to perform SGA. Arthur Stevens, III, Esq., Medford. OR.

Thom v. Astrue, No. 10-CV-3069-ST (D.Ore. July 26, 2011); 2011 U.S. Dist LEXIS 81892 – 32 pages.

1852. District court remand because the ALJ found that the plaintiff did not comply with treatment and thus could not meet or equal listing 8.02. But the ALJ failed to apply the factors in SSR 82-59, which is used to determine whether a claimant's noncompliance is justifiable. An ALJ must determine whether noncompliance is justifiable before dining that a claimant's noncompliance precludes a disability finding. In this case, the record shows that the plaintiff met two of the factors finding noncompliance justifiable: 1) he was unable to afford treatment; and 2) a treating doctor was unwilling to continue a course of treatment with steroids due to many potential side effects. The court did not find that the noncompliance was justifiable. Rather, it found that remand was warranted because the ALJ failed to perform the required analysis under SSR 82-59 to determine

whether the noncompliance was excusable. Margolius, Margolius and Associates, Cleveland, OH.

Milligan v. Astrue, Case No, 1:10-CV-126 (N.D.Ohio Apr. 26, 2011); 2011 U.S. Dist LEXIS 45001; 165 SSRS 209 – 16 pages

ONSET DATE – RETROACTIVE

1849. Fully favorable Appeals Council decision based on the opinion of an Appeals Council medical consultant who found that the claimant met the criteria of listing 12.04. The Appeals Council considered the additional evidence from hospitalizations and treating sources, with some dated after the date of the ALJ decision. The Appeals Council disregarded an earlier request to amend the onset date to January 2008, and found the claimant to be disabled as of April 1, 2005. Chris Noel, Esq., Boulder, CO.

Fully Favorable Appeals Council decision (May 17, 2011) – 6 pages

1847. Fully favorable Appeals Council decision, finding the claimant disabled as of December 31, 2006, her date last insured. The ALJ had found the claimant's onset date was April 2007, the date of her application, and therefore approved her SSI claim, but denied the DIB claim. She began treatment with a vascular specialist in March 2007. Records of her previous treatment from her family practitioner were furnished to the vascular specialist who provided a retrospective opinion in accordance with SSR 83-20. In his opinion, the claimant was unable to perform full-time work even prior to December 2006. The Appeals Council found that it was reasonable that the plaintiff was under a disability on December 31, 2006, less than four months before the onset date initially found for the SSI claim. Gilbert Laden, Esq., Mobile AL.

Fully Favorable Appeals Council decision (undated) - Appeals Council decision, and Letter Brief from claimant's attorney (April 2, 2010) – 13 pages

1844. ALJ decision finding the claimant disabled since December 1991, he alleged onset date. The application was filed in July 2007 and the claimant's DLI was December 31, 1997. The ALJ reviewed evidence from prior to 1997. In a report January 2010 report, the treating physician discussed the claimant's limitations and reported that "work activity is not possible for the claimant and the claimant's limitations have been present since 1996." The ALJ gave the treating physician's opinion controlling weight. The VE testified that there are no jobs in the national economy that the individual could perform. In this case, there was no DDS disability determination because it was denied on the basis of res judicata. However, after the claimant filed his request for hearing, the SSA Regional Center for Disability Programs determined that the application was improperly denied and should have gone to the DDS. Michael Perry, Esq., Ellwood City, PA.

Fully favorable ALJ decision (Feb 16, 2010) and Attorney's Letter Brief to ALJ – 8 pages

OVERPAYMENT – WAIVER

1888. ALJ decision waiving an overpayment of $22,736.00 charged to a 13 year old claimant who was receiving duplicate child's insurance benefits based on both her mother's and her father's earnings records. The mother was named the representative payee. SSA found that the mother was "at fault" because should have known she was

receiving duplicate payments. The ALJ found that neither the 13 year old nor the mother was at fault. The SSA Payment Center should have offset the past due benefits on the father's record with the benefits already paid on the mother's record. "However, due to mistakes by the benefit authorizer in computing coding, the Payment Center processed the benefits incorrectly." It took SSA over one year to recognize the mistake and remedy the error. The payee "would have no way of knowing" what the correct payment would be on the father's record. In addition, recovery of the overpayment would be against equity and good conscience because the benefits were used for the claimant's benefits. Recovery would defeat the purpose of Title II because the family needs all of its current income to meet necessary expenses. John Bowman, Esq., Davenport, IA. ALJ decision waiving overpayment (Nov. 21, 2011) – 8 pages

1866. Appeals Council remand because the ALJ incorrect considered the claimant's work activity instead of considering whether the claimant's impairment related work expenses (IRWEs) significantly affected her earnings, and whether her work was done under special conditions. These factors would affect whether an overpayment actually occurred. SSA found an alleged overpayment of over $300,000 for SSDI benefits paid from 1996 through 2007. The claimant submitted additional information showing that neither the district office nor the ALJ considered numerous IRWEs, including payments to an assistant, and medical expenses. On remand, if the ALJ decides that an overpayment exists, he must determine whether waiver is appropriate. Given the size of the alleged overpayment, the Appeals Council notes that "the claimant reported her work activity to the Social Security Administration on numerous occasions" and was repeatedly told to "keep the checks." Albert Carrozza, Esq., Olney, MD.

Appeals Council remand (July 27, 2011) - 26 pages included Remand Order of Appeals Council, and Claimant's Brief to the Appeals Council

1864. Fully favorable ALJ decision, finding that the beneficiary was not liable for a $10,244.50 overpayment of SSI benefits that allegedly caused by the receipt of reverse mortgage payments, which the beneficiary received as an annuity with regular monthly payments. In October 2008, she sold ten years' worth of payments for a lump sum to make home repairs, and will receive no payments until 2016. The ALJ found that "the original monies were exempt and the original exempt character of the underlying reverse mortgage proceeds was not changed by any subsequent transaction." The overpayment was waived and SSA was ordered to refund the $3,981 in benefits previously withheld. John V. Johnson, Esq., Chico, CA.

Fully favorable ALJ Decision (Apr. 15, 2011) – 14 pages, including POMS SI 01140.300, Reverse Mortgage Guide and Social Security, Counsel's Cover Letter

1857. The Appeals Council remanded the case because the ALJ erred in finding the claimant to be at fault in causing an overpayment. The claimant was found disabled in 1987 due to Acute Paranoid Schizophrenia. He began to work part-time in 2000 and started to earn over the SGA amount in January 2003 (his trial work period ended in September 2000). In September 2006, SSA sent him a notice that it had determined his disability ceased in January 2003 due to SGA and that he was overpaid $47,455.70 from April 2003 through September 2006. After a hearing, the ALJ adjusted the overpayment

amount to $45,205.70 (based on recovery of $2,250.) but denied the waiver request, finding that the claimant was not without fault.

The Appeals Council found that the claimant was not "at fault." First, the ALJ incorrectly applied the fault standard for deduction overpayments, which required "a bona fide attempt" to restrict earnings, evaluated under 20 C.F.R. § 404.510. This case involved an entitlement overpayment, evaluated under 20 C.F.R. § 404.507, which requires consideration of all pertinent circumstances when evaluating fault, e.g., mental and intelligence claimant met listing 12.03 and has borderline intellectual functioning. Yet, he then found that the part-time work as a custodian demonstrated that his mental impairments did not interfere with the claimant's ability to report work activity. This rationale was wrong because it would result in everyone who is overpaid because of work being at fault and would obviate the requirement to consider mental limitations in 404.507. The medical and other evidence in this case "strongly indicates" that the claimant's mental impairments did affect his understanding of and ability to comply with the reporting requirements. Third, the ALJ noted that the claimant's fiancée testified that she did all of paperwork. But he did not move in with her until July 2006 (the overpayment occurred because of work in 2003) and, at any rate, she was not his representative payee. Since the Appeals Council found the claimant not at fault, the case was remanded solely to determine whether the claimant was financially able to repay the overpayment. John A. Bowman, Esq., Davenport, IA.

Appeals Council remand on waiver of overpayment (March 31, 2011) – 5 pages

1831. Appeals Council waiver of the claimant's Title II overpayment. The claimant was overpaid when she became simultaneously entitled to disability insurance benefits and mother's benefits, and the mother's benefits were not reduced. The mother's benefits were terminated in 2005 and SSA attempted to recover the remaining overpayment from her DIB benefits. The Appeals Council found that recovery of the overpayment would defeat the purpose of Title II, and waived the overpayment of $9,423. The purpose of Title II is defeated if recovery deprives the individual of income required to ordinary and necessary living expenses. 20 CFR 404.508(a). The plaintiff was receiving SSI and the Appeals Council found that "it is fair to assume that an individual receiving public assistance [e.g. SSI] does not have sufficient funds to meet their ordinary and necessary living expenses. John Bowman, Esq., Davenport, IA.

Appeals Council waiver of overpayment (Nov. 19, 2010) – 8 pages

PAIN

1840. The ALJ issued a partially favorable decision, following an Appeals Council remand. The Appeals Council had remanded because the ALJ did not evaluate pain as required by the factors in SSR 96-7p. The ALJ stated that the testimony of the claimant's husband "would be of no help" if the husband did not testify to additional incidents that the claimant had not testified to. The ALJ also did not consider the VE's response to the hypothetical from the claimant's attorney. The ALJ also failed to consider some medical records, documenting the claimant's limitations, including increased pain during prolonged periods of sitting. On remand, the ALJ issued a partially favorable decision, finding the claimant disabled beginning on August 2, 2007. ON that date, the claimant

had the RFC to perform a limited range of sedentary work but the ALJ found her testimony credible that she would be unable to report to work three or four days a month on an irregular basis. The ALJ relied on the VE's testimony that there were no jobs in the national economy that the individual could perform. It was helpful to the final outcome that the claimant kept a diary of her limitations and pain every day along with statements from her aunt who observed her every day. Ronald Heiman, Esq., Sharon, PA

Partially favorable ALJ decision after remand (Nov. 12, 2010) – 28 pages including Notice of Decision, ALJ decision, Order of ALJ, List of Exhibits, Appeals Council Remand (Feb 18, 2010), Medical Interrogatories, Pain Questionnaire

PAST RELEVANT WORK

1861. Appeals Council remand where the ALJ erred in finding that the claimant could perform past relevant work. One job was not within the 15-year period during which work is considered to be relevant and for the other job, the record did not establish that the job was of sufficient duration or remuneration to be considered vocationally relevant since the claimant performed that job for only two months. In addition, the ALJ failed to evaluate the third party statements submitted by the claimant's husband. John Bowman, Esq., Davenport, IA.

Appeals Council remand (Jan. 13, 2011) – 3 pages

PAST RELEVANT WORK – SGA ISSUES

1839. Appeals Council remand where the ALJ denied the case at Step 4, finding that the claimant could perform his past relevant work as a grocery store stocker. However, the ALJ relied on the wrong DOT code. The ALJ acknowledged that the claimant's earnings as a grocery stocker were below the presumed SGA level, but involved SSR 83-33 to determine that it was SGA level work. The ALJ stated that the work was comparable to that of individuals in the community who are not disabled performing the same or similar occupations. But the ALJ failed to take into account the time, energy, duties, and responsibilities of non-disabled individuals engaged in the same or similar occupations as their means of livelihood, as required by SSR 83-33. Gilbert Laden, Esq., Mobile, AL.

Appeals Council remand (Feb. 4, 2011) Notice of Order of Appeals Council Remanding Case to ALJ, Order of Appeals Council, Letter Brief to Appeals Council from Claimants' Attorney – 8 pages.

POST TRAUMATIC STRESS DISORDER

1874. District Court reversal and remand for payment of benefits. The plaintiff filed her claim for disability benefits in 2002. In 2004, the VA found the plaintiff permanently and 100% disabled based on PTSD and other physical impairments. The ALJ failed to provide "persuasive, specific and valid reasons" for giving less that "great weight" to the VA determination. Instead the ALJ discounted the VA determination because, in her opinion, it was based on the plaintiff's statements regarding her subjective symptoms. The court found the ALJ's credibility finding flawed, and found her disabled as of her August 1999 alleged onset date. Arthur W. Stevens, III, Esq., Medford, OR.

Johnson v. Astrue, Case No. CV-10-3052-CL (D.Ore. Sept. 27, 2011); 2011 U.S. Dist LEXIS 11071; 170 SSRS 631 – 21 pages

PRESUMPTION OF DEATH

1877. Fully favorable ALJ decision relying on 20 C.F.R. § 404.721 and § 404.722 to find that the claimant's husband should be presumed dead and thus the 62 year old claimant was entitled to widow's benefits. The claimant's husband had left her and her daughter in the late 1980s and had not been head from since then. There had been no earnings recorded since 1985. The claimant obtained statements from three individuals who had known the husband, stating that they had not seen or heard from him since he left. The attorney also obtained a report from a private investigator who turned up no trace of the husband. Constance Somers, Esq. San Antonio, TX.

ALJ decision on presumption of hearth (Sept 12, 2011) – 9 pages including fully favorable decision and claimant's pre-hearing brief.

RESIDUAL FUNCTIONAL CAPACITY – FULL RANGE OF LIGHT WORK

1845. Fully favorable ALJ decision after an Appeals Council remand. The remand directed the ALJ to pose a hypothetical question that reflected the specific limitations established by the record as a whole. In the earlier decision, the ALJ made contradictory findings when he made specific RFC findings that the claimant was capable of a limited range of light work but then found that the claimant could perform a full range of light work. In the decision following remand, the ALJ found that he claimant was limited to sedentary work. However, since the evidence shows she would miss more than three days of work per month due to fatigue, she lacks the RFC to perform even sedentary work. Fritzie Vammen, Esq., Conway, AR.

ALJ decision (April 6, 2011) – 36 pages including Notice of Decision, Notice of Order of Appeals Council Remanding Case to ALJ, Claimant's Appeal Brief, Original Unfavorable decision (Nov. 28. 2008)

RESIDUAL FUNCTIONAL CAPACITY – LOW STRESS

1880. District court remand for consideration of the plaintiff's RFC. The examining psychologist found that the plaintiff has the ability to perform simple, repetitive tasks but would do best away from the public and in a "low stress environment." These restrictions are more limiting that those adopted by the ALJ. i.e limited to simple instructions with "occasional interaction with the general public." The ALJ did not include "low stress environment" in the restrictions. "[A] limitation to simple, unskilled work is not sufficient to cover limitations in concentration and persistence. In fact, a limitation to low stress work may not be enough." It was error for the ALJ to reject the limitations on concentration and persistence because the plaintiff spends hours reading. Marcia Margolius, Esq., Cleveland, OH.

Miller v. Commissioner of Social Security, Case No. 1:09 CV 2369 (N.D.Ohio Oct. 17, 2011); 2011 U.S. Dist LEXIS 119694- 8 pages

RESIDUAL FUNCTIONAL CAPACITY – MEDICAL ISSUES

1860. District court remand where the ALJ "altogether failed" to provide reasons why he rejected the opinion of the plaintiff's treating rheumatologist. He did not provide any support for his finding that the doctor's opinion was inconsistent with the record. The ALJ also refused to consider the doctor's opinion to the extent that it was inconsistent

with the RFC found by the ALJ. This "puts the cart before the horse. The ALJ is not at liberty to first create an RFC and then disregard the evidence that may contradict it." By so doing, the ALJ "improperly attempted to 'play doctor'" to reach his conclusion. The ALJ's disregard of the doctor's opinion was key to his finding of "not disabled" since the hypothetical to the VE did not include the treating doctor's opinion. John Horn, Esq., Tinley Park, IL.

Reindl v. Astrue, Case No. 09 C 2695 (N.D. Ill. July 22, 2010); 2010 U.S. Dist LEXIS 73866; 155 SSRS 199 – 24 pages

RESIDUAL FUNCTIONAL CAPACITY – MENTAL IMPAIRMENTS

1869. Appeals Council remand because the ALJ provided no rationale for omitting limitations caused by the claimant's mental impairment from the RFC assessment. The ALJ found that the claimant could perform sedentary work expect for avoiding standing and walking more than 30 minutes at a time. The ALJ also found that the claimant had "severe" impairments of anti-social personality disorder and substance addiction disorder. The ALJ's RFC did not include any restrictions caused by the severe mental impairments. A medical expert found moderate limitations in working with coworkers, responding appropriately to supervisors, and accepting instructions. A PRTF and medical source statement were uploaded to the electronic file but were not made exhibits. The ALJ also did not include limitations, supported by evidence, that he claimant used a cane to ambulate. The ALJ also erred in failing to obtain VE testimony. The ALJ decision used boilerplate language regarding the use of the grids as a framework, as support for his failure to obtain VE testimony. Allan Bonney, Esq., Spokane, WA.

Appeals Council Remand Order (April 15, 2011) – 5 pages

RESIDUAL FUNCTIONAL CAPACITY – SIMPLE UNSKILLED WORK

1837. District Court remand finding that the ALJ erred in concluding that the plaintiff was able to perform three jobs – telephone quotation clerk, surveillance system monitor, and call out operator. The court held that the job requirements did not meet the RFC formulated by the ALJ for "simple, unskilled work" because these three jobs require a reasoning level of three (Appendix C of the DOT). Under **Hackett v. Barnhart**, 395 F.3d 1168 (10th Cir. 2005), and RFC for simple work requires level two reasoning. Therefore, the case was remanded so the ALJ could develop VE testimony regarding the discrepancy between the reasoning level for simple work (level two) versus the reasoning level of the three jobs (level three). Chris Noel, Esq., Boulder, CO.

DeQuinze v. Astrue, Civil Action No. 09-cv-02874-PAB (D.Colo. Jan. 11, 2011); 2011 U.S. Dist LEXIS 4455– 11 pages

SEIZURE DISORDERS

1853. District court remand for an award of benefits. The ALJ erred in giving substantial weight to a non-examining DDS doctor's opinion that the plaintiff could perform simple, unskilled repetitive work. The psychological consultative examiner reported that the plaintiff was "markedly limited (poor or none)" in the "ability to maintain attention and concentration for extended periods" and noted that she "has poor skills in focused attention." During the CE, the psychologist observed that the plaintiff had difficulties with focus and concentration, which worsened as the evaluation progressed. The

"Working Memory" indices were significantly below expectation that could result from a long standing attentional deficit or also could be related to her medications to control seizures or the presence of a migraine. The CE psychologist noted that "difficulties in working memory can make many routine cognitive tasks quite difficult." The non-examining DDS doctor also found a "marked" limitation regarding "difficulties in maintaining concentration, persistence, or pace" but concluded that the plaintiff could perform simple, unskilled repetitive work. In his hypothetical to the VE, the ALJ included the CE psychologist's limitation of "poor or no ability for focused attention." The VE responded that the person could not work. Yet the ALJ concluded that the plaintiff had the RFC for simple, unskilled repetitive work by crediting the report of the non-examining DDS physician. Mark R. Caldwell, Esq., Phoenix, AZ.

Pierre v. Astrue, No. CV 10-0130-PHX-EHC (D. Ariz.May 13, 2011); 2011 U.S. Dist LEXIS 51796; 165 SSRS 407 - 101 pages including the Order, Brief for Plaintiff, Defendant's Opposition to Plaintiff's Opening Brief, Reply Brief for Plaintiff. This is available by pdf only.

SEVERITY

1887. District Court remand where the ALJ improperly rejected all evidence regarding the plaintiff's impairment. The ALJ found the only "severe impairment" was "pain in left shoulder." The ALJ recognized the plaintiff's cervical fusion during the hearing but failed to make a finding in his decision or to discuss any evidence of this impairment. "Here, the very best comment this Court could make about the ALJ's decision is that it constitutes . . . an improperly broad rejection of every piece of evidence in the record, of which there was plenty, regarding plaintiff's cervical fusion and follow-up treatment. . ." The court is unable to determine whether the ALJ's decision is rational and supported by substantial evidence... One doctor's assignment of a 15% permanent partial impairment rating for the plaintiff's whole body "stands in stark contrast and cannot be reconciled" with the ALJ's failure to find a severe impairment. William Coplin Jr., Esq., Demopolis, AL.

Agnew v. Astrue, No. CA 11-0060-C (S.D.Ala. Dec. 1, 2011); 2011 U.S. Dist LEXIS 138133; 172 SSRS 445 – 10 pages

1842. District Court remand where the ALJ failed in his "heightened duty" to fully develop the record for the plaintiff who was unrepresented at the hearing. This was not harmless error because the failure may have affected the ALJ's step 2 decision, and thus all remaining steps of the sequential evaluation. The ALJ did not follow up on the plaintiff's testimony that she suffered from depression and anxiety. He did not ask for copies of her prescription records and did not ask for the name of her treating psychiatrist. The records that were not requested by the ALJ might have supported the claimant's allegations. "The record is devoid of any evidence that the ALJ ever sought any medical evidence regarding [the plaintiff's] psychological condition or the effects it might have on her ability to work." Because the ALJ did not identify depression or anxiety as severe impairments at step 2, he did not address these impairments at step 3 or as part of the RFC determination at steps 4 and 5. Ashley Rose, Esq., Glen Ellyn, IL.

Daniels v. Astrue, Case No. 09 C 2252 (N.D.Ill. Mar. 10, 2011); 2011 U.S. Dist LEXIS 25836 – 24 pages

SCHIZOPHRENIA

1851. Appeals Council remand due to the ALJ's failure to adequately evaluate the treating source opinions. The treating physician diagnosed schizoaffective disorder. He noted that the claimant was functioning better since taking medications and was less bizarre, but still did not function well, and had no social skills. The ALJ only included the "positive" notes from the treating physician but did not include the discussion that the claimant was not functioning well. The ALJ relied on a psychological CE finding that the claimant was malingering on the WAIS-II. However, the Appeals Council found that the claimant had nearly the same IQ scores before age 22 and that they were found valid with no malingering. Fritzie Vammen, Esq., Conway, AR.

Appeals Council remand (March 31, 2011) – 4 pages

SUBSTANCE ABUSE

1859. Seventh Circuit remand. Although the plaintiff bears the burden of proving that DA&A is not a contributing factor material to the disability determination, under EM 96200, the ALJ had not "adequately disentangled the effects of [the claimant's] drug abuse from her other [mental] impairments." In his brief, the Commissioner attempted to argue that the ALJ was not bound by EM 96200 because it was primarily directed to state agency personnel. However, at oral argument, the government conceded that the teletype reflected agency policy generally. The ALJ relied on the claimant's improvement after hospitalization to establish that DA&A was material. But the court notes that improvement would be expected after a course of treatment in a structured hospital environment. The court ordered the ALJ to reconsider whether the claimant would be disabled in the absence of drug abuse and the weigh afforded to the treating psychiatrist's opinion. David Kornfeld, Esq., Evanston, IL.

Harlin v. Astrue, No. 10-3258 (7th Cir. June 13, 2011); 424 Fed. Appx. 564; 2011 U.S. App. LEXIS 11952 – 6 pages

1850. ALJ decision, finding that the claimant met listing 12.04 and that his substance abuse disorder was not a contributing factor material to the determination of disability. The claimant had struggled with alcoholism through most of his adult life, while managing to compile a good earnings record. He had periods of abstinence but was hospitalized with liver disease on multiple occasions, and achieved sobriety in September 2010. The claimant's treating gastroenterologist diagnosed hepatic encephalopathy due to alcoholic cirrhosis and stated that the damage was permanent. A CE rated the claimant's mental functioning when sober as a 45, or "serious functional improvement." Michael Perry, Esq., Ellwood City, PA.

Fully favorable ALJ decision (March 30, 2011) – 6 pages

SUBSTANTIAL GAINFUL ACTIVITY

1886. Favorable ALJ decision, finding the claimant disabled since December 1998, his alleged onset date. The claimant filed his application in December 2009. His date last insured expired in June 2002. His claims were denied at the initial and reconsideration levels based on findings that he had engaged in SGA since 2002. The ALJ found that work on one of the jobs was an unsuccessful work attempt per SSR 84-25 and SSR 05-

02. Work on another job was performed under "special condition," with the claimant working less than full-time and with help from someone to drive him around. When the special conditions were removed, he could not continue working. The ALJ found that the claimant had sever physical and mental limitations and would require frequent unscheduled breaks during the workday and would miss two days of work per month. The VE testified that there were no jobs the claimant could perform. David Harp, Esq., Fort Smith, AR.

Fully favorable ALJ decision (Dec. 6, 2011) – 11 pages

1883. Appeals Council remand to clarify whether or not the claimant engaged in substantial gainful activity. SSA Determine that the claimant completed his trial work period and that his disability ceased in August 2008, and he had been overpaid, because he was engaging in SGA. The claimant alleged that his earning were below the SGA level, and provided some evidence to support that. On remand, the ALJ will obtain evidence of earnings from November 2007 forward and evaluate, if and when, the claimant's disability ceased due to SGA. John Bowman, Davenport, IA.

Appeals Council remand on earnings (March 15, 2011) – 4 pages.

SSI RESOURCES

1872. On-the-Record ALJ decision finding that he claimant did not have excess resources. The claimant's SSI application was denied based on excess resources, because he owned a home that he was not living in. The home is an excludable resource if the claimant lives in the home, but it becomes a countable resource if it is no longer the principle place of residence. After the claimant filed his application, his medical condition required him to move in with his mother. Per POMS SI 01130.100, the property is no longer the principle place of residence if the claimant left with no intention of returning. The ALJ found that there was no statement in the record to support that the move was permanent. The mother's affidavit stated that her son had moved back and only left again when he was hospitalized. He intends to return to his home if his health permits. This, it is excluded as a countable resource. In addition, the home cannot count as a resource because it cannot be liquidated. The claimant was awarded the house is a divorce decree but his ex-wife has appealed the property settlement. Until a decision is issued, the home cannot be sold. John Bowman, Esq., Davenport, IA.

ALJ decision on SSI resources. (Sept. 14, 2011) – 7 pages

TIME LIMIT ON REMAND

1875. District Court remand setting a time limit of 120 days for completion of the remand proceedings. If the deadline is not met, the court orders that "a calculation of benefits owed Plaintiff shall immediately be made." The court rejected the government's argument that a time limit would be inappropriate. The ALJ failed to explain why he considered only a portion of the treating pulmonary specialist's report and failed to engage in any evaluation of the appropriate factors for another treating physician's opinion. The ALJ also failed to consider all of the plaintiff's impairments when determining his RFC. Irwin Portnoy, Esq., New Windsor, NY.

Balsano v. Commissioner of Social Security, Case No. 1:09-CV-490 (N.D.N.Y. Aug, 12, 2011)

VETERANS DISABILITY DETERMINATION

1874. District Court reversal and remand for payment of benefits. The plaintiff filed her claim for disability benefits in 2002. In 2004, the VA found the plaintiff permanently and 100% disabled based on PTSD and other physical impairments. The ALJ failed to provide "persuasive, specific and valid reasons" for giving less that "great weight" to the VA determination. Instead the ALJ discounted the VA determination because, in her opinion, it was based on the plaintiff's statements regarding her subjective symptoms. The court found the ALJ's credibility finding flawed, and found her disabled as of her August 1999 alleged onset date. Arthur W. Stevens, III, Esq., Medford, OR.

Johnson v. Astrue, Case No. CV-10-3052-CL (D.Ore. Sept. 27, 2011); 2011 U.S. Dist LEXIS 11071; 170 SSRS 631 – 21 pages

VISUAL IMPAIRMENTS

1836. District court decision remanding the case to reevaluate both credibility and the RFC with regard to work in a lighted environment. The plaintiff had a cornea problem that led to surgery, which resulted in the loss of useful vision in the right eye. The iris basically lost its ability to open and close in response to light, so the pupil was always wide open. This made it difficult for the plaintiff to work in normal light. The VE testified that if he were limited to working in "movie theater" darkness, the plaintiff could not do any jobs in the competitive workforce. But the VE also testified, in response to a question from the ALJ, that jobs did exist if the plaintiff worked in "reduced lighting, such as a library-type setting." The Appeals Council declined to review the "library level" of light, despite an argument that libraries are relatively quiet, but not relatively dark places. The court held that the ALJ's credibility assessment was defective in its handling of the post-surgical pain and the photophobia documented in the file. And it held that no evidence existed to support the "library" standard for the level of lighting. Thomas Geelhoed, Esq., Grand Rapids, MI.

Thompson v. Commissioner of Social Security, Case No. 1:100-cv-2 (W.D.Mich. Feb 4, 2011); 2011 U.S. Dist. LEXIS 18967 Report and Recommendation – 14 pages

WEIGHT OF MEDICAL EVIDENCE – EXPLANATION OF WEIGHT GIVEN

1846. District Court remand because, under SSR 06-3p, the ALJ "was obligated to provide a more detailed explanation for his decision to reject the opinions of the [treating] physician assistant . . . the medical professional with arguable the most detailed knowledge of claimant's condition, her treatment, and her response to that treatment." The ALJ has discretion, but must still give "at least a brief and sufficient explanation" for giving less weight to that evidence. In this case, the ALJ stated that the physician assistant was not "an acceptable medical source" and then concluded that "her opinions are not supported by the medical evidence on the record." Based on this meager statement, he gave her opinions "little weight." The court found that [h]ere, the ALJ's reasons for rejecting [the treating physician assistant's] opinions are not sufficient detailed to permit meaningful appellate review. Raymond Kelly, Esq., Manchester, NH.

Dumensil v. Astrue, Civil No. 10-cv-060-SM (D.N.H. Aug. 4, 2010); 2010 DNH 135; 2010 U.S.Dist. LEXIS 135125 – 19 pages

1834. District Court remand because the ALJ failed to adequately articulate the reasons for the weight assigned to the opinions of the treating physicians and other medical sources, leading to the need for a reevaluation of the RFC finding. The ALJ assigned "less weight" to the treating physician's opinion. He gave "full weight" to the DDS physician's postural limitations but "less weight" to that physician's exertional limitations. He assigned "some weight" to the consulting examining doctor, while stating that "the evidence as a whole indicates greater limitations." "The use of the terms 'less weight' and 'some weight' by this ALJ is not helpful. Less than what? Some compared to what?" The sitting limitation is critical because the VE testified that if limited to sitting 2 hours in an 8-hour day, no jobs existed that the plaintiff could perform. The court is deprived of a basis for meaningful review of the ALJ's decision since the ALJ did not give "good reasons" for the conclusions adopted. "To comply with the rule in **Wilson** [**v. Comm'r of Soc. Sec**., 378 F.3d 541 (6th Cir. 2004)] the ALJ must pain with a narrower brush." Margolius, Margolius, and Associates, Cleveland, OH.

Elias v. Commissioner of Social Security, Case No. 1:10 CV 472 (N.D.Ohio Dec. 14, 2010); 2010 U.S. Dist. LEXIS 132043 – 8 pages

WEIGHT OF MEDICAL EVIDENCE – 3rd CIRCUIT

1854. District court remand for further proceedings. The ALJ erred by failing to give appropriate weight to the treating physician's opinion. The ALJ rejected the opinion by finding that it was not supported by his own treatment notes. The court cited three major problems with the ALJ's opinion. First, he failed to properly cite to the evidence that he was rejecting. Neither of the exhibits cited by the ALJ contained reports from the treating doctor. This does not permit meaningful review by the court and the ALJ's decision "must be vacated and remanded for this reason alone." Second, the ALJ's reasons for rejecting the treating physician's opinions indicate that the ALJ improperly formed his own medical opinion. Under Third Circuit case law, it is "absolutely forbidden" for the ALJ to impermissibly substitute his or her own judgment for that of a physician. Third, as also required by Third Circuit case law, the ALJ can only reject the treating physician's opinion on the basis of contradictory medical evidence. In this case, the ALJ appears to have even ignored the CE's report that the plaintiff has "quite severe irritable bowel syndrome." Gregg M. Hobbie, Esq., Eatontown, NJ.

Ryan v. Astrue, No. 2:10-cv-04469-SRC (D.N.J. May 18, 2011) – 10 pages

1832. District court remand where the ALJ failed to "adequately explain his reason for rejecting or discrediting competent evidence." The treating physician submitted a statement that the plaintiff's disability began January 1, 2004, but provided no further explanation. The ALJ's decision failed to consider the statement and the Appeals Council "minimized" the opinion because it was very brief. Agnes S. Wladyka, Esq., Mountainside, NJ.

Murrieta v. Commissioner of Social Security, Civil Action, No. 09-4694 (PGS) (D.N.J. Dec. 22, 2010) – 4 pages

WEIGHT OF MEDICAL EVIDENCE – 6th CIRCUIT

1873. District court remand pursuant to sentence four due to the ALJ's failure to properly consider the opinion of the plaintiff's treating physicians. This is not harmless error, as

the government argues. "This error alone, dictates reversal and remand as it is contrary to the Agency's self-imposed treating physician rule." In this case, the ALJ did not articulate the nature of the treating physicians' relationship with the plaintiff or recognize their opinions "in any way obvious to this reviewer." Specifically, the ALJ failed to mention their observations regarding the plaintiff's lightheadedness, tremors, and depression. Because the treating physicians' opinions were not considered, the ALJ's RFC must de redone. On remand, the ALJ is directed to give the appropriate consideration to the opinions of the treating physicians. Marcia Margolius, Esq., Cleveland OH.

Walton v. Astrue, Case No. 3:09CV2869 (N.D.Ohio Jan 18, 2011); 2011 U.S. Dist. LEXIS 4561; *published at* 773 F.Supp.2d 742 – 24 pages

1834. District Court remand because the ALJ failed to adequately articulate the reasons for the weight assigned to the opinions of the treating physicians and other medical sources, leading to the need for a reevaluation of the RFC finding. The ALJ assigned "less weight" to the treating physician's opinion. He gave "full weight" to the DDS physician's postural limitations but "less weight" to that physician's exertional limitations. He assigned "some weight" to the consulting examining doctor, while stating that "the evidence as a whole indicates greater limitations." "The use of the terms 'less weight' and 'some weight' by this ALJ is not helpful. Less than what? Some compared to what?" The sitting limitation is critical because the VE testified that if limited to sitting 2 hours in an 8-hour day, no jobs existed that the plaintiff could perform. The court is deprived of a basis for meaningful review of the ALJ's decision since the ALJ did not give "good reasons" for the conclusions adopted. "To comply with the rule in **Wilson** [**v. Comm'r of Soc. Sec**., 378 F.3d 541 (6th Cir. 2004)] the ALJ must pain with a narrower brush." Margolius, Margolius, and Associates, Cleveland, OH.

Elias v. Commissioner of Social Security, Case No. 1:10 CV 472 (N.D.Ohio Dec. 14, 2010); 2010 U.S. Dist. LEXIS 132043 – 8 pages

WEIGHT OF MEDICAL EVIDENCE – 7th Circuit

1860. District court remand where the ALJ "altogether failed" to provide reasons why he rejected the opinion of the plaintiff's treating rheumatologist. He did not provide any support for his finding that the doctor's opinion was inconsistent with the record. The ALJ also refused to consider the doctor's opinion to the extent that it was inconsistent with the RFC found by the ALJ. This "puts the cart before the horse. The ALJ is not at liberty to first create an RFC and then disregard the evidence that may contradict it." By so doing, the ALJ "improperly attempted to 'play doctor'" to reach his conclusion. The ALJ's disregard of the doctor's opinion was key to his finding of "not disabled" since the hypothetical to the VE did not include the treating doctor's opinion. John Horn, Esq., Tinley Park, IL.

Reindl v. Astrue, Case No. 09 C 2695 (N.D. Ill. July 22, 2010); 2010 U.S. Dist LEXIS 73866; 155 SSRS 199 – 24 pages

WEIGHT OF MEDICAL EVIDENCE-10th Circuit

1853. The ALJ erred in giving substantial weight to a non-examining DDS doctor's opinion that the plaintiff could perform simple, unskilled repetitive work. The

psychological consultative examiner reported that the plaintiff was "markedly limited (poor or none)" in the "ability to maintain attention and concentration for extended periods" and noted that she "has poor skills in focused attention." The court found that the ALJ relied on the CE's report without rejecting any part of it but then ignored the CE's finding in the Medical Source Statement that plaintiff had a marked limitation in her ability to maintain attention and concentration for extended periods. The court discussed the rule that the opinion of an examining physician is afforded more weight than a non-examining physician. Further, the opinion of a non-examining physician cannot by itself constitute substantial evidence justifying the rejection of the opinion of an examining physician. Since the VE testified that all work was precluded with a marked limitation of "poor or no ability for focused attention" as reported by the examining CE, the court reversed and remanded for an award of benefits. Mark R. Caldwell, Esq., Phoenix, AZ.

Pierre v. Astrue, No. CV 10-0130-PHX-EHC (D. Ariz.May 13, 2011); 2011 U.S. Dist LEXIS 51796; 165 SSRS 407 - 101 pages including the Order, Brief for Plaintiff, Defendant's Opposition to Plaintiff's Opening Brief, Reply Brief for Plaintiff. This is available by pdf only.

WEIGHT OF MEDICAL EVIDENCE – PHYSICIAN ASSISTANT

1846. District Court remand because, under SSR 06-3p, the ALJ "was obligated to provide a more detailed explanation for his decision to reject the opinions of the [treating] physician assistant . . . the medical professional with arguable the most detailed knowledge of claimant's condition, her treatment, and her response to that treatment." The ALJ has discretion, but must still give "at least a brief and sufficient explanation" for giving less weight to that evidence. In this case, the ALJ stated that the physician assistant was not "an acceptable medical source" and then concluded that "her opinions are not supported by the medical evidence on the record." Based on this meager statement, he gave her opinions "little weight." The court found that [h]ere, the ALJ's reasons for rejecting [the treating physician assistant's] opinions are not sufficient detailed to permit meaningful appellate review. Raymond Kelly, Esq., Manchester, NH.

Dumensil v. Astrue, Civil No. 10-cv-060-SM (D.N.H. Aug. 4, 2010); 2010 DNH 135; 2010 U.S.Dist. LEXIS 135125 – 19 pages

WEIGHT OF MEDICAL EVIDENCE – TREATING DOCTOR Administrative Decisions

1851. Appeals Council remand due to the ALJ's failure to adequately evaluate the treating source opinions. The treating physician diagnosed schizoaffective disorder. He noted that the claimant was functioning better since taking medications and was less bizarre, but still did not function well, and had no social skills. The ALJ only included the "positive" notes from the treating physician but did not include the discussion that the claimant was not functioning well. The ALJ relied on a psychological CE finding that the claimant was malingering on the WAIS-II. However, the Appeals Council found that the claimant had nearly the same IQ scores before age 22 and that they were found valid with no malingering. Fritzie Vammen, Esq., Conway, AR.

Appeals Council remand (March 31, 2011) – 4 pages

WEIGHT OF MEDICAL EVIDENCE – Treating Doctor Bias

1876. District court remand where the ALJ failed to give a proper reason for the according the treating doctor's opinion less than controlling weight. The plaintiff and the doctor worked in different departments of the same clinic. The ALJ believed that the doctor favored the plaintiff and gave a "subjective, favorable evaluation of Plaintiff so that Plaintiff could obtain benefits from the Social Security Administration." The court holds that this fact "alone, is simply not a sufficient basis to conclude that [the doctor's] opinion was biased and unreliable. . ." There was no evidence in the record that they had a friendly relationship. On remand, the ALJ must reassess the doctor's credibility. Marcia Margolis, Esq., Cleveland, OH.

Papaleo v. Astrue, Case No. 1:10-cv-2146 (N.D. Ohio Sept. 30, 2011); 2011 U.S. Dist. LEXIS 113242 – 20 pages