LIST OF AVAILABLE MATERIAL
ITEM NUMBER 1597 – 1830
January 2007 – December 2010

ABSENTEEISM

1794. District court decision when the ALJ erred in considering objective medical signs in determining that the plaintiff, who suffered from fibromyalgia, was not credible. "Fibromyalgia patients present no objectively alarming signs." The ALJ's statement regarding joint deformity, range of motion, muscle strength etc. are "irrelevant to determining whether a claimant's subjective assertions regarding pain are credible." What the ALJ persistently ignored. . was [the plaintiff's] ability to maintain work on a daily basis." This was a particular problem, since the VE testified that if an individual cannot work for a month without missing 5 days of work, then there are no jobs she can perform. Marcia Margolius, Esq., Cleveland OH.

Hayes v. Commissioner of SSA, Case No. 1:09-cv-0647 (N.D.Ohio Feb 24, 2010); 2010 U.S. Dist. LEXIS 16298 – 24 pages

ADMINISTRATIVE HEARING: RIGHT TO ATTEND

1753. Appeals Council remand when the attorney had requested a continuance of the supplemental hearing because the claimant was in prison with no known release day. The supplemental hearing had been scheduled in response to the attorney's objections to the VE testimony at the first hearing. The ALJ held the supplemental hearing, determining that the claimant's presence was not required as the hearing involved only VE testimony. HALLEX I-2-6-60 gives the claimant the right to present testimony at the hearing. The ALJ's action violated the HALLEX. On remand, the ALJ will provide the claimant an opportunity to present testimony consistent with HALLEX I-2-6-60. John Bowman, Esq., Davenport, IA.

Appeals Council Remand (July 31, 2009)

ADMINISTRATIVE HEARING – DEFECTIVE NOTICE

1808. Appeals Council remand for several reasons, including a defective hearing notice. HALLEX I-2-3-15C requires that hearing notices include the proper names of the expert witnesses. An ME and VE testified at the hearing, but the notice did not include their proper names. Kenneth Isserlis, Spokane, WA

Appeals Council remand, July 23, 2010 – 4 pages

ADMINISTRATIVE HEARING – TELEPHONIC TESTIMONY

1803. District court remand finding that the ALJ erred by taking testimony from the ME by telephone. Although HALLEX I-2-5-30 provides for ME or VE testimony to be taken by telephone or video teleconferencing, the regulations authorize only two methods for taking testimony: in person and by video teleconference. 20 C.F.R. § 404.950 and § 404.936(c). There is no mention of telephonic testimony in the regulations. The parties had previously agreed to a remand for the ALJ to consider the weight given to all medical opinion evidence. In the ALJ's decision following remand, he gave "great weight" to the ME's testimony, which was provided by telephone. Further, the transcript contains many gaps of the ME's telephonic testimony, making it difficult to understand the basis for his opinions. The court holds that the Commissioner has not met his obligation to provide a

copy of the transcript of the record and "the practice of accepting critical testimony via telephone is not universally applauded." Whether the practice is or is not authorized by the regulations, remand is required by the circumstances of this case. Francis M. Jackson, Esq., South Portland, ME.

Ainsworth v. Astrue, Civil No. 09-cv-286-SM (D.N.H. June 17, 2010); 2010 DNH 105; 2010 U.S. Dist LEXIS 60686; 154 SSRS 974 – 12 pages

AGE, BORDERLINE

1764. District court remand because the ALJ applied the Grid rules only as of the plaintiff's initial onset date, and not as of her alternate alleged onset date, 10 months later, which was her 50th birthday. If the Grid Rule had applied when she turned 50 and if limited to sedentary work, a finding of "disabled" would have been warranted. The court also ordered that the ALJ consider the threshold issue of whether the Grids can be meaningfully applied in light of all of the plaintiff's limitations. John E. Horn, Esq., Finley Park, IL.

Motley v. Astrue, No. 07 C 3489 (N.D.Ill. Oct. 28, 2009) - 25 pages including Magistrate's R&R, District Court Order entering Judgment.

ALJ's COMPLIANCE WITH COURT ORDER

1735. District Court remand for a second time for the ALJ to fully develop the record. The ALJ's failure to follow a court's remand order is legal error subject to reversal. In the initial remand (see Available Material No, 1624, June 2007), the court ordered the ALJ to contact a psychologist who had seen the plaintiff on only one occasion to specifically address any work capabilities or limitations related to mental health issues. The psychologist had found a GAF of 40 – 45, but the ALJ relied on other statements that the plaintiff might be able to work in limited environments. In fact, the psychologist indicated that the plaintiff could function outside his home for only "relatively short periods." On remand, the ALJ wrote to the psychologist who responded that he had not had any further dealings with the plaintiff and could not provide additional information about work-related limitations. The ALJ took no further steps to resolve the ambiguity as to whether the plaintiff's mental impairments precluded him from sustaining jobs for more than a few months at a time. This error by the ALJ was inconsistent with 20 CFR 416.912 (e)(1), which requires the ALJ to seek clarification from a medial source where an ambiguity exists. Arthur Stevens, III, Esq., Medford, OR.

Trotter v. Astrue, No. 08-CV-3083-TC (D.Ore. March 31, 2009) – 15 pages

1660. District court remand because the ALJ erred in failing to follow the court's first remand order to recontact the plaintiff's treating physicians to resolve the ambiguity in their treatment plans. This case is the appeal of a prior remand order where the court ordered, among other things, that the ALJ reevaluate the medical evidence and if necessary recontact the treating sources and obtain a CE. The ALJ obtained two CEs and the testimony of an ME at the hearing, but failed to recontact the treating doctors. They failed to address key medical issues that were unresolved from the first appeal. On the second appeal, the court found the record inadequate because the evidence was ambiguous and inadequate. The court remanded again and ordered the ALJ to recontact

the treating doctors to resolve these issues and to recontact the VE if necessary. Arthur Stevens, III, Esq., Medford, OR.

McKay v. Astrue, Civil No. 06-3093-AA (D.Ore. Oct 25, 2007) – 8 pages

ALJ's DUTIES

1772. District court reversal finding that the ALJ erred in basing the disability determination on the opinion of a non-treating, non-examining, non-physician DDS disability examiner instead of the treating physicians' reports. As stated by the court, this is "bordering on ludicrous." The ALJ simply concluded that the treating neurologist was lying and ignored his statements. The court chided the ALJ for inferring that the treating doctors provided their opinions because "patients can be quite insistent and demanding." An ALJ "may not arbitrarily substitute his own hunch or intuition for the diagnosis of a medical professional." The rejection on the uncontrverted treating physician's opinion in favor of the RFC completed by the DDS examiner was "error requiring reversal." The plaintiff met listing 9.08 and is found disabled. Michael Booker, Esq., Birmingham, AL.

Chambers v. Astrue, Case No. CV-09-J-1011-NE (N.D.Ala. Nov. 19, 2009) – 22 pages including Order, Memorandum Opinion, Letter from Plaintiff's Attorney.

1684. The ALJ erred in his "special duty to develop the record when the claimant appears without counsel." While the ALJ complied with the duty to inform the plaintiff of her right to counsel, that is "is distinct from the ALJ's duty to fully develop the factual and medical record of an unrepresented claimant." The ALJ failed to invest the time and patience needed to obtain useful information. The hearing transcript reveals that the plaintiff has extreme difficulty understanding others and expressing herself. The transcript reveals numerous mutual misunderstandings between the plaintiff and the ALJ. This should have out the ALJ on notice. "Once on notice that the plaintiff was limited in her ability to understand others and to express herself, the ALJ should have done more to cure the ambiguity in [the plaintiff's] responses." Also, the record clearly indicated that the plaintiff had impairments that the ALJ did not explore at the hearing, including allegations of arthritic pain and deformity. The ALJ erroneously relied on the DDS physician's RFC finding, which was based on an incomplete record. Because the plaintiff did not have a full and fair hearing, the court remanded the case. Margolius, Margolius & Associates, Cleveland, OH.

Austin v. Astrue, Case No. 1:07-cv-2112 (N.D.Ohio May 7, 2008) – 25 pages, including the Memorandum Opinion and Order, Judgment Entry

1675. District court remand where the ALJ did not explain the reason that her conclusions after two hearings were markedly different. In a 2003 decision, the ALJ concluded that the claimant was generally credible and that his depression was "severe," and that he was disabled as of 1998, but benefits were denied based on DA&A. The Appeals Council reversed in part and remanded the case to the same ALJ. In a 2005 decision, despite evidence that the plaintiff's condition had worsened, the same ALJ found that he was not disabled as of April 1998, that his testimony was not credible, and that his depression was not "severe." The court concluded that the 2005 decision was not supported by substantial evidence and remanded the case. Raymond J. Kelly, Esq., Manchester, NH.

Barriault v. Astrue, Civil No. 07-cv-176-SM (D.N.H. Apr. 2, 2008); 2008 DNH 75; 2008 U.S.Dist. LEXIS 26916. Not for publication – 20 pages

1632. District Court decision that the plaintiff's due process rights were violated when the ALJ denied his subpoena request. The ALJ had the plaintiff examined by a VE who said he could engage in light work. The ALJ then denied the plaintiff's attorney's request that he subpoena the VE doctor to be cross-examined at a supplemental hearing. At the hearing, the ALJ asked the VE a hypothetical based on the CE's RFC, and found him not disabled based on the VE's response to this hypothetical. The court here relied on Coffin v. Sullivan, 895 F.2d 1206 (8th Cir. 1990), regarding the claimant's right to cross-examine individuals who submit reports. The plaintiff did not waive his rights by failing to object to the ALJ's denial of the subpoena requests and to the CE report in the record. Larry Pitts, Esq., Springfield, MO.

Passmore v. McMahon, Case No. 06-3225-CV-S-NKL (W.D.Mo.Feb. 7, 2007) – 7 pages

On appeal, the Eight Circuit reverses, holding that the plaintiff's due process rights were not violated. The case is remanded to the district court to determine whether substantial evidence supports the ALJ's decision to deny benefits. *Passmore v. Astrue*, 533 F.3d 658 (8th Cir. 2008).

1620. Appeals Council remand for consideration of two issues related to vocational evidence. First, it required the ALJ to address the attorney's request that a subpoena duces tecum be issued to the VE for the materials he relied on in forming his opinion. Second, the Appeals Council discussed the DOT requirement of reasoning level 2, defined as the ability to carry our "detailed but uninvolved written or oral instructions." The Appeals Council found that this is not the same as a restriction to perform short, simple insurrections learned in 30 days or less with a short demonstration. This finding may eliminate many of the reasoning level 2 jobs relied upon by VEs. Winona W. Zimberlin, Esq., Hartford, CT.

Appeals Council Remand order (April 27, 2007) – 4 pages

1616. Appeals Council remand because the ALJ's RFC finding for a full range of sedentary work was "marginally rationalized." To reach his erroneous RFC finding, the ALJ also erred in rejecting the treating physician's opinion, especially since there was no other functional assessment from another treating or examining source. The ALJ relied on Rule 201.15 to direct a finding of "not disabled" but failed to identify any jobs to which the claimant's skills could be transferred within the RFC found by the ALJ. The ALJ also wrote in the decision that he did not write the decision and he expressly disavowed his responsibility for its content. The Appeals Council noted this language is improper. (February 16, 2006)

Gil Laden, Esq., Mobile, AL – 13 pages including Order of Appeals Council and Letter Brief to Appeals Council

1601. District court remand where the ALJ erroneously gave greater weight to the opinion of the state agency physician than to the treating physician. It is unclear how much weight was given to the treating physician's opinion. The ALJ may not rely on the

absence of evidence to discredit an opinion. "Rather, an ALJ confronted with an incomplete record must seek out additional information *sua sponte*, even where the claimant is represented by counsel." (citations omitted). The absences of an opinion about specific function is a gap to be filled, "not a reason to discredit or disregard" the treating physician's opinion. While under 96-5p, treating physician's opinions on issued "reserved to the Commissioner" are not entitled to controlling weight, they are opinions that must be considered. And SSR 96-5p requires the adjudicator to make "every reasonable effort" to recontact the medical source for clarification when opinions are given on an issued reserved to the Commissioner. Max Leifer, Esq., New York, NY

Tornatore v. Barnhart, Case No. 05 Civ. 6858 (GEL) (S.D.N.Y. Dec. 12, 2006); 2006 U.S.Dist. LEXIS 90397; 115 SSRS 393 – 15 pages

ALJ's DUTIES/ REMAND TO NEW ALJ

1781. District court remand ordering that the case be heard by a different ALJ. The ALJ had already issued two hearing decisions with reversible error. The transcript raised the possibility that the ALJ "was not seeking neutrally to develop the record" but was seeking support for his first decision, where he alluded to the fact that the claimant was seeking benefits as salary replacement while she raised her child. The government moved to remand the case for a new hearing because the ALJ's decision relied on the testimony of a ME who, shortly after the ALJ decision, agreed to stop treating patients due to multiple malpractice charges. The government conceded that the ALJ placed "significant weight" on the ME's testimony, which may no longer be considered "reliable," and did not properly consider opinion evidence from the treating physician. The court found no evidence that the ALJ deliberately used an unreliable expert, thus held that remand for a new hearing, rather than for the payment of benefits, was appropriate. Douglas Brigandi, Esq., Bayside, NY.

Gross v. Astrue, Case No. 1:08-cv-00578-NG (E.D.N.Y. Jan. 20, 2010); 2010 U.S. Dist. LEXIS 4292 – 7 pages

1779. District court remand strongly urging the Commissioner to reassign the case to a different ALJ on remand and also urging the Plaintiff to pursue the ALJ disqualification procedures set forth in 20 CFR § 404.940. The plaintiff's counsel had requested a new ALJ, but SSA counsel disagreed, citing the long-standing policy that the hearing on the first remand goes back to the same ALJ who made the initial decision. The Magistrate Judge felt that she could not order the Commissioner to reassign the case to a different ALJ, as to do so would constitute unwarranted judicial interference into the administrative process. Upon remand, the Appeals Council directed the case to be assigned to a different ALJ and also did not require plaintiff to pursue the ALJ disqualification procedure e. Winona Zimberlin, Esq., Hartford, CT.

A.B. v. Astrue, [case number withheld] D.Conn. Sept 24, 2009. – 12 pages, including Recommended Ruling on Defendant's Partially Assented to Motion for Entry of Judgment, Notice of Order and Order of Appeals Council Remanding Case to ALJ.

1769. District court decision "strongly urg[ing]" the Commissioner to reassign the case to a new ALJ on remand. The court relied on factors in *Sutherland v. Barnhart*, 322 F.Supp.2d 282 (S.D.N.Y. 2004) to determine whether assignment to the same ALJ would

compromise the integrity of the disability review process: ((1) a clear indication that the ALJ will not apply the appropriate legal standard on remand; (2) a clearly manifested bias or inappropriate hostility toward any party; (3) a clearly apparent refusal to consider portions of the testimony or evidence favorable to a party, due to apparent hostility to that party; (4) a refusal to weigh or consider evidence with impartiality, due to apparent hostility to that party. The court found that not all of the factors were met in this case, but that the evidence indicated a possible barrier to consider the evidence with impartiality. Ivan Katz, Esq., New Haven, CT.

Dellacamera v. Astrue, Case 3:09-cv-01175-JBA (D.Conn. Nov. 5, 2009); 2009 U.S. Dist. LEXIS 10989 – 7 pages.

1750. Circuit court remand "urging" that a new ALJ hear the case, after finding that this case was "not the first case in which this particular ALJ has misstated the treating-physician rule." The ALJ had held that the treating physician opinion was not entitled to significant weight because it concerned "issues reserved to the Commissioner." The ALJ confused these two standards. A treating physician's opinion is entitled to controlling weight if well supported by objective medical evidence and consistent with other substantial evidence in the record. In contrast, the treating doctor's administrative opinion, e.g. that the claimant has the RFC for sedentary work, is not entitled to significant weight. Here, the doctor limited himself to a medical opinion and gave only as assessment of the plaintiff's physical limitations. Such a medical opinion is presumptively entitled to controlling deference per 20 CFR 404.1527(a)(2). William Jenner, Esq., Madison, IN.

Collins v. Astrue, No. 0-2663 (7th Cir. May 7, 2009), 2009 WL 1247188 (C.A.7 (Ind)); 2009 U.S.App. LEXIS 9980; 324 Fed. Appx. 516 – 11 pages.

1744. On appeal, the plaintiff alleged that the ALJ was biased and should have recused himself. While the court did not order an investigation of the ALJ, it did find that the ALJ's denials of the attorney's request to keep the record open for 30 days was arbitrary and capricious. The plaintiff initially proceeded *pro se*, but then decided she wanted representation, and retained an attorney a few weeks before her second hearing. Rather than asking for a postponement, he requested 30 days after the hearing to submit important medical evidence, primarily updated records from the treating doctor. The ALJ kept the record open for 10 days, which was insufficient. The ALJ's decision "reflects at a minimum that the process was compromised in this case. . . In light of her knowledge of Mr. Culbertson's late entry into the case, the ten-day limitation for the addition of the records was arbitrary and capricious." Given the legal errors and the ALJ's refusal to keep the record open for more than 10 days, the court found that the "plaintiff is entitled to an unbiased reconsideration of whether she had medically improved before a different ALJ. Richard Culbertson, Esq., Orlando, FL.

King v. Commissioner of Social Security, Case No. 6:07-cv-Orl-22DAB (M.D. Fla. Aug. 28, 2008) – 46 pages, including Order, and award of EAJA fees, Plaintiff's Memorandum in Support of Petition for Judicial Review.

1669. Appeals Council remand because the ALJ failed to follow the guidelines in SSR 06-03 for evaluating evidence from sources who are not "acceptable medical sources"

when he did not give sufficient weight to a treating mental health therapist. The ALJ also erred by finding that the claimant's depressive disorder was not "severe" and imposed only "mild" limitations in contrast to the State Agency medical consultant's findings. The Appeals Council ordered that the case be assigned to a new ALJ on remand because this was the second remand. David Harr, Esq., Greensburg, PA

Appeals Council remand (Feb. 2008) – 3 pages

1667. Appeals Council remand because the record was unclear regarding the nature and severity of the claimant's mental impairment and because the ALJ made no effort to obtain updated medical evidence. The ALJ based his finding that the claimant's depression was not "severe" on a record with no current evidence. The claimant has a history of mental illness and evidence in the record indicates that she has been diagnosed with various mental illnesses, including major depression, personality disorders and dysthemia. At the hearing, she testified that her depression had gotten worse. The Appeals Council concluded that updated medical evidence was needed. Because this was the second remand the case is to be assigned to a new ALJ. Lynn Stevens, Esq., Atlanta,GA.

Appeals Council Remand – 3 pages

1636. District Court decision finding that that the case should be assigned to a new ALJ on remand. Applying the factors in United States v. Robin, 553 F.2d 8, 10 (2nd Cir. 1977), the court determined that the ALJ would have difficulty putting out of his mind previous findings that were erroneous or based on rejected evidence. The ALJ's findings on RFC and nonexertional impairments were erroneous and the government agreed that that the ALJ erred in reconciling numerous medical source opinions. Also, the ALJ's negative credibility finding was "seriously disputed" by the court. Second, the appearance of justice "would be well-served by assigning the matter to a new ALJ on remand, particularly in view of [the ALJ's] negative credibility finding against the plaintiff." Third, the reassignment does not "entail waste and duplication" out of proportion to preserving the appearance of fairness. Ivan Katz, Esq., New Haven, CT.

Maggipinto v. Astrue, Case No, 3:06-CV-707-RNC (D.Conn. Aug. 10, 2007) – 5 pages

APPEALS COUNCIL

1619. Appeals Council remand because the ALJ had not properly developed the claimant's past relevant work and for consideration of post-hearing psychological testimony results. The claimant retained a new attorney after the ALJ. The Appeals Council granted his request for additional time to submit the WAIS II test scores, which ranged from 67 – 71. The Appeals Council found that the record contained insufficient evidence regarding the claimant's cognitive functioning and that further evaluation is needed on remand. The attorney notes that the record can be supplemented at the Appeals Council and that additional time to submit new and material evidence will often be granted upon request. John A. Bowman, Esq., Davenport, IA.

Appeals Council Remand Order (May 2, 2007) – 4 pages

APPEALS COUNCIL: NEW EVIDENCE

1819. Appeals Council remand based, in part, on new medical evidence submitted to the Appeals Council. In this claim based on uncontrolled diabetes, the Appeals Council recognized that some of the new evidence submitted was dated after the ALJ decision, "however, it offers a longitudinal perspective that provides added information about the limitations the claimant may have experienced before the hearing decision was issued." The Appeals Council noted that there is no evidence that the claimant has had a period of controlled diabetes and that he has multiple impairments. As a result, it ordered the ALJ to obtain evidence from a medical expert on remand to clarify the nature and severity of the claimant's impairments. Thomas Chambers, III, Esq., Waycross, GA.

Appeals Council remand due to new evidence (Sept. 16, 2010) – 3 pages

1806. Appeals Council decision granting the request for review under the new and material evidence provision of 20 CFR 416.1470(b). There were many deficiencies in the ALJ's decision. The claimant's attorney submitted records from the treating physician with the Request for Review. The records were not in the hearing record. On remand, the ALJ is ordered to evaluate these records. Lynn Stevens, Esq., Atlanta, GA.

Appeals Council remand for new evidence (Dec. 3, 2009) – 4 pages

1730. District Court finding that "good cause" existed to remand the case. The plaintiff submitted new medical evidence to the Appeals Council that further documented the impairments and limitations presented at the ALJ hearing. If the Appeals Council considers this new evidence, it must give reasons for finding that a remand is not necessary. The court rejects the government's reliance on Wilkins v. Secretary, 953 F.2d 93 (4th Cir. 1991) and its opposition to remand due to the date of some of the evidence. Roger A. Ritchie, Esq., Harrisonburg, VA.

Reedy v. Astrue, Civil Action No. 5:08CV00072 (W.D.Va. May 8, 2009); 2009 U.S. Dist. LEXIS 39349 – 10 pages

1727. District court remand to consider all new and material evidence. The ALJ's decision failed to mention any of the treating physician's opinions. And, a substantial amount of significant evidence from the treating physician was submitted to the Appeals Council. This leaves the court unable to determine what legal standards the ALJ applied in weighing the doctor's opinions. The court rejected the defendant's "post hoc rationalizations" that the opinions were not supported by substantial evidence and were not entitled to significant weight. The Appeals Council's failure to include any of the new evidence in the record was inconsistent with the regulations, which permit submission of new and material evidence relevant to the period before the ALJ decision, without the need to show good cause. On remand, any opinions from the treating doctor during the relevant period should specifically be considered in accordance with the treating physician rule. Ivan Katz, Esq. New Haven, CT (represented plaintiff in federal court, not at earlier administrative levels).

Shrack v. Astrue, Case No. 3:08-cv-00168-CFD (D.Conn. Mar. 17, 2009); 2009 U.S. Dist. LEXIS 39349 – 8 pages

ARTHRITIS

1611. The court remanded because the ALJ failed to address plaintiff's arthritis in her knees at step two as a "severe impairment." "Contrary to the defendant's suggestion, this court may not speculate as to findings the ALJ would have made or to make findings for the ALJ." The plaintiff's arthritis was also not considered at step three. The failure to analyze the arthritis at steps two and three "invalidates the ALJ's RFC determination, which is based in part on the preceding steps." The ALJ also failed to consider the plaintiff's obesity, as required by SSR 02-1p. Larry Wittenberg, Esq., Durham, NC.

Young v. Astrue, Case No. 4:05-cv-00142-D (E.D.N.C. March 16, 2007) – 5 pages

ATTORNEYS' FEES

1747. District court decision that the plaintiff's counsel timely filed the motion for fees under sec. 406(b)(1)(A). Under FRCP 54(d)(2), a motion for attorneys fees must be filed within 14 days "after entry of judgment." In *Bergen v. Comm'r of Social Security*, 454 F.3d 1273 (11th Cir. 2006), the court suggested that district courts integrate the Federal Rule in the sec. 406 fee award procedures by including in the remand judgment that the attorney apply for fees within a specified time after determination of the plaintiff's past due benefits. In *Blitch v. Astrue*, 261 Fed. Appx. 241 (11th Cir. 2008), the court stated that courts should fashion a local rule or general order, "keeping in mind Congress' intent behind sec 406(b) to encourage attorneys to represent Social Security claimants." The remand order in this case did not specify a deadline, but "in the spirit of the Eleventh Circuit's rulings," the court held that the motion for fees was timely because it was field within 14 days of the Notice of Award. The court added three days for mailing under FRCP 6(d). Carol Avard, Esq., Cape Coral, FL.

Perkins v. Astrue, Case No. 8:06-CV-962-T-24MAP (M. D. Fla. June 11, 2009); *Published at 632 F.Supp.2d 1114 (M.D.Fl. 2009)* – 6 pages

1623. District court decision applying the *Gisbrecht* analysis to award 406(b) fees of $6170.25 (less EAJA fees of $831.63) amounting to an hourly rate of $1,121.86. The court determined that the contingent fee agreement was reasonable, and the attorney did not cause delay in the case. Finally, the court found that the fees requested are not excessive. Under *Gisbrecht*, the court is not to use the lodestar method in determining the reasonableness of the fees. The hourly rate is high, but other courts have awarded similar amounts for Social Security contingency fee cases. The court noted that the attorney reduced her fee request to 5% of the past due benefits and that 25% of the full retroactive benefits would have been more than $30,000. The district court adopted the U.S. Magistrate Judge's Report and Recommendation. Carol Avard, Esq., Cape Coral, FL.

Vilkas v. Commissioner of Social Security, Case No.2:03-cv-687-FtM-29DNF (M.D.Fla. June 8, 2007); 2007 U.S.Dist. LEXIS 36926. U.S. Magistrate's Report and Recommendation, Second Amended Judgment – 5 pages

ATTORNEYS' FEES – EAJA

1825. District court award of attorneys fees at the time of a sentence four remand because the government's position was not substantially justified. The court had previously held that the ALJ failed to give controlling weight to the treating physician's opinion by

mistakenly finding that the plaintiff had not been compliant with her medications and that the physician's opinion was not supported by documentation or explanation. The ALJ failed to give any explanation why the doctor's assessment of the plaintiff's functional capacity was inconsistent with the rest of the record. "This made review of the ALJ's decision impossible." The court rejected the government's effort to argue that the ALJ's decision was substantially justified by describing evidence upon which the decision could reasonably be based. "The ALJ's opinion must stand or fall on its own merits. It cannot be rescued by *post ad hoc* additions proposing what the ALJ might have said had he the inclination." Dianne Newman, Esq., Akron, OH.

Cooper v. Astrue, Case No. 5:09-cv-1446 (N.D.Ohio Sept 3, 2010) Order awarding EAJA fees, Memorandum Opinion & Order Remanding Case under Sentence Four – 22 pages

1770. District court award of EAJA fees in the amount of $8,136.19 where the Commissioner failed to meet his burden of proving that his position was substantially justified. "IT was clear legal error for the ALJ to apply the grids without considering Plaintiff's borderline age and to disregard evidence from Plaintiff's treating physician without applying the long-established proper legal steps. . . "In addition, the Commissioner's position was not reasonable in fact. The ALJ's RFC finding rejected the treating doctor's opinion as "too dated." This was "unreasonable as the restrictions had recently been renewed." Further, the ALJ misstated the record in finding that there were a significant number of jobs in the economy that the plaintiff could perform. The government's position on appeal was not substantially justified either as its brief "often responded to Plaintiff's specific points of error with only general references to the ALJ's boilerplate statement that the record had been considered in its entirety." Paul Radosevich, Esq., Denver, CO.

Zamora v. Astrue, Civil Action No. 05-cv-01761-WDM (D.Colo. Dec. 1, 2009); 2009 U.S.Dist. LEXIS 116733; 148 SSRS 49 – 6 pages.

1751. Second Circuit award of EAJA fees after holding that the Commissioner's position was not substantially justified. The Court found that the government's opposition to an award of benefits did not have reasonable basis in fact. SSA previously determined that the plaintiff-appellant's disability had ceased. She appealed *pro se* and the first ALJ upheld the termination. In district court, she retained counsel. The case was remanded to a different ALJ found that she remained disabled. The first ALJ had improperly disregarded or mischaracterized evidence of continuing disability, which the second ALJ properly assessed. The first ALJ told the appellant that he could contact her doctor for medical records, when in fact he made no such inquiry. The first ALJ then admonished the appellant for filing to submit medical reports, when she had. The Second Circuit held that the district court acted outside its discretion in denying EAJA fees. The court remanded to the district court for a determination of the fee amount. Charles A. Pirro, IIII, Esq., Norwalk, CT.

Ericksson v. Commissioner of Social Security, No. 07-4009-cv (2nd Cir. Feb. 19, 2009) – 87 pages, including decision, Brief of Plaintiff-Appellant, Brief of the Government. *Published at 557 F.3d 70 (2nd Cir. 2009).*

1687. The Commissioner agreed that the plaintiff was a "prevailing party" but argued that EAJA fees should not be awarded due to "special circumstances." The EAJA special circumstances provision should be narrowly construed and the burden of proving their existence is on the defendant opposing the award of fees. In this case, a different attorney represented the claimant in the administrative proceedings. The government argued that the administrative attorney's negligence caused the ALJ to incorrectly find that the plaintiff's mental impairments had not lasted for 12 months and had this "negligence" not occurred, the court appeal likely could have been avoided. The court distinguished a case cited by the government where special circumstances were found for the failure to raise certain facts at the administrative level because the case is not controlling and the facts are not analogous. The court also noted that the ALJ has the obligation to develop the record and investigate the facts, which the ALJ should have done in this case. "Thus the Commissioner's position has no merit, and any negligence on the part of the Plaintiff's attorney [at the administrative level] does not constitute a special circumstance." EAJA fees were awarded to the plaintiff's attorney at the judicial level. Carol Avard, Esq., Cape Coral, FL.

McCullough v Astrue, Case No. 2:07-cv-0557-DNF (M.D.Fla. July 2, 2008); *published at 565 F. Supp.2d 1327 (M.D.Fl. 2008)* – 7 pages

1676. District Court of Florida holding that while an attorney does not have independent standing to request an award of EAJA fees on her own behalf, an attorney does have the right to file a petition for EAJA fees on behalf of her client and within that petition to request that payment should be made directly to the attorney. EAJA fees should be awarded if the Commissioner's position is not substantially justified on one issue, even if the position is substantially justified on another issue. The court found that the Commissioner's position was not substantially justified on the issue of the plaintiff's ability to return to past relevant work. The court rejected the government's argument that the fees should be paid directly to the plaintiff. The court also refused to stay the decision in this case pending an Eleventh Circuit decision in Reeves because that case is dissimilar since it involves a Treasury offset. [N.B. The Eleventh Circuit subsequently determined that the EAJA fee in Reeves must be made payable to the plaintiff and offset for any debts owed.]. Carol Award, Esq., Cape Coral, FL.

Hagman v. Astrue, Case No. 5:06-cv-198-Oc-GRF (M.D.Fla. Dec. 27, 2007); *published at 546 F. Supp.2d 1294 (M.D.Fl. 2007)* – 9 pages

1665. District Court order on Motion for Attorneys fees under EAJA and 406(b). The plaintiff sought reimbursement for 87.8 hours of attorney time. The government argued that this was excessive. The court described the administrative record as "voluminous" and containing medical evidence dating back more than 26 years before the onset date. But the court found the time claimed to be "somewhat excessive' and found it reasonable to reduce the number of hours by 30%. The government also disputed the hourly rate to be awarded for EAJA fees. The court applied the formula used in the Northern District of Iowa to determine the EAJA hourly rate, using the CPI. Further, fees are to be reimbursed at the rate applicable to the year in which the services were performed. The court awarded total EAJA fees of $10.093, expenses of $293.93, and the filing fee of $350. One-half hour of paralegal time is not compensable under EAJA. The motion for fees

under 42 USC § 406(b) was denied as premature, without prejudice to refile after the plaintiff's past-due benefit award has been calculated. The subsequent motion for additional attorney's fees for administrative work under 42 USC §406(b) is denied because the Commissioner, not the Court, has jurisdiction to pay fees for administrative work (*Combs v. Astrue*, 2008 U.S. Dist. LEXIS 82415 (N.D.Iowa, Oct. 16, 2008) Dennis Mahr, Esq., Sioux City, IA.

Combs v. Astrue, No. C06-4-61-PAZ (N.D.Iowa Jan. 7, 2008); U.S.Dist. LEXIS 842; 125 SSRS 675 – 4 pages

AUXILIARY BENEFITS

1668. District court decision remanding to determining whether the father's earlier application could be reopened under 20 CFR § 404.989 to establish an earlier application date for the daughter. The issue is whether the application filed by the child's father/wage earner, naming only one of two children, should serve as an effective application for benefits to entitle the second child to survivor's benefits form the time of her father's death in April 2003. The father's 2002 application for disability benefits did not name the daughter. There was no question of paternity. The mother filed an application in March 2005 when she learned of the father's death and the daughter was granted benefits effective 2004. The appeal alleged eligibility as of the father's death. The court distinguished this from cases where no application had ever been filed by the wage earner, and also rejected reliance on the POMS. The court remanded for further consideration John Bednarz, Esq., Wilkes-Barre, PA.

Duggins o/b/o A.N.W. v. Astrue, Civil Action No. 3:07-CV-560 (M.D.Pa. Feb. 28, 2008) – 17 pages

BACK IMPAIRMENT

1664. Appeals Council remand for further evaluation and a new hearing. The medical expert testified that the claimant's impairment possibly met the severity of listing 1.04A in the past, The ALJ decision does not discuss the weight given to that statement, whether a closed period is warranted, or whether the claimant has a medical impairment that could reasonably be expected to produce the symptoms alleged. John Horn, Esq., Tinley Park, IL.

Appeals Council remand on listing 1.04A and credibility (Nov.30 2007) – 4 pages

1606. District court awarding benefits more than ten years after the plaintiff filed his application, and after four ALJ hearings. His primary impairments are a back injury, pain and depression. The court found that the ALJ ignored the medical expert's opinion that the plaintiff's condition equaled the spinal disorder listing: 1.04A. The ALJ also erroneously found that the ME found that the listing was equaled only when depression was considered. Instead of relying on the ME's equivalence opinion, the ALJ "embarked on a concerted effort to discredit" the treating physician's diagnosis of depression. The ALJ placed more weight on the opinions of a psychiatric CE and ME and failed to consider the depression in the context of the other impairments as required by law. The court was also disturbed by the ALJ's "sweeping disregard" of the plaintiff's allegations of pain. Douglas C.J. Brigandi, Esq., Bayside, NY.

El-Shabazz v. Commissioner of Social Security, Case No. 04-CV-3731 (E.D.N.Y. Dec. 6, 2006) - 20 pages

BI-POLAR DISORDER

1689. District Court decision finding that the ALJ erred when he discredited an RFC assessment from a licensed social worker and instead gave overwhelming support to the notes that supported his decision. The notes may not have been contradictory because the plaintiff has bipolar disorder which is episodic in nature. The ALJ ignored a line of evidence that ran contrary to his findings without providing a reasoned explanation. Contrary to Seventh Circuit case law, the ALJ also placed undue weight on the plaintiff's ability to do some daily activities. The activities she performed were not the same as those required for continuous employment. And the fact that she searched for work does not preclude a finding of disability. "[A] person may be employed yet be disabled." The attempt to lead a normal life, despite a disabling condition, should not be used against a claimant. The court remanded for further proceedings. John Bowman, Esq., Davenport, IA.

Maresca v. Astrue, Case No. 07-4025 (C.D.Ill. July 15, 2008) – 15 pages

CARDIAC IMPAIRMENT

1817. On the record ALJ decision finding that the claimant's impairments medically equaled listing 4.02A and B. The claimant had severe impairments of asthma, obesity, hypertension, cardiomyopathy and COPD. The ALJ had a physician complete a medical interrogatory and he indicated that the claimant's impairments medically equaled these listings as of January 1, 2008 when her condition worsened and a string of hospitalizations occurred. He also completed a functional capacity form, which indicated that the claimant would be able to perform less than a full range of sedentary work. Based on these findings, the ALJ also held that the claimant was disabled under Rule 201.14 as of her 2006 alleged onset date. John Horn, Tinley Park, IL.

On the Record fully favorable ALJ decision (July 23, 2010) – 9 pages

1763. District court remand because the ALJ failed to accord the treating physician's opinion "great weight" regarding the plaintiff's limitations due to her cardiac impairment. He had been her physician for many years, saw her on many occasions, and submitted numerous reports on her condition. The ALJ gave greater weight to a CE by an internist who found the plaintiff's exertional capacity "more than moderate." The court found the conclusion vague and that the use of the term "moderate" does not permit the ALJ, a "layperson" to infer that the claimant can perform sedentary work, as found by this ALJ. The court also held that the ALJ failed to properly consider whether the plaintiff's impairments met or equaled Listings 4.02, 4.04 or 4.05. The ALJ did not explain what, if any, listings he considered. Irwin M. Portnoy, Esq., New Windsor, NY.

Fuentes v. Astrue, Case 2:08-cv-02146-ADS (E.D.N.Y. Sept 26, 2009) – 34 pages.

CARPAL TUNNEL SYNDROME

1739. Appeals Council remand where the ALJ failed to evaluate the severity of the claimant's carpal tunnel syndrome. The CE found decreased grip strength in the right

hand. The claimant had surgery on the hand and the treating doctor limited lifting to no more than 10 pounds. The ALJ did not provide an adequate rationale in finding the claimant had full use of the right upper extremity. The ALJ also failed to evaluate treating source and non-examining state agency opinions regarding depression and post-traumatic stress disorder. Further, there is no evaluation of the claimant's obesity as required by SSR 02-1p. The Appeals Council remanded the case, including the opportunity for a new hearing. John E. Horn, Esq., Tinley Park, IL.

Appeals Council Remand (Apr. 24, 2009)– 4 pages

CHRONIC FATIGUE SYNDROME

1694. District court order of remand. After the plaintiff's Complaint was filed, the Commissioner did not file an Answer but instead agreed to remand the case. The ALJ failed to properly consider the treating physicians' opinions and the plaintiff's diagnoses of fibromyalgia and chronic fatigue syndrome pursuant to SSR 99-2p, and to address the consistency between the VE's testimony and the DOT. The plaintiff's Complaint provides a recitation of the relevant facts and of the legal claims that led the Commissioner to remand the case before filing and Answer and before the plaintiff filed a brief. John Horn, Esq., Tinley Park, IL.

Moore v. Astrue, Case No. 08-cv-02507 (N.D.Ill. Aug. 14, 2008), Judgment, Joint stipulation for Remand to the Commissioner, Order, Plaintiff's Amended Complaint – 14 pages.

COMBINATION OF IMPAIRMENTS

1796. District court reversal and award of benefits. The ALJ failed to consider the degree of the plaintiff's mental impairments in combination with his other impairments. The plaintiff was diagnosed with schizo-typal personality disorder and post-traumatic stress disorder. He had a GAF score of 45. Psychological testing resulted in a score in the "brain damage" range. His "Trauma Symptom Inventory" was valid and consistent with a PTSD diagnosis. Other testing revealed significant limitations in other areas including social judgment and verbal reasoning. The work performed at a structured VA work program was not SGA, and did not indicate an ability to perform sedentary work. The ALJ also erred in rejecting the opinion of the treating nurse practitioner. Arthur Stevens III, Esq., Medford, OR.

Ellis v. Astrue, Civil No, 09-3040-AA (D.Ore. May 14, 2010) – 8 pages

1724. District Court decision holding that the ALJ must determine if the combination of impairments is medically equivalent to a listing if the claimant presents evidence to establish equivalence. The plaintiff is diagnosed with obesity, several musculoskeletal impairments and several mental disorders. Listing 1.00Q requires consideration of the combined effects of obesity with musculoskeletal impairments which can be greater than the effects of each separately. The ALJ failed to give convincing reasons for rejecting the treating physician's opinion that her back problems are compounded by severe morbid obesity and that she is further limited by her mental disorders. The court also ordered that, on remand, the ALJ consider additional evidence submitted to the Appeals Council that was found to be "not material. Arthur Stevens, Esq., Medford, OR.

Delgado v. Astrue, Civil No. 08-30470CL (D.Ore. Feb. 18, 2009)– 21 pages

CONSULTATIVE EXAMINER

1800. Appeals Council remand ordering the ALJ to offer the opportunity for a supplemental hearing and to obtain a response from the CE to the representative's request for additional information from the CE. The ALJ had obtained a post-hearing CE from a psychologist. The report was proffered to the claimant's attorney who requested a supplemental hearing to ask the VE another hypothetical question. He also sent a letter to the ALJ, asking to have the CE respond to an article. The ALJ did not hold a supplemental hearing or recontact the CE. HALLEX I-2-7-30H requires the ALJ to grant a request for a supplemental hearing and to determine if questioning the VE is necessary through testimony or written interrogatories. John Bowman, Esq., Davenport, IA.

Appeals Council remand on supplemental hearing. (April 29, 2010) – 3 pages

1692. District court reversal and award of benefits. Among other errors, the ALJ improperly discredited the CE's opinion regarding the plaintiff's moderate to significant limitations in concentration, persistence, and pace. Discounting the CE's opinion because it is from a one-time examination is "both illogical, since such is the inherent nature of a [CE], and ironic in this instance, given that the opinion to which the ALJ ultimately afforded the greatest weight was based on no examination at all. Paul Radosevich, Esq., Denver, CO.

Daniel v. Astrue, Civil Action No. 07-cv-01490-REB (D.Colo. Aug. 13, 2008); 2008 U.S.Dist. LEXIS 62820; 133 SSRS 471 - Order Reversing Disability Decision and Directing Award of Benefits, Appellant's Opening Brief – 24 pages.

1632. District Court decision that the plaintiff's due process rights were violated when the ALJ denied his subpoena request. The ALJ had the plaintiff examined by a VE who said he could engage in light work. The ALJ then denied the plaintiff's attorney's request that he subpoena the VE doctor to be cross-examined at a supplemental hearing. At the hearing, the ALJ asked the VE a hypothetical based on the CE's RFC, and found him not disabled based on the VE's response to this hypothetical. The court here relied on Coffin v. Sullivan, 895 F.2d 1206 (8th Cir. 1990), regarding the claimant's right to cross-examine individuals who submit reports. The plaintiff did not waive his rights by failing to object to the ALJ's denial of the subpoena requests and to the CE report in the record. Larry Pitts, Esq., Springfield, MO.

Passmore v. McMahon, CaseNo. 06-3225-CV-S-NKL (W.D.Mo.Feb. 7, 2007) – 7 pages

On appeal, the Eight Circuit reverses, holding that the plaintiff's due process rights were not violated. The case is remanded to the district court to determine whether substantial evidence supports the ALJ's decision to deny benefits. *Passmore v. Astrue*, 533 F.3d 658 (8th Cir. 2008).

CREDIBILITY

1778. Magistrate Judges' recommended remand because the ALJ's decision was "internally inconsistent." While the court noted that the ALJ's decision could be affirmed

on the basis of the evidence in the record, the court "should be concerned with fairness." The ALJ based his denial on credibility findings, yet did not state his reasons. The ALJ's findings were also contradictory and possibly confused. The ALJ found that the plaintiff could not tolerate exposure to heights, moving parts or operating a car. Yet he noted that the plaintiff drives a car, but there is no evidence to support this critical finding. The ALJ found that the plaintiff did not meet listing 11.03 because the record did not support a finding that she had petit mal seizures more than once weekly. The ALJ found the testimony of the plaintiff and her daughter that she did have seizures of the required frequency to be not credible. The court noted that the credibility determination had a "devastating impact" on the plaintiff's claim at step 3 and on her RFC. The plaintiff's financial reasons prevented her from regular medical treatments, which is why she lacked corroborating medical records. Ivan Katz, Esq., New Haven Ct.

Sholun v. Astrue, Civil No,. 03-09-CV-609 (CFD) (TPS) (D.Conn. Nov. 20 2009); 2009 U.S. Dist. LEXIS – 7 pages

1759. District Court remand for a compliance with the law on evaluating a plaintiff's credibility, which requires articulation of a rationale for the ALJ's finding that the plaintiff's testimony regarding her need for frequent and lengthy bathroom breaks was less than fully credible. The ALJ had provided "absolutely" no explanation for discounting her statements, and for his finding that the correct number of bathroom breaks per eight hour day is 3, since no evidence supported this finding. "Without any rationale for what are essentially the determinative factors supporting the decision to deny benefits, the Court has nothing to review." Margolius, Margolius & Associates, Cleveland, OH.

Thomas v. Astrue, Case No. 2:08-cv-0675 (S.D.Ohio, Sept. 9, 2009) – 13 pages.

1709. Appeals Council remand because the ALJ erred in his credibility finding. The claimant's wife completed reports about his restrictions and testified at the hearing but "[t]here is no assessment of the credibility of her comments, as required in the Eighth Circuit." The ALJ also found the claimant's subjective complaints "not fully credible," but did not consider the factors required by the regulations, Eighth Circuit case law, and SR 96-7p. John Bowman, Esq., Davenport, IA.

Appeals Council remand on credibility (November 13, 2008). – 4 pages

1701. Appeals Council remand for another hearing where, in assessing the claimant's credibility, the ALJ erroneously cited the claimant's testimony that she had not sought treatment for her symptoms since late 2007. However, the Appeals Council audited the hearing record, which revealed that she is currently in physical therapy. This was corroborated by evidence submitted by her attorney. John E. Horn, Esq., Tinley Park, IL.

Appeals Council remand to ALJ on credibility (September 23, 2008) – 3 pages

1688. District Court remand where the ALJ's credibility determination was not based on substantial evidence. The ALJ found that a letter from an examining specialist contrasted "markedly" with the plaintiff's testimony on symptoms and limitations, but did not explain the contrast. "This alone is grounds for reversal," relying on SSR 96-7p's requirement that '[t]he reasons for the credibility finding must be grounded in the

evidence and articulated in the determination or decision." The ALJ's brief statement that the claimant is exaggerating pain also is inconsistent with SSR 96-7p's requirement that the ALJ consider the entire case record when making the credibility determination. The ALJ's brief statement relied on isolated statements in the examining specialist's letter, and does not constitute substantial evidence. Also, the ALJ erroneously relied on the plaintiff's ability to perform minimal daily activities, which he mischaracterized. The ALJ's conclusory statements are not grounded in the evidence. In addition, the ALJ did not mention many of the factors required by SSR 96-7p when determining credibility regarding subjective complaints of pain. While the case was pending in court, the plaintiff reached age 50, and the court held she was disabled under rule 201.15. The court limited the remand to the period before she reached 50. Defendant's Motion to Alter or Amend Order under FRCP 59(e) is later denied (2008 U.S.Dist. LEXIS 69442, Aug. 29, 2008). Paul E. Radosevich, Esq., Denver, CO.

Hesser v. Astrue, Civil No. 07-cv-02073-LTB (D.Colo. July 7, 2008); 2008 U.S. Dist. LEXIS 51469; 132 SSRS 767– 27 pages

1643. Appeals Council remand for evaluation of the claimant's mental impairment and his subjective complaints where the ALJ failed to fully evaluate the claimant's credibility regarding his subjective complaints. The ALJ failed to consider the claimant's steady work history or consistent reports to treating sources of pain with prolonged sitting. Treating source notes also found mental symptoms and recommended a mental evaluation due to chronic pain. The ALJ decision did not address allegations of problems with concentration or the fact that the claimant received electrical stimulation treatments. Further, new evidence submitted to the Appeals Council indicated that the claimant had been referred for management of depression. John Horn Esq., Tinley Park, IL.

Appeals Council Remand Order (August 24, 2007)- 2 pages

1626. District court holding that the ALJ failed to give proper weight to the plaintiff's well documented complaints of pain and fatigue and did not include the plaintiff's credible nonexertional limitations in the hypothetical question to the VE. If the plaintiff's testimony was deemed credible, the VE stated that he would be unable to work because he needed to lie down a couple of times a day because of fatigue. That would preclude attendance at any job. The treating physician's reports were consistent and well supported and should have been given controlling weight. Instead, the ALJ gave more weigh to the reports of the non-examining DDS physicians. Johns S. Grady, Esq., Dover, DE.

Whitmore v. Barnhart, Civ. No. 05-190-SLR (D.Del. Jan. 9, 2007). *Published at 469 F.Supp.2d 180 (D.Del. 2007)* – 30 pages
Subsequent history: Defendant's motion to amend decision denied. ***Whitmore v. Astrue***, 2007 U.S. Dist. LEXIS 60159 (D.Del.Aug. 16, 2007)

1622. District court reversal and remand for an award of benefits where the ALJ discredited the treating orthopedic surgeon's opinion that the plaintiff could not work full-time, that her ability to sit was limited by pain, and that she would need to lie down 4 to 5 times per day for up to one hour. The ALJ also discredited similar findings by another treating physician. The ALJ erred in rejecting the opinions because they were similar. Given that both had treated the plaintiff for years, the fact that they would assess

the same limitations "seems logical and beyond reproach." Also, the fact that the plaintiff gave forms to the doctors at her attorney's request is a "permissible credibility determination" in the Ninth Circuit, when supported by objective medical evidence. Because the ALJ's rejection of these opinions was based on incorrect legal standards, they are credited as true as a matter of law. Further, because the court found that "not one of the grounds upon which the ALJ questioned [the plaintiff's] credibility is supported by the record" the ALJ's finding that the plaintiff was not credible is given no weight. Robert F. Webber, Esq., Medford, OR.

Frey v. Astrue, Case No. CV 06-3061-PK (D.Or. May 22, 2007) – 19 pages

1612. District court remand because the ALJ's finding that the plaintiff's testimony was not credible is not supported by substantial evidence. While there is an absence of objective medical evidence supporting her subjective pain testimony, there is no objective medical evidence contrary to her claims. Under Third Circuit caselaw, the ALJ may not discount the claimant's pain testimony without contrary medical evidence. The ALJ may not discredit subjective complaints because she received only conservative treatment. All of the evidence indicates that the plaintiff has a severe medical problem with her back that is reasonably expected to produce pain. John Grady, Esq., Dover, DE

McMillon v. Barnhart, Civ. No. 05-131-SLR (D.Del. Aug. 11, 2006). Memorandum and Opinion – 21 pages

1604. Appeals Council remand because the ALJ made several errors in evaluating the evidence. First, although he cited the proper standard for evaluating the credibility of the claimant's subjective complaints and found that his impairments could reasonably be expected to produce the alleged symptoms, he then found the claimant's statements "not entirely credible." The ALJ "provided little additional evaluation of the credibility of claimant's subjective complaints or discussion of the regulatory factors." The ALJ also did not explain the weight he gave to the opinion provided by the treating physician regarding the duration of certain impairments. And, the ALJ erred in discounting the diagnosis of dementia and did not explain whether or not the diagnosis of peripheral neuropathy was "severe." Paul Radosevich, Esq., Denver, CO.

Appeals Council Remand Order; Letter brief from Claimant's Attorney – 5 pages

CROHN'S DISEASE

1614. District court remand where the ALJ found that the plaintiff's Crohn's Disease was not a "severe impairment" at step two because the plaintiff had stopped taking prescribed medication. While "[r]emediable impairments do not qualify for disability benefits," there are exceptions. Conditions must be evaluated without regard to remediability if the claimant cannot afford treatment. McKnight v. Sullivan, 927 F.2d 241, 242 (6thCir. 1990). The record was very clear that the plaintiff stopped her medication due to her inability to pay for it. Further, the fact that the plaintiff admitted she had never tried adult diapers for incontinence is not a reason for rejecting her credibility. The real issue was whether the incontinence constituted a non-exertional severe impairment. The court remanded for further consideration. Margolius, Margolius & Associates, Cleveland, OH.

Reis v. Commissioner of Social Security, Case No. 1:06 CV 0774 (N.D.Ohio, Mar. 30, 2007) – Memorandum Opinion, Judgment Entry - 14 pages

DAILY ACTIVITIES/HOUSEHOLD CHORES

1827. District Court award of benefits for a period for 4 years and 2 months, and then for the nine-month trial work period. The plaintiff suffered from multiple sclerosis, which began as "relapsing-remitting" where she was relatively stable between exacerbations, but later converted to "secondary progressive MS," which results in a continuous downhill course. Among other errors, the ALJ found the plaintiff not credible because she was responsible for household chores and cared for a foster child. The ALJ failed to explain how her daily activities conflicted with the inability to work full-time and failed to address testimony that she could not complete all chores. Further, "the ability to care for children does not equate to the ability to work full-time outside of the home." Nor does attending school for 3 ½ hours per week prove the ability to engage in SGA. "This evidence shows, not that plaintiff was capable of full-time work, but that she continued to try to push herself to do more than she could physically handle." The plaintiff was represented at the administrative level by Thomas Bush, Esq., Milwaukee, WI and in two federal court civil actions by Fred Daley, Esq. and Heather Freeman Esq., Chicago, IL.

Sucharski v. Astrue, Case No. 089-C-2484 (E.D.Wis. Sept. 25, 2009); 2009 U.S. Dist. LEXIS 95878; 146 SSRS 577 – 35 pages

1794. District court decision when the ALJ erred in considering objective medical signs in determining that the plaintiff was not credible. "Fibromyalgia is not a disease that may be evaluated by looking for abnormalities in the musculoskeletal system. . . Rather, fibromyalgia patients present no objectively alarming signs." The ALJ also erred by focusing on the plaintiff's ability to perform household chores. Symptoms pf fibromyalgia vary in intensity. The ability "to perform some chores on some occasions does not necessarily undercut the credibility of [the plaintiff's] assertions that her pain generally precludes substantial gainful employment. . . What the ALJ persistently ignored. . was [the plaintiff's] ability to maintain work on a daily basis." Marcia Margolius, Esq., Cleveland OH.

Hayes v. Commissioner of SSA, Case No. 1:09-cv-0647 (N.D.Ohio Feb 24, 2010); 2010 U.S. Dist. LEXIS 16298 – 24 pages

1776. District Court remand due to the ALJ's rejection of the treating physician's opinion without good cause. The doctor's notes, which stated that the plaintiff's prognosis was good and that he could engage in activities of daily living, do not contradict her opinion that the plaintiff was disabled. "Performing household chores is very different from working eight hours a day in a labor-intensive job." Participating in everyday activities of short duration, such as housework does not disqualify a claimant from a finding of disability. In this case, the Magistrate Judge recommended that Plaintiff's Motion for Summary Judgment be denied. However, after objections were filed, the district court held that the Plaintiff's Motion should be granted. Jan Elizabeth Read, Esq. Miami, FL.

Stroman v. Astrue, Case No, 08-22881-CV-KING/DUBE (S.D.Fla. Nov. 4 2009) – 10 pages, including Order Granting Plaintiff's Motion for Summary Judgment, Letter from Plaintiff's Council; 2009 U.S. Dist. LEXIS 10491; 147 SSRS 73

1760. District Court reversal and award of benefits. The ALJ erred in rejecting the plaintiff's testimony by finding that answers to DDS questionnaires and activities of daily living were inconsistent with his hearing testimony. While an ALJ may cite contradictory testimony to find a claimant not credible, the ALJ "may not penalize a claimant for attempting to lead a normal life in spite of his disability." The ALJ reliance on testimony of the plaintiff's limited activities was not based upon proper legal standards. The ALJ also cannot speculate to discredit a claimant. The ALJ also erred in rejecting the finding of the plaintiff's treating physician who had been treating him since he was one year old for Ehlers-Danlos Syndrome, a hereditary connective disorder. Arthur Stevens, III, Esq., Medford, Or.

Mendoza v. Astrue, Civil No. 08-3090-HU (D. Ore. Sept. 30, 2009) – 23 pages

1689. District Court decision finding that the ALJ erred when he discredited an RFC assessment from a licensed social worker and instead gave overwhelming support to the notes that supported his decision. The notes may not have been contradictory because the plaintiff has bipolar disorder which is episodic in nature. The ALJ ignored a line of evidence that ran contrary to his findings without providing a reasoned explanation. Contrary to Seventh Circuit case law, the ALJ also placed undue weight on the plaintiff's ability to do some daily activities. The activities she performed were not the same as those required for continuous employment. And the fact that she searched for work does not preclude a finding of disability. "[A] person may be employed yet be disabled." The attempt to lead a normal life, despite a disabling condition, should not be used against a claimant. The court remanded for further proceedings. John Bowman, Esq., Davenport, IA.

Maresca v. Astrue, Case No. 07-4025 (C.D.Ill. July 15, 2008) – 15 pages

DIABETES

1829. Fully favorable ALJ decision, finding that the claimant's impairments medically equaled listing 9.08, "diabetes mellitus." The claimant had diabetes mellitus, proliferative diabetic retinopathy with significant macular ischemia, vitreous hemorrhage in the right eye; bilateral calf edema; cardiomegaly; hypertension; obesity; and right shoulder pain. The medical expert testified that the claimant met listing 9.08, but the ALJ found that the impairments were not identical to the listing criteria. The ALJ rejected the findings of the DDS physicians who said that the claimant could perform medium work. Also, the ALJ found the claimant's testimony credible. John Horn, Esq., Tinley Park IL.

ALJ decision (Aug. 26, 2010) – 7 pages

1765. Fully favorable ALJ decision after District court remand. The claimant was found eligible for SSI childhood disability benefits as of the date of his application. The claimant has Type I insulin-dependent juvenile diabetes mellitus and a language disorder. At the remand hearing, the ALJ found that the child met listing 109.08. He needs several shots of insulin every day; he has recurrent, at least weekly, episodes of hypoglycemia and fatigue, headaches, and crankiness associated with these episodes. His blood sugar must be checked several times per day and he requires snacks to combat low blood sugar. The ALJ assigned "the most significant weight" to evidence from treating sources and "significant weight" to school records and CE reports. This evidence corroborated the

mother's testimony. Only "minimal weight" was assigned to the DDS assessments. For the District court remand, see LAM 1748. J.P. Morella, Esq., Patterson, LA.

Fully Favorable ALJ decision on SSI childhood disability and diabetes (Oct 29, 2009) – 8 pages.

1748. District Court remand of an SSI childhood disability case to obtain an updated CE regarding juvenile diabetes and to specifically determine whether the plaintiff meets Listing 109.08. The ALJ summarily concluded that the plaintiff did not meet or equal a listing, but did not identify any listing specifically. Nor did the ALJ provide any explanation as to how he reached the conclusion that no listing was met. In *Audler v. Astrue*, 501 F.3d 446 (5th Cir. 2007), the court held that 42 USC 405(b) requires the ALJ to discuss the evidence and explain why a claimant is not disabled at each step. In this case, the ALJ did not even refer to the listing for juvenile diabetes, Listing 109.08. For the ALJ decision after remand, see LAM 1765. J.P. Morella, Esq., Patterson, LA.

Mickey Campbell o/b/o D.C. v. Commissioner of Social Security, Civil Action No. 07-1690 (W.D.La. Feb 9, 2009) 2009 WL 335275; 2009 U.S.Dist. LEXIS 9869 – 9 pages

1631. Appeals Council remand because the ALJ failed to discuss the severity of the claimant's diabetes in his decision. At the hearing, the claimant testified that she had numbness and tingling in her feet from the diabetes. Also, the ALJ decision does not contain an adequate evaluation of the treating doctor's opinion. The treating doctor stated that the claimant is unable to do any lifting and is not able to engage in gainful employment. John Horn, Esq., Tinley Park, IL

Appeals Council Remand Order (June 1, 2007) – 3 pages

DISABLED CHILDREN'S EVALUATION

1802. Appeals Council favorable decision awarding childhood benefits based on the SSI application filed in 2005. The Appeals Council submitted the record to its medical support staff for analysis. The two medical consultants found that the claimant met the childhood listings for asthma - listing 103.03B, through September 2008, but they could not determine the claimant's eligibility for SSI childhood disability benefits using a domain evaluation after September 2008. The Appeals Council relied on a subsequent application filed in May 2010, which revealed that the claimant was still requiring emergency room visits and physician intervention, despite following prescribed treatment. John Bowman, Esq., Davenport, IA.

Fully Favorable Appeals Council Decision (July 9, 2010) – 7 pages

1798. District Court remand because the ALJ erred by not finding a marked limitation in the domain of acquiring and using information. This finding is not supported by substantial evidence since the ALJ failed to acknowledge "critically low standardized test scores and the larger pattern in the record indicating that [the plaintiff's] ability to learn was seriously compromised." The court relied on SSR 09-3p, which describes in more detail the evaluation of the "acquiring and using information" domain, stressing the importance of reading and writing. The court engages in an extensive discussion of the plaintiff's limitations and numerous testing results, including tests showing his reading

was in the first or second percentile, which are more than two standard deviations below the mean. Under the regulations, a child will have a "marked" limitation when valid scores are at least two standard deviations below the mean. Irwin M. Portnoy, Esq., New Windsor, NY.

Van Velkenberg o/b/o B.G. v. Astrue, No. 1:08-CV-0959 (DNH/VEB) (N.D.N.Y. May 27, 2010) – 37 pages

1765. Fully favorable ALJ decision after District court remand. The claimant was found eligible for SSI childhood disability benefits as of the date of his application. The claimant has Type I insulin-dependent juvenile diabetes mellitus and a language disorder. At the remand hearing, the ALJ found that the child met listing 109.08. He needs several shots of insulin every day; he has recurrent, at least weekly, episodes of hypoglycemia and fatigue, headaches, and crankiness associated with these episodes. His blood sugar must be checked several times per day and he requires snacks to combat low blood sugar. The ALJ assigned "the most significant weight" to evidence from treating sources and "significant weight" to school records and CE reports. This evidence corroborated the mother's testimony. Only "minimal weight" was assigned to the DDS assessments. For the District court remand, see LAM 1748. J.P. Morella, Esq., Patterson, LA.

Fully Favorable ALJ decision on SSI childhood disability and diabetes (Oct 29, 2009) – 8 pages.

1748. District Court remand of an SSI childhood disability case to obtain an updated CE regarding juvenile diabetes and to specifically determine whether the plaintiff meets Listing 109.08. The ALJ summarily concluded that the plaintiff did not meet or equal a listing, but did not identify any listing specifically. Nor did the ALJ provide any explanation as to how he reached the conclusion that no listing was met. In *Audler v. Astrue*, 501 F.3d 446 (5th Cir. 2007), the court held that 42 USC 405(b) requires the ALJ to discuss the evidence and explain why a claimant is not disabled at each step. In this case, the ALJ did not even refer to the listing for juvenile diabetes, Listing 109.08. For the ALJ decision after remand, see LAM 1765. J.P. Morella, Esq., Patterson, LA.

Mickey Campbell o/b/o D.C. v. Commissioner of Social Security, Civil Action No. 07-1690 (W.D.La. Feb 9, 2009) 2009 WL 335275; 2009 U.S.Dist. LEXIS 9869 – 9 pages

1726. District Court remand for the ALJ to properly evaluate the credibility of the child's symptoms. Under SSR 96-7p, if a child is unable to adequately describe her symptoms, the ALJ must accept a statement of symptoms from the person most familiar with her. First, the ALJ must determine the claimants' credibility and then assess the credibility of the other person who testifies. In this case, the ALJ made a cursory, single sentence evaluation of the claimant's statements. This is "clearly insufficient." The ALJ made no separate evaluation of the claimant's guardian. The ALJ also erred in rejecting more recent IQ testing that the plaintiff had full scale IQ of 68, and failed to analyze whether the test results were credible. The regulations do not require a medical diagnosis of mental retardation to meet a listing. Michael DePree, Esq., Davenport, IA.

McCaw for ANK v. Commissioner of Social Security, Case No. 07-cv-4067 (S.D.Ill. Mar. 27, 2009)– 16 pages

1705. District court remand because the court is unable to determine the ALJ's reasons for the credibility determination. The ALJ failed to provide a specific rationale for rejecting the testimony provided by the plaintiff and her mother. In his decision, the ALJ stated that he considered all of plaintiff's symptoms under the regulations and SSR 96-7p. The ALJ summarized the hearing testimony and concluded that the statements regarding the limitations imposed by the plaintiff's symptoms were not credible. But the ALJ did not specifically discuss the hearing evidence and why it was not credible. The Commissioner could not point to any particular language in the ALJ's decision that could be construed as the rationale for the credibility determination. The court rejected the argument that the ALJ need not articulate specific and adequate reasons for rejecting testimony as not credible so long as the ALJ states that he or she is applying the proper standard and evaluates the other evidence of record. EAJA fees in the amount of $3687.50 are later awarded (*Murray v. Astrue*, 2009 U.S.Dist. Lexis 8465 (M.D.Ala. Feb.4, 2009)). Brian Carmichael, Esq., Enterprise, AL.

Murray o/b/o C.S.M v. Astrue, Case 2:970cv-00654-SRW (M.D.Ala. Sept. 24, 2008); 2008 U.S.Dist. LEXIS 73062 – Memorandum Opinion - 13 pages

1698. District Court remand where the ALJ had denied the claim, finding that the plaintiff had a marked impairment in only one domain. The plaintiff relied on records from non-physician sources, i.e. therapist, teacher's reports, and school records, to argue that she has a marked impairment in a second domain. The therapists' assessments that the plaintiff is markedly impaired in the domain of attending and completing tasks is supported by her treating physician and psychologists. The ME's testimony that the plaintiff's limitations in this domain are "merely isolated or inconsistent" is not supported by the record. The Magistrate Judge recommended remand for an award of benefits. The Commissioner filed objections and the district court determined that further proceedings are needed. On remand, the Commissioner should consider the scope of the limitations in the domain of attending and completing tasks in light of the evidence of record. Margolious, Margolious & Associates, Cleveland, OH.

Jennifer Carson for Leesha Alwood v. Astrue, Civil Action 2:07-CV-281 (S.D.Ohio, Sept 3, 2008); 2008 U.S. Dist. LEXIS 85891 - 27 pages including Order, Judgment in a Civil Case, Defendant's Objections to Magistrate Judge's Report and Recommendation, Report and Recommendation

DISMISSAL OF HEARING

1808. Appeals Council remand for several reasons, including an improper dismissal. The ALJ improperly dismissed the Title II application based on lack of insured status. This is not a regulatory basis for dismissal and the Appeals Council vacated this finding. Kenneth Isserlis, Spokane, WA

Appeals Council remand, July 23, 2010 – 4 pages

1741. Magistrate Judge decision finding that the plaintiff presented a colorable constitutional claim and recommending that the government's motion to dismiss be

denied. The ALJ erred in finding that the plaintiff filed the request for hearing more than 60 days after receiving the reconsideration determination. The plaintiff filed an application in May 1997 that was denied in September 1997. A second application was filed on September 5, 2007, and was approved, with an onset date of December 15, 1996. The plaintiff filed a request for reconsideration from the September 2007 allowance, requesting reopening of the prior 1997 application. The reconsideration was denied on May 9, 2008, and a request for hearing was filed May 20, 2008. On June 27, 2008, the ALJ dismissed the request as untimely and because "good cause" for missing the deadline was not established. The ALJ dismissal was appealed to the Appeals Council, which upheld the dismissal, finding that it related to an untimely appeal from the first, 1997 denial. The appeal to district court followed.

In general, an ALJ dismissal is not considered a "final" decision under 42 U.S.C. § 405(g). However, the court has jurisdiction to consider an appeal of a dismissal if a colorable constitutional claim is raised. *Califano v. Sanders*, 430 U.S. 99, 109 (1977). A claimant has a right to due process and to have SSA follow its regulations. In this case, the request for hearing was timely; the plaintiff had not missed the deadline; and he had no need to establish good cause. The Appeals Council, "apparently recognizing" the ALJ's error, tried to rehabilitate the dismissal by relating it to the 1997 denial. However, the ALJ's dismissal "clearly did *not* so consider the request for hearing." The Magistrate Judge found that a colorable constitutional claim was presented and recommended that the government's motion to dismiss be denied. Daniel Emery, Esq., Yarmouth, ME.

Bowie v. Astrue, Civil No. 08-428-P-S (D.Me. May 7, 2009); 2009 U.S.Dist. LEXIS 39460, Recommended Decision on Motion to Dismiss – 8 pages
Recommended Decision affirmed, ***Bowie v. Astrue***, Civil No. 08-428-P-S (D.Me. May 29, 2009); 2009 U.S. Dist. LEXIS 47987

1618. Appeals Council remand when the ALJ erroneously dismissed the hearing when neither the claimant nor his attorney appeared at the hearing. The ALJ found that the claimant's statement that he did not receive the hearing notice and was not contacted by his attorney was not a good reason for not appearing. The claimant s attorney at the time was located in New Orleans. His new attorney suggested that the notice was not received due to mailing difficulties after Hurricane Katrina. In this case, there was no acknowledgement card in the file, no evidence that the hearing office attempted to contact the claimant, and no evidence before the ALJ that the notice of hearing was actually received. The Appeals Council found that the regulations were not followed and directed the ALJ to give the claimant another opportunity for hearing. Clarence Thornton, Esq., Baton Rouge, LA.

Appeals Council Remand Order (May 15, 2007) – 3 pages

DRUG ADDICTION and ALCOHOLISM
See SUBSTANCE ABUSE

EDUCATION
1686. Appeals Council remand were the ALJ found that the claimant was in regular classes from 10th to 12 grade, but failed to acknowledge that most of those classes were

nonacademic e.g. work study, positive thinking, adult living and home management, and that the claimant was in special education classes from 7th to 9th grades. A CE psychologist reported a number of difficulties with memory, reading comprehension, and abstract reasoning. Despite this evidence, the ALJ found that the claimant did not have a "severe" mental impairment. The Appeals Council remanded for further development, including intelligence testing to determine that the claimant has a "severe" mental impairment. John Bowman, Esq., Davenport, IA.

Appeals Council remand (June 20, 2008) - 4 pages, including Notice of Order, Order to Appeals Council remanding Case to ALJ.

EHLERS-DANLOS SYNDROME

1760. District Court reversal and award of benefits. The ALJ erred in rejecting the plaintiff's testimony by finding that answers to DDS questionnaires and activities of daily living were inconsistent with his hearing testimony. While an ALJ may cite contradictory testimony to find a claimant not credible, the ALJ "may not penalize a claimant for attempting to lead a normal life in spite of his disability." The ALJ reliance on testimony of the plaintiff's limited activities was not based upon proper legal standards. The ALJ also cannot speculate to discredit a claimant. The ALJ also erred in rejecting the finding of the plaintiff's treating physician who had been treating him since he was one year old for Ehlers-Danlos Syndrome, a hereditary connective disorder. Arthur Stevens, III, Esq., Medford, Or.

Mendoza v. Astrue, Civil No. 08-3090-HU (D. Ore. Sept. 30, 2009) – 23 pages

FATIGUE

1695. Fully Favorable ALJ decision. The claimant suffers from a long-standing history of severe chronic fatigue. The ALJ did not require her to provide laboratory testing to confirm her hypoadrenalism. She could not undergo the testing because it requires her to be free of the steroid medication, which she cannot stop taking, because of her profound fatigue. Her treating physician stated that she is unable to do any physical work, however menial, and that the fatigue also leads to decreased focus, concentration and mental abilities. He further noted that any attempts to wean her off steroids have been associated with severe exacerbation of symptoms. Michael Matthews, Esq., Altamonte Springs, FL.

Fully Favorable ALJ decision (June 17, 2008) – 6 pages

FIBROMYALGIA

1812. Circuit court remand due to the ALJ's rejection of the plaintiff's treating rheumatologist's opinion because the limitations imposed in his opinion "are based primarily upon [the Appellant's] subjective complaints." The court stated: We along with several other courts, have recognized that fibromyalgia 'often lacks medical or laboratory signs, and is generally diagnosed mostly on an individual's described symptoms,' and that the 'hallmark' of fibromyalgia is therefore 'a lack of objective evidence." An ALJ cannot reject a treating physician's opinion in a fibromyalgia case based on a "lack of objective clinical findings." With fibromyalgia, a claimant's subjective complaints of pain "are often the only means of determining the severity of a patient's condition and the functional limitations caused thereby." In this case, the plaintiff "consistently reported

symptoms of fibromyalgia," including chronic muscle pain, severe fatigue, pain upon palpitation of tender points, insomnia and dizziness. The treating doctor credited these complaints. "Other than a lack of objective medical findings, there is nothing in the record to suggest that [the Appellant] did not suffer the degree of pain she reported or that her doctors should have disbelieved her complaints. Sarah H. Bohr, Esq., Atlantic Beach, FL.

Somogy v Commissioner of Social Security, No. 09-12067 (11th Cir. Feb 16, 2010) Per Curiam Opinion; 266 Fed. Appx. 56; 2010 U.S. App. LEXIS 2952 – 24 pages

1794. District court decision when the ALJ erred in considering objective medical signs in determining that the plaintiff was not credible. "Fibromyalgia is not a disease that may be evaluated by looking for abnormalities in the musculoskeletal system. . . Rather, fibromyalgia patients present no objectively alarming signs." The court relied on *Rogers v. Commissioner of Social Sec*., 486 F.3d 234 (6th Cir. 2007). The ALJ's statement regarding joint deformity, range of motion, muscle strength etc are "irrelevant to determining whether a claimant's subjective assertions regarding pain are credible." The ALJ also erred by focusing on the plaintiff's ability to perform household chores. Symptoms pf fibromyalgia vary in intensity. The ability "to perform some chores on some occasions does not necessarily undercut the credibility of [the plaintiff's] assertions that her pain generally precludes substantial gainful employment. *Rogers* requires a particular analysis to determine credibility in fibromyalgia cases. What the ALJ persistently ignored. . was [the plaintiff's] ability to maintain work on a daily basis." This was a particular problem, since the VE testified that if an individual cannot work for a month without missing 5 days of work, then there are no jobs she can perform. Marcia Margolius, Esq., Cleveland OH.

Hayes v. Commissioner of SSA, Case No. 1:09-cv-0647 (N.D.Ohio Feb 24, 2010); 2010 U.S. Dist. LEXIS 16298 – 24 pages

1784. First Circuit remand because the ALJ failed to properly evaluate the plaintiff's fibromyalgia and failed to give proper weight to the treating rheumatologist's RFC assessment. The decision includes some very good language regarding the evaluation of fibromyalgia. The ALJ's "unpersuasive reasons" for giving little weight to the treating doctor's opinion were "significantly flawed." The ALJ gave no explanation why a relationship of three visits at three month intervals was too short for the doctor to offer an informed opinion. The ALJ also misread the record regarding the doctor's statement on the relief provided by injections. Third, the ALJ found that the RFC was not consistent with the doctor's prescription for physical therapy and aerobic exercise. These treatments are appropriate for fibromyalgia but typically start at a very low level and low impact. Finally, the ALJ said that the RFC was based on the plaintiff's subjective allegations. Such allegations are an essential diagnostic tool for fibromyalgia and reliance on such complaints does not undermine the treating doctor's opinion. The ALJ also erred in relying on non-examining physicians and in disregarding the claimant's allegations of pain. David Green, Esq., Providence, RI.

Johnson v. Astrue, No. 08-2486 (1st Cir. July 21, 2009). Per Curiam Opinion – 12 pages, *published at* 597 F.3d 409 (1st Cir. 2010)

1780. District Court remand, holding that the ALJ did not properly assess the opinion of the treating physician and instead relied on the opinion on the non-examining state agency physician. The court found it "troubling" that the state agency reviews, upon which the ALJ relied, were done without taking into account a single record concerning the plaintiff's most disabling condition, fibromyalgia. The court noted that the existence of fibromyalgia and its severity are not readily susceptible to objective determination. In adopting the Magistrate Judge's Report and Recommendation, the court found that the ALJ's reasons for rejecting the treating physician's opinion were inadequate under 6th Circuit precedent. Rita S. Fuchsman, Esq., Chillicothe, OH.

Ginther v. Astrue, Case No. 2:09-cv-00189 (S.D.Ohio Mar 12, 2010); 2010 U.S. LEXIS 23128 – 16 pages

1774. District court remand because the ALJ improperly evaluated the plaintiff's credibility regarding her fibromyalgia symptoms. The court referred to its analytical framework for claims of fibromyalgia: severity and assessment cannot be accomplished by reliance on objective medical evidence; the opinion of a specialist regarding work-related limitations who has employed the appropriate diagnostic techniques – trigger point analysis – and has documented the findings is entitled to controlling weight; the credibility finding is particularly important. The court's decision discusses the Sixth Circuit precedent on credibility and fibromyalgia. The absence of objective medical evidence does not create any informal presumption of no disability. In this case, the ALJ's articulation as to credibility was conclusory and minimal and discussed none of the factors in the regulation. The ALJ has a "procedural obligation" to address credibility and to apply the factors in the regulations. Margolius, Margolius, & Associates, Cleveland, OH.

Wallace v. Commissioner of Social Security, Case No. 1:08 CV 2549 (N.D.Ohio Nov. 9. 2009) – 11 pages.

1752. District Court decision that confirms the standard to be used in evaluating fibromyalgia cases. The ALJ did not find that the plaintiff's fibromyalgia was a severe impairment. The court recognized that fibromyalgia can be a severe impairment without presenting any objective signs. "To reject a treating physician's diagnosis of fibromyalgia in a patient exhibiting characteristic tender points and other hallmark symptoms on the basis that such a diagnosis is inconsistent with objective medical evidence constitutes reversible error. " On remand, the ALJ is instructed to articulate a definition of a "moderate" restriction as set forth in the state agency PRTF and mental RFC forms. Emily Warren, Esq., Cleveland, OH.

Puchalski v. Astrue, Case No. 1:08-cv-2404 (N.D.Ohio. July 28, 2009) – 21 pages

1644. District Court remand for a new RFC finding. The ALJ improperly rejected the treating physician's opinion regarding work-related limitations based on the absence of objective evidence to support it. The court cites to *Rogers v. Comm'r of Soc. Sec*., 486 F.3d 234 (6th Cir. 2007) and notes that fibromyalgia is "not susceptible of objective verification through traditional means" and "opinions that focus solely upon objective evidence are not particularly relevant." The ALJ failed to follow the mandates of Rogers.

The ALJ's failure to articulate good reasons for rejecting the treating doctor's opinion is not harmless error. Further, the ALJ's reliance on the non-examining DDS doctor's RFC did not supply substantial evidence for the ALJ's RFC. On remand, the ALJ should obtain either a CE or a medical expert. Margolius, Margolius & Associates, Cleveland, OH.

Smith v. Commissioner of Social Security, Case No. 1:06 CV 1733 (N.D.Ohio Aug.3, 2007) – 10 pages

FORMER WORK

See PAST RELEVANT WORK

GAF SCORE

1603. District court remand for review of all medical findings relating to the plaintiff's GAF score from the disability onset date of January 7, 2002,though the date last insured of December 31, 2002. The court wanted to determine if the score was consistently at 50 or below, and whether the plaintiff's impairment met listing 12.06. The plaintiff alleged he had PTSD caused by his service in the Vietnam War and that listing 12.06 was met. The ALJ ignored several medical reports from the treating psychiatrist that noted GAF scores of 50. Instead, he relied on two state agency psychological consultants who found less serious limitations. The court held that "A GAF score of 50 is considered severe under the Regulations and would change the nature of the ALJ's ruling." Carol Avard, Esq., Cape Coral, FL.

Hall v. Commissioner of Social Security, Case No. 2:05-cv-559-ftM-29SPC (M.D.Fla. Feb 9, 2007) Opinion and Order, Report and Recommendation – 33 pages

HEADACHES

1757. Appeals Council remand to determine the appropriate weight to be given the VA determination. The ALJ found that the claimant had no "severe" impairment. The ALJ failed to consider the VA determination that the claimant had service-connected disabilities of migraine headaches, depressive disorder, and chronic folliculitis, entitling him to an individual "unemployability" rating by the VA. While not bound by the VA's determination, the ALJ must address it and weigh that finding per SSR 06-3p. The ALJ erroneously stated that the record contained no test results regarding complaints of migraine headaches. In fact, the record includes and MRI that documents complaints of worsening migraines, increased medication dosages, and referral to a neurologist. On remand, the ALJ must address whether the claimant has an impairment that could reasonably be expected to produce the migraines and evaluate the pain under the factors in the regulations and SSR 96-7p. The Appeals Council decision is the Order t the ALJ following a remand by the district court. Albert Carrozza, Esq., Olney, Md.

Appeals Council Remand (June 29, 2009) – 4 pages.

1737. District Court remand so the medical evidence from the plaintiff's treating physicians can be properly weighed. The record clearly established that the plaintiff had headaches and migraines, as documented by the treating doctors. "Incredibly, the ALJ disregarded almost all of this evidence, finding that there was no objective medical evidence to support this disorder." The court noted that migraines are generally not

proved through diagnostic tests but through medical signs and symptoms. But in this case, there were diagnostics tests – two MRIs and a blood test – that supported the diagnosis. The ALJ also erred in finding the "lack of any workup" and then concluding that the headaches were nonsevere. Evidence also indicated that the headaches caused work-related restrictions. The court also found that the ALJ did not properly assess the plaintiff's mental impairments, discrediting the opinions of three treating doctors. The court remanded so that the. On remand, the actual weight given to each source must be clarified. To reject treating physicians' opinions, there must be actual inconsistencies or lack of medical findings to support the opinions. EAJA fees are later awarded. The plaintiff was represented by Chris Noel, Esq., Boulder, CO.

Meyers-Schreiner v. Astrue, Civil Action No. 08-cv-00573-WYD (D.Colo. Mar. 31, 2009); 2009 U.S. Dist. LEXIS 31751; 141 SSRS 375. Order – 31 pages

1719. District court remand because the ALJ did not give proper weight to the treating physician's opinions, and the reasons he gave for rejecting the opinions were not supported by substantial evidence. The plaintiff was diagnosed with migraine headaches, and the symptoms were documented by the treating doctor at almost every medical appointment. The caselaw does not require objective evidence for impairments where there is no such test, e.g., migraines. In this case, the ALJ erroneously did not give any deference to the treating doctor's opinion, including that the plaintiff was disabled. While not dispositive, it is an issue that should be considered and weighed. On remand, the ALJ will consider a new questionnaire completed by the treating physician and submitted to the Appeals Council; reconsider the plaintiff's credibility assessment; and reassess the weight given to the treating physician and consultative examiners EAJA fees are later awarded. Thomas Feldman, Esq., Denver CO.

Hua v. Astrue, Civil Action No 07-cv-02249-WYD (D.Colo. Mar 2, 2009); 2009 U.S.Dist. LEXIS 30345; 140 SSRS 207 - 85 pages including Order, Plaintiff's Opening Brief, Defendant's Response Brief, Plaintiff's Reply Brief.

1647. ALJ decision finding that the claimant suffered from cervical dystonia and migraine headaches. The neurological disorder caused her head to turn to the right involuntarily, which was diagnosed as spasmodic torticollis. There was considerable pain associated with this condition and there is no cure. The ALJ found that the claimant's allegations of pain were generally credible and would preclude her form performing SGA on a sustained basis. He also found that she would be unable to return to her past work as vice president of an automobile repair shop. Based on her exertional imitations, the ALJ applied rule 201.06 of the Medical Vocational Guidelines and found the claimant disabled. J. Michael Matthews, Esq., Altamonte Springs, Fl.

Fully Favorable ALJ decision (July 20, 2007) – 9 pages

HOUSEHOLD CHORES

See DAILY ACTIVITES

HUNTINGTON'S DISEASE

1697. District Court remand, finding that the ALJ violated SSR 83-20, which requires an ALJ to consult a medical advisor when he finds disability but must infer onset from

ambiguous evidence. In this case, the ALJ skipped over the question of present disability and denied the claim by finding that the claimant was not disabled as of her date last insured. The court found no support for the Commissioner's position that the opinion of a medical advisor was not required in this case. SSR 83-20 "does not authorize ALJs to circumvent the ruling by withholding a finding on present disability and denying the claim based upon a determination that he claimant was not disabled as of her date last insured." The agency's interpretation of the ruling also is inconsistent with the public policy it was meant to address. Some progressive impairments, such as Huntington's Disease (the plaintiff's impairment) are not diagnosed until long after the alleged onset date. Defendant's Motion to reconsider the determination is later denied (2008 U.S.Dist. LEXIS 84462, Sept. 19, 2008). Raymond J. Kelly, Esq., Manchester, NH.

Ryan v. Astrue, Civil No. 08-cv-17-PB (D.N.H. Aug. 21, 2008); 2008 DNH 148; 2008 U.S.Dist. LEXIS 65080; 134 SSRS 323; Not for publication – 21 pages

INABILITY TO AMBULATE

1804. Fully favorable ALJ decision, finding that the claimants impairments meet the criteria of Listing 1.02A (Major dysfunction of a joint). The claimant was hit by a truck and suffered multiple fractures of the skull. The ALJ also found that she had post-traumatic stress disorder. The claimant tried to work after the alleged onset date, but the ALJ found these jobs to be unsuccessful work attempts. The ALJ found her testimony regarding the ability to stand and walk for only short periods of time to be credible. The medical expert testified at the hearing that her impairments met listing 1.02A and the ALJ agreed. John Horn, Esq., Tinley Park, IL.

Fully favorable ALJ decision (June 15, 2010) – 9 pages

1672. Ninth Circuit decision that provides clarification regarding the definition of "inability to ambulate effectively." It makes clear that the use of a two-handed assistive device is not necessary to establish inability to ambulate effectively in order to meet listing 1.02A. It further clarifies that the definition of "inability to ambulate effectively" in Listing 1.00B.2 can be satisfied by, for example, the inability to walk a block at a reasonable pace on rough or uneven surfaces or the inability to climb a few steps at a reasonable pace with the use of a single hand rail. The court remanded the case for a new step-three analysis. Max Rae, Esq., Salem, OR.

Dobson v. Astrue, No. 05-36212 (9th Cir. Feb 20, 2008) – 6 pages

JUDICIAL REVIEW

1825. District court award of attorneys fees at the time of a sentence four remand because the government's position was not substantially justified. The court rejected the government's effort to argue that the ALJ's decision was substantially justified by describing evidence upon which the decision could reasonably be based. "The ALJ's opinion must stand or fall on its own merits. It cannot be rescued by *post ad hoc* additions proposing what the ALJ might have said had he the inclination." Dianne Newman, Esq., Akron, OH.

Cooper v. Astrue, Case No. 5:09-cv-1446 (N.D.Ohio Sept 3, 2010) Order awarding EAJA fees, Memorandum Opinion & Order Remanding Case under Sentence Four – 22 pages

1778. Magistrate Judges' recommended remand because the ALJ's decision was "internally inconsistent." While the court noted that the ALJ's decision could be affirmed on the basis of the evidence in the record, the court "should be concerned with fairness." The ALJ based his denial on credibility findings, yet did not state his reasons. The ALJ's findings were also contradictory and possibly confused. The ALJ found that the plaintiff could not tolerate exposure to heights, moving parts or operating a car. Yet he noted that the plaintiff drives a car, but there is no evidence to support this critical finding. The ALJ found that the plaintiff did not meet listing 11.03 because the record did not support a finding that she had petit mal seizures more than once weekly. The ALJ found the testimony of the plaintiff and her daughter that she did have seizures of the required frequency to be not credible. The court noted that the credibility determination had a "devastating impact" on the plaintiff's claim at step 3 and on her RFC. The plaintiff's financial reasons prevented her from regular medical treatments, which is why she lacked corroborating medical records. Ivan Katz, Esq., New Haven Ct.

Sholun v. Astrue, Civil No,. 03-09-CV-609 (CFD) (TPS) (D.Conn. Nov. 20 2009); 2009 U.S. Dist. LEXIS – 7 pages

KNEE IMPAIRMENTS

1814. Favorable ALJ decision where the medical expert testified that the claimant met listing 1.02A for ineffective ambulation because her replaced right knee had not healed well and had to be replaced again. She could not stand or walk and used a cane to ambulate. At 62 inches tall and weighing 307 pounds, the claimant was also morbidly obese. John E. Horn, Esq., Tinley Park, IL.

ALJ decision on Listing 1.02A (July 23, 2010) – 9 pages

1743. District court remand when the ALJ failed to provide adequate analysis at step three. The ALJ discussed only whether her mental impairments met a listings, but did not discuss whether her knee problems satisfied Listing 1.02A. As a result, she was prejudiced by the ALJ's failure. The plaintiff presented significant medical evidence of problems with her knees, e.g. eight knee surgeries, calcifications, joint narrowing, instability, degenerative and osteoarthritis changes. The court relied on precedent cited by plaintiff's attorney, *Audler v. Astrue*, 501 F.3d 446 (5th Cir. 2007), which requires the ALJ to discuss whether a claimant's impairments meet a particular listing. Suzanne Villalon-Hinojosa, Esq., San Antonio, TX.

Hill v. Astrue, Civil Action No. 5:08-CV-168-BG (N.D.Tex. Apr. 30, 2009) – 8 pages

1661. District court remand where the ALJ failed to articulate sufficient reasons for rejecting the opinions of the plaintiff's three treating physicians. One doctor stated that the plaintiff's knee pain caused severe limitations on her ability to work, bend, walk, stoop and stand His opinion was entitled to controlling weight because it met the regulatory requirements. The ALJ inferred that the opinion was inconsistent because the doctor stated that pain medication helped the plaintiff's symptoms and no surgeries were

planned. “Under Sixth Circuit precedent, improvements in a condition are insufficient reasons for rejecting a treating physician’s opinion . . .The finding that a patient’s condition has improved does not render a physician’s finding of disability inconsistent.” Also, the ALJ did not explain why he adopted the conclusions of a physical therapist over those of the treating doctor. Finally, the ALJ failed to consider whether the plaintiff’s impairments met listing 12.05 when IQ testing revealed a full scale IQ of 58. Marcia Margolius, Esq., Cleveland, OH.

Holliman v. Commissioner of Social Security Administration, Case No. 1:06CV2992 (N.D.Ohio, Oct. 25, 2007), Memorandum Opinion & Order, Judgment Entry – 27 pages

LACK OF COUNSEL

1684. The ALJ erred in his “special duty to develop the record when the claimant appears without counsel.” While the ALJ complied with the duty to inform the plaintiff of her right to counsel, that is “is distinct from the ALJ’s duty to fully develop the factual and medical record of an unrepresented claimant.” The ALJ failed to invest the time and patience needed to obtain useful information. The hearing transcript reveals that the plaintiff has extreme difficulty understanding others and expressing herself. The transcript reveals numerous mutual misunderstandings between the plaintiff and the ALJ. This should have out the ALJ on notice. “Once on notice that the plaintiff was limited in her ability to understand others and to express herself, the ALJ should have done more to cure the ambiguity in [the plaintiff’s] responses.” Also, the record clearly indicated that the plaintiff had impairments that the ALJ did not explore at the hearing, including allegations of arthritic pain and deformity. The ALJ erroneously relied on the DDS physician’s RFC finding, which was based on an incomplete record. Because the plaintiff did not have a full and fair hearing, the court remanded the case. Margolius, Margolius & Associates, Cleveland, OH.

Austin v. Astrue, Case No. 1:07-cv-2112 (N.D.Ohio May 7, 2008) – 25 pages, including the Memorandum Opinion and Order, Judgment Entry

1662. District court remand for another hearing. The ALJ erred by failing to consider the opinion of the treating physician, inadequately reviewing the medical records, making unsupported assumptions about the plaintiff’s work history and providing a perfunctory evidentiary hearing at which the plaintiff was not represented. The plaintiff does not read or write English and was assisted at the hearing by his friend and neighbor. Chris Noel, Esq. Bolder, CO.

Altamirano v. Astrue, Civil Action No. 06-cv-02285-RPM (D.Colo. Jan 4, 2008); 2008 U.S. Dist. LEXIS 40619; 125 SSRS 247 – 4 pages

LATE FILING IN FEDERAL COURT

1713. District court dismissed the government’s motion to dismiss and held that the plaintiff’s Complaint was timely filed, based on equitable tolling. After being represented by a non-attorney at the administrative level, the plaintiff hired an attorney two days before the deadline for filing a complaint. He immediately sent a certified letter to the Appeals Council requesting additional time to file the complaint, which was filed six days after the deadline. The defendant filed its motion to dismiss two months later. The

court stayed the proceedings, noting that ODAR had not ruled on the request for extension of time, which was later denied.
The court held that the 60-day requirement of 42 USC 405(g) is subject to equitable tolling and that such tolling was justified because: 1) Plaintiff and her attorney were diligent in pursuing her rights; 2) Plaintiff's case merited reopening by the Appeals Council because new and material evidence is a basis for reopening; and 3) Both Plaintiff and Defendant would be harmed by dismissal because it would require both parties to repeat the process with the filing of a new application. "[I]n arguing for dismissal, the Commissioner essentially argues that the preferable route in the present case is an unnecessary loop back through the agency proceedings rather than a single argument before this Court." Lawrence Wittenberg, Esq., Durham, NC

Hargrove v. Astrue, Case No. 5:07-sc-76-BO (E.D.N.C. Dec. 15, 2008); 2008 U.S.Dist. LEXIS 100884; 137 SSRS 661 – 7 pages

LATE REQUEST FOR HEARING

1700. The Appeals Council remanded the case for a hearing, finding good cause for filing a late request for the hearing. The ALJ had dismissed the request for hearing on the basis that good cause for late filing was not established. The ALJ dismissal noted that the claimant had not provided an explanation for the late filing. The Appeals Council relied on HALLEX I-2-415B.2, which instructs that the ALJ may develop a reason for the late filing if there is insufficient evidence or information to determine good cause. When the claimant filed the late request for hearing, it is unclear why a good cause statement was not requested by the local SSA office. "Absent a good cause statement, the record was lacking information to determine whether good cause existed, and such statement should have been obtained." In addition, SSR 91-5p applies. The claimant was unrepresented at the hearing and the evidence suggests he has a cognitive impairment. "[T]he evidence provides some support . . . that a memory impairment affected his ability to request a hearing. . ." He had a steady work record before his alleged onset date and his request was less than 30 days late. The Appeals Council considered the factors and applied the guidance of SSR 91-5p that any reasonable doubt be resolved in favor of the claimant in finding that good cause exists to extend the filing deadline. Phillip B. Verrette, Esq., Tuscan, AZ.

Appeals Council remand to ALJ on good cause for late request for hearing and SSR 91-2p (Sept. 24, 2008) – 2 pages

LATE REQUEST FOR HEARING – NON-RECEIPT OF NOTICE

1830. District Court decision denying the government's motion to dismiss and remanding for an ALJ hearing on the merits. The plaintiff had appealed his dismissal based on lat request for hearing. The court found that the record before the ALJ did not contain any evidence showing that the notice of reconsideration had sufficient postage or was deposited in the mail. "Accordingly, there was no evidence before the ALJ sufficient to trigger the presumption [of receipt]." A "standardized" Declaration by the Chief of the ODAR Court Case Preparation and Review Branch, filed in court, "offers little support" for mailing since he had no connection with the plaintiff's case. The court concluded that the dismissal of the request for hearing as untimely "was not based on substantial

evidence and Defendant's reliance on presumption of receipt was unfounded." The court did not adopt the U.S. Magistrate's Recommendation.

The plaintiff and his attorney had not received the reconsideration denial until July 30, 2008, a day after the plaintiff called SSA to inquire. The denial was dated April 25, 2008. On May 26, 2009, the ALJ dismissed the request for hearing finding it was untimely and the plaintiff did not establish good cause for extending the deadline. The plaintiff hired a new attorney, who submitted an affidavit from the plaintiff to the Appeals Council, but the request for review was denied. In court, the Commissioner argued that the ALJ's Order of Dismissal was not subject to judicial review. The court found that an allegation of non-receipt of a notice of reconsideration is sufficient to present a colorable constitutional claim. Richard Culberson, Esq. Orlando, FL.

Counts v. Commissioner of Social Security, Case No. 6:09-cv-2157-Orl-22KRS (M.D.Fla. Dec. 15, 2010) – 20 pages

LATEX ALLERGIES

1755. District Court fully favorable decision finding that the plaintiff was disabled as of her 1997 onset date. The plaintiff has a severe latex allergy. The issue in the case is whether any work places exists that are latex-free environments. The medical expert testified that her allergy met or equaled a listing. He stated that she could work only if she could be guaranteed a latex-free environment. SSA's VE only provided interrogatory responses. He stated that the plaintiff could transfer her skills to a number of jobs in a latex-free environment, but did not explain if any such environment exists. The plaintiff's VE stated that the plaintiff was unable to perform any work. The court found that SSA's VE failed to explain how he arrived at the conclusion that the jobs enumerated were in a latex-free environment or what constitutes a latex-free environment. The court also relied on the testimony of the medical expert who testified at the hearing and stated that it is virtually impossible to guarantee a latex-free environment, which includes preventing others from entering the workplace with latex particles. The court agreed, remanding the case only for the calculation of benefits. Barry Simon, Esq.

Rudt-Pohl v. Commissioner of SSA, Case No. 07-CV5019 (RJD)(E.D.N.Y. Aug. 26, 2009) ; 2009 U.S. Dist. LEXIS 75612; 144 SSRS 730. Decision and plaintiff's memorandum of law – 42 pages

LAY TESTIMONY

1822. Appeals Council remand due to several ALJ errors. The ALJ found the following "severe" impairments; fibromyalgia, Tourette's syndrome, and anxiety disorder. However, in formulating the claimant's RFC, the ALJ decision did not state what, if any, limitations were caused by the fibromyalgia and anxiety disorder. "Considering that any severe impairment causes vocational restrictions, the hearing decision must explain what restrictions result from each sever impairment." The ALJ also erred in discounting the testimony of the claimant's daughter and friend because they do not reside with the claimant. There is no requirement that testimony of lay witnesses is valid only if they

reside with the claimant. The ALJ also failed to explain what effect the claimant's speech limitations would have on her ability to work. Randolph Baltz, Esq., Little Rock, AR.

Appeals Council remand (July 23, 2010) – 6 pages

1726. District Court remand for the ALJ to properly evaluate the credibility of the child's symptoms. Under SSR 96-7p, if a child is unable to adequately describe her symptoms, the ALJ must accept a statement of symptoms from the person most familiar with her. First, the ALJ must determine the claimants' credibility and then assess the credibility of the other person who testifies. In this case, the ALJ made a cursory, single sentence evaluation of the claimant's statements. This is "clearly insufficient." The ALJ made no separate evaluation of the claimant's guardian. The ALJ also erred in rejecting more recent IQ testing that the plaintiff had full scale IQ of 68, and failed to analyze whether the test results were credible. The regulations do not require a medical diagnosis of mental retardation to meet a listing. Michael DePree, Esq., Davenport, IA.

McCaw for ANK v. Commissioner of Social Security, Case No. 07-cv-4067 (S.D.Ill. Mar. 27, 2009)– 16 pages

1600. District court finding that the plaintiff was disabled as of her date last insured, which was December 31, 1993. The plaintiff had alleged disability since 1988 due to lupus. At the initial hearing and at the second hearing after a court remand, the testimony focused on the plaintiff's limitations prior to her date last insured, although the lupus was not definitely diagnosed until after that date. The ALJ improperly found the claimant not credible because her subjective complaints were not consistent with her daily activities. The court found that the record does not support the ALJ's description of her daily activities and concluded that the ALJ did not state clear and convincing reasons for rejecting her credibility. The court also rejected the ALJ's reasons for rejecting testimony regarding the plaintiff's daily activities provided by a neighbor. Lay testimony is competent evidence which the ALJ must take into account unless he gives legitimate reasons for the rejection. The court "credited as true" the testimony of the plaintiff and her neighbor. And also relying on the delay due to the first remand, the court concluded that the plaintiff was disabled and a second remand would not shed any additional light on the issue. ***Tabacchi v. Barnhart***, Case No. Cv 05-3104-KI (D.Ore. Sept. 28, 2006)

Robert F. Webber, Esq., Medford, OR – 17 pages

LISTINGS OF IMPAIRMENTS

1782. District court remand. The ALJ has the duty to identify relevant listings. The mere conclusion that a listing is not met, without discussion of the evidence, is "beyond judicial review and must be remanded." IN this case, the ALJ found that listing 12.08 was not met, but failed to mention listing 12.04 anywhere in his decision. His discussion of listing 12.08 does not incorporate 12.04. Although both listings have the same "B" criteria, listing 12.04 has C criteria which 12.08 does not have. The ALJ failed to address the 12.04C criteria. He noted that the plaintiff admitted he could concentrate and get along with others. However, the medical evidence indicated that the plaintiff's outward statement and affect cannot be trusted. Agnes Wladyka, Esq., Mountainside, NJ

Simmons v. Commissioner of Social Security, Case 2:09-cv-01677-SDW (D.N.J. Mar. 8, 2010); 2010 U.S. Dist. LEXIS 20488 – 20 pages

1765. Fully favorable ALJ decision after District court remand. The claimant was found eligible for SSI childhood disability benefits as of the date of his application. The claimant has Type I insulin-dependent juvenile diabetes mellitus and a language disorder. At the remand hearing, the ALJ found that the child met listing 109.08. He needs several shots of insulin every day; he has recurrent, at least weekly, episodes of hypoglycemia and fatigue, headaches, and crankiness associated with these episodes. His blood sugar must be checked several times per day and he requires snacks to combat low blood sugar. The ALJ assigned "the most significant weight" to evidence from treating sources and "significant weight" to school records and CE reports. This evidence corroborated the mother's testimony. Only "minimal weight" was assigned to the DDS assessments. For the District court remand, see LAM 1748. J.P. Morella, Esq., Patterson, LA.

Fully Favorable ALJ decision on SSI childhood disability and diabetes (Oct 29, 2009) – 8 pages.

1748. District Court remand of an SSI childhood disability case to obtain an updated CE regarding juvenile diabetes and to specifically determine whether the plaintiff meets Listing 109.08. The ALJ summarily concluded that the plaintiff did not meet or equal a listing, but did not identify any listing specifically. Nor did the ALJ provide any explanation as to how he reached the conclusion that no listing was met. In *Audler v. Astrue*, 501 F.3d 446 (5th Cir. 2007), the court held that 42 USC 405(b) requires the ALJ to discuss the evidence and explain why a claimant is not disabled at each step. In this case, the ALJ did not even refer to the listing for juvenile diabetes, Listing 109.08. For the ALJ decision after remand, see LAM 1765. J.P. Morella, Esq., Patterson, LA.

Mickey Campbell o/b/o D.C. v. Commissioner of Social Security, Civil Action No. 07-1690 (W.D.La. Feb 9, 2009) 2009 WL 335275; 2009 U.S.Dist. LEXIS 9869 – 9 pages

LISTINGS OF IMPAIRMENTS – EQUIVALENCE

1743. District court remand when the ALJ failed to provide adequate analysis at step three. The ALJ discussed only whether her mental impairments met a listings, but did not discuss whether her knee problems satisfied Listing 1.02A. As a result, she was prejudiced by the ALJ's failure. The plaintiff presented significant medical evidence of problems with her knees, e.g. eight knee surgeries, calcifications, joint narrowing, instability, degenerative and osteoarthritis changes. The court relied on precedent cited by plaintiff's attorney, *Audler v. Astrue*, 501 F.3d 446 (5th Cir. 2007), which requires the ALJ to discuss whether a claimant's impairments meet a particular listing. Suzanne Villalon-Hinojosa, Esq., San Antonio, TX.

Hill v. Astrue, Civil Action No. 5:08-CV-168-BG (N.D.Tex. Apr. 30, 2009) – 8 pages

1724. District Court decision holding that the ALJ must determine if the combination of impairments is medically equivalent to a listing if the claimant presents evidence to establish equivalence. The plaintiff is diagnosed with obesity, several musculoskeletal impairments and several mental disorders. Listing 1.00Q requires consideration of the combined effects of obesity with musculoskeletal impairments which can be greater than

the effects of each separately. The ALJ failed to give convincing reasons for rejecting the treating physician's opinion that her back problems are compounded by severe morbid obesity and that she is further limited by her mental disorders. The court also ordered that, on remand, the ALJ consider additional evidence submitted to the Appeals Council that was found to be "not material. Arthur Stevens, Esq.,Medford, OR.

Delgado v. Astrue, Civil No. 08-30470CL (D.Ore. Feb. 18, 2009) – 21 pages

LUPUS

1773. District court remand for further development of the record. The ALJ erred when he minimized the diagnosis of lupus made by treating sources as being "remote" and not made within the "adjudicatory period." The plaintiff repeatedly testified at the hearing that she could nto receive treatment for lupus after she lost her health insurance when forced to leave work. The more recent CE diagnosed fatigue, noting that it could be a manifestation of lupus, but he did not have the earlier medical records from the treating physicians. The CE also erred in stating when lupus was first diagnosed. There was no discussion that the plaintiff's symptoms had diminished or changed since the original lupus diagnosis. The ALJ also erred in finding the plaintiff not credible due to the lack of medical evidence. Arthur Steven, Esq., Medford, OR.

Laplante v. Commissioner of Social Security, Case No. CV 08-3104-TC (D.Ore. Nov. 12, 2009) – 11 pages.

1600. District court finding that the plaintiff was disabled as of her date last insured, which was December 31, 1993. The plaintiff had alleged disability since 1988 due to lupus. At the initial hearing and at the second hearing after a court remand, the testimony focused on the plaintiff's limitations prior to her date last insured, although the lupus was not definitely diagnosed until after that date. The ALJ improperly found the claimant not credible because her subjective complaints were not consistent with her daily activities. The court found that the record does not support the ALJ's description of her daily activities and concluded that the ALJ did not state clear and convincing reasons for rejecting her credibility. The court also rejected the ALJ's reasons for rejecting testimony regarding the plaintiff's daily activities provided by a neighbor. Lay testimony is competent evidence which the ALJ must take into account unless he gives legitimate reasons for the rejection. The court "credited as true" the testimony of the plaintiff and her neighbor. And also relying on the delay due to the first remand, the court concluded that the plaintiff was disabled and a second remand would not shed any additional light on the issue. ***Tabacchi v. Barnhart***, Case No. Cv 05-3104-KI (D.Ore. Sept. 28, 2006)

Robert F. Webber, Esq., Medford, OR – 17 pages

MANUAL DEXTERITY

1791. ALJ decision that the claimant was disabled under Grid Rule 202.09. The claimant had multiple right hand surgeries due to a workplace injury, resulting in amputation of several digits and skin grafts. His right hand is his dominant hand. His treating orthopedic hand surgeon restricted the claimant from heavy lifting and repetitive manipulation with the right upper extremity. The ALJ found the claimant limited to light work, with the ability to perform right arm gross manipulations "frequently" but fine/finger manipulation only "occasionally." As the claimant is closely approaching advanced age,

is illiterate, and has an unskilled work history, he is disabled under Rule 202.09. Steven G. Rosales, Esq., Sante Fe Springs, CA.

ALJ decision on upper extremity manipulation (Mar. 22, 2010) – 12 pages including Decision and Counsel's letter to claimant.

MEDICAL-VOCATIONAL GUIDELINES (GRIDS)

1764. District court remand because the ALJ applied the Grid rules only as of the plaintiff's initial onset date, and not as of her alternate alleged onset date, 10 months later, which was her 50th birthday. If the Grid Rule had applied when she turned 50 and if limited to sedentary work, a finding of "disabled" would have been warranted. The court also ordered that the ALJ consider the threshold issue of whether the Grids can be meaningfully applied in light of all of the plaintiff's limitations. The ALJ had found that the plaintiff could perform light work, but the court held that the ALJ's RFC finding was not supported by substantial evidence for several reasons: failure to obtain complete medical opinions; failure to follow SSR 96-7p regarding her credibility; and failure to follow SSR 02-1p regarding obesity. John E. Horn, Esq., Finley Park, IL.

Motley v. Astrue, No. 07 C 3489 (N.D.Ill. Oct. 28, 2009) - 25 pages including Magistrate's R&R, District Court Order entering Judgment.

MEDICATION – SIDE EFFECTS

1729. Appeals Council remand for a new hearing. The claimant testified that she needed unscheduled breaks during the day due to fatigue. The VE testified that if the claimant needed unscheduled breaks, she would not be able to perform the jobs the VE previously identified. The Appeals Council found that the ALJ erred by failing to address the claimant's allegations and her credibility on this issue. The ALJ also failed to consider the side effects of the claimant's medications, which she testified caused fatigue and dehydration. Testimony about these side effects must be acknowledged and the claimant's credibility addressed. In addition, the ALJ improperly relied on the RFC finding of the DDS physician, even though that doctor did not have the more recent medical evidence and testimony. On remand, the ALJ will also determine whether work performed after the alleged onset date was SGA. John Bowman, Esq., Davenport, IA.

Appeals Council remand (February 20, 2009) – 5 pages

1680. District Court decision where the ALJ failed to consider the side effects of the plaintiff's medications for her seizure disorder. She testified that she lost her last job after falling asleep due to the medications prescribed by her treating physicians. A VE testified that if the side effects of the medications caused the plaintiff to doze off two or three times daily for 10 to 30 minutes each time, as she testified, that would be enough to preclude any employment. The ALJ's decision did not discuss any of this evidence. The court remanded the case for the ALJ to address this issue, including the taking of additional evidence, if appropriate. John E. Horn, Esq., Tinley Park, IL.

Racicik v. Astrue, No. 07C 3297 (N.D.Ill. May 8, 2008) – 20 pages

MEDICAL EXPERT

1808. Appeals Council remand for several reasons, including the fact that the ME's specialty was not consistent with the claimant's impairment. The ME was an orthopedic

surgeon. The claimant's main impairment was sensory idiopathic neuropathy, which is usually treated by a neurologist. Kenneth Isserlis, Spokane, WA

Appeals Council remand, July 23, 2010 – 4 pages

1803. District court remand finding that the ALJ erred by taking testimony from the ME by telephone. Although HALLEX I-2-5-30 provides for ME or VE testimony to be taken by telephone or video teleconferencing, the regulations authorize only two methods for taking testimony: in person and by video teleconference. 20 C.F.R. § 404.950 and § 404.936(c). There is no mention of telephonic testimony in the regulations. The parties had previously agreed to a remand for the ALJ to consider the weight given to all medical opinion evidence. In the ALJ's decision following remand, he gave "great weight" to the ME's testimony, which was provided by telephone. Further, the transcript contains many gaps of the ME's telephonic testimony, making it difficult to understand the basis for his opinions. The court holds that the Commissioner has not met his obligation to provide a copy of the transcript of the record and "the practice of accepting critical testimony via telephone is not universally applauded." Whether the practice is or is not authorized by the regulations, remand is required by the circumstances of this case. Francis M. Jackson, Esq., South Portland, ME.

Ainsworth v. Astrue, Civil No. 09-cv-286-SM (D.N.H. June 17, 2010); 2010 DNH 105; 2010 U.S. Dist LEXIS 60686; 154 SSRS 974 – 12 pages

1715. The district court adopted the Magistrate Judge's Report and Recommendation and rejected the Commissioner's objections and remanded the case for further proceedings. The ALJ improperly adopted the "stale opinions" of non-examining DDS doctors over the treating physician's opinion and could not reach the finding of "not disabled" without obtaining testimony from a medical expert. Without that testimony, the rejection of the treating physician's findings was made without "specific and good reasons." And, after reviewing the evidence of record, there was no adequate basis to reject those findings. If the ALJ "possessed some doubt as to the thoroughness or accuracy of [the treating physician's opinion], the proper course of action here was to summon a medial expert to provide him with more information or to interpret the recent objective medical evidence. . ." Dianne Newman, Esq., Akron, OH.

Arena v. Astrue, Case No. 5:07-cv-766-KMO (N.D.Ohio, Sept 8, 2008) – 10 pages.

1697. District Court remand, finding that the ALJ violated SSR 83-20, which requires an ALJ to consult a medical advisor when he finds disability but must infer onset from ambiguous evidence. In this case, the ALJ skipped over the question of present disability and denied the claim by finding that the claimant was not disabled as of her date last insured. The court found no support for the Commissioner's position that the opinion of a medical advisor was not required in this case. SSR 83-20 "does not authorize ALJs to circumvent the ruling by withholding a finding on present disability and denying the claim based upon a determination that he claimant was not disabled as of her date last insured." The agency's interpretation of the ruling also is inconsistent with the public policy it was meant to address. Some progressive impairments, such as Huntington's Disease (the plaintiff's impairment) are not diagnosed until long after the alleged onset

date. Defendant's Motion to reconsider the determination is later denied (2008 U.S.Dist. LEXIS 84462, Sept. 19, 2008). Raymond J. Kelly, Esq., Manchester, NH.

Ryan v. Astrue, Civil No. 08-cv-17-PB (D.N.H. Aug. 21, 2008); 2008 DNH 148; 2008 U.S.Dist. LEXIS 65080; 134 SSRS 323; Not for publication – 21 pages

1605. District Court reversal for an immediate award of benefits. The ALJ had erred in basing the RFC determination on the opinions of the ME who had never treated or examined the plaintiff. The court rejected the opinion of this nonexamining medical expert because he "based his opinions on what the ordinary person could do with the diagnosed physical impairments and not what this particular plaintiff could do." The ALJ also erred in rejecting the opinions of the longtime treating physician, a position that the government did not defend in court. The treating physician had found significant psychiatric impairments and functional limitations, which precluded impairment. The ME did not evaluate the mental limitations in this case. The court found the record to be fully developed. Kenneth Isserlis, Esq., Spokane, WA.

Fry v. Barnhart, No. CV-05-0269-MWL (E.D.Wash. Aug. 11, 2006) – 18 pages

MEMORY LIMITATIONS

1597. District Court remand finding that the ALJ erred in posing a hypothetical question to the VE which indicated that the plaintiff could not perform work requiring "close concentration." It is "not apparent" how such a restriction related to the conclusion of two state agency psychologists that the plaintiff "often" had deficiencies in concentration. In addition, the ALJ's restriction to jobs that did not involve assembly line work or fast pace "is not clearly related to the reviewers' statement that plaintiff often had deficiencies of persistence and pace." The ALJ found that the claimant had only "moderate" deficiencies, but did not explain why the state reviews' opinions were rejected. The ALJ also erred in his evaluation of the plaintiff's memory impairment. There was a difference between the extremely low scores on the Wechsler memory test and a statement that she could remember simple or basic instructions. This inconsistency required the Commissioner to make some further inquiry about the plaintiff's ability to perform the basic memory tasks required by the jobs cited by the VE in response to the ALJ's hypotheticals. A hypothetical question referring to the inability to perform jobs involving detailed or complex instructions does not adequately describe the memory deficits in the record. ***Sanders v. Barnhart***, Case No. 2:04-cv-0726 (S.D.Ohio, Nov. 15, 2006).

Timothy F. Cogan, Esq., Wheeling, West Virginia – 13 pages

MENTAL IMPAIRMENTS

1782. District court remand. The ALJ has the duty to identify relevant listings. The mere conclusion that a listing is not met, without discussion of the evidence, is "beyond judicial review and must be remanded." IN this case, the ALJ found that listing 12.08 was not met, but failed to mention listing 12.04 anywhere in his decision. His discussion of listing 12.08 does not incorporate 12.04. Although both listings have the same "B" criteria, listing 12.04 has C criteria which 12.08 does not have. The ALJ failed to address the 12.04C criteria. He noted that the plaintiff admitted he could concentrate and get along with others. However, the medical evidence indicated that the plaintiff's outward statement and affect cannot be trusted. Agnes Wladyka, Esq., Mountainside, NJ

Simmons v. Commissioner of Social Security, Case 2:09-cv-01677-SDW (D.N.J. Mar. 8, 2010); 2010 U.S. Dist. LEXIS 20488 – 20 pages

1721. District Court decision finding that the ALJ erred in relying on the plaintiff's failure to seek or continue treatment for his mental impairments and his numerous missed appointments as the main reasons for rejecting his credibility regarding limitations caused by those impairments. The ALJ also rejected letters from the plaintiff's mother and sister. Instead, the ALJ relied on MMPI testing, which suggested possible malingering. However, the same testimony suggested psychological distress, with ability to work moderately to markedly impaired. A subsequent psychological CE noted some possibility of malingering, but stated that the plaintiff' May have been anxious or emotionally distressed at the CE." The ALJ also erred in relying on negative parts of reports, while disregarding other parts or the reports from other mental health professionals. ***Dukovski v. Astrue***, Case No. 5:07CV3899 (N.D.Ohio Mar. 3, 2009).

Dianne Newman, Esq., Akron, Oh – 13 pages

1718. The issue in this case was whether the plaintiff was disabled prior to his date last insured (DLI). The court stated that the medical evidence supported a finding that the mental impairments existed prior to and shortly after the DLI. "[E]vidence after the DLI can be relevant . . , particularly in this case where the ALJ was determining whether the plaintiff was disabled up to 20 months after the DLI. On remand, the ALJ must address whether the actual onset date was before August 2004, the onset date found in a subsequent SSI application filed in that month. The later SSI onset date does not rule out an earlier onset date in this prior Title II claim. In the subsequent SSI claimant, there was no requirement to determine onset prior to the application date. In this case, the ALJ was required to determine the appropriate onset date if the medical evidence suggested it was prior to August 2004. The court agreed with the plaintiff that the August 2004 onset date was inconsistent with the Plaintiff's allegations and at least some of the medical evidence. On remand, the ALJ cannot refuse to consider the evidence after the DLI when it supports the plaintiff, but then rely on evidence from the same period to find against the plaintiff. The court also discussed the use of GAF scores and other evidence from the treating physician. Chris Noel, Esq., Denver, CO.

Noller v. Astrue, Case No. 07-cv-01796-WYD (D.Colo. Sept. 30, 2008); 2008 U.S.Dist. LEXIS 82854; 135 SSRS 978 – 24 pages.

1699. Appeals Council remand because the record was unclear regarding the nature of the severity of the claimant' mental impairments. The claimant's attorney obtained a psychological explanation, where the psychologist diagnosed mental retardation, which imposed serious limitations in the claimant's functional ability. Additional evidence from the psychologist, submitted to the Appeals Council "suggest that the claimant's mental impairment may be more severe than previously indicated." In that letter, the psychologist elaborated on his earlier report and reiterated his earlier opinion that the claimant had serious deficits in intellectual functioning and would have difficulty performing most work activities. On remand, the ALJ will obtain additional evidence about the claimant's mental impairments and supplemental evidence from a VE if warranted. John Bowman, Esq., Davenport, IA

Appeals Council Remand of Evaluation of Mental Impairments (May 27, 2008) – 7 pages, including Notice of Order, Order of Appeals Council Remanding Case to ALJ, Letter brief of Claimant to Appeals Council

1692. District court award of benefits. The ALJ erred in discrediting the opinions of the treating physician and consultative examining physician (CE). The ALJ found that the treating psychiatrist's treatment notes were contradictory and did not support the doctor's opinions. However, the ALJ failed to provide an explanation. The ALJ also failed to recognize that the plaintiff's mental condition "waxed and waned over time." "The ALJ's failure to acknowledge the cyclical pattern of plaintiff's symptoms smacks of 'cherry picking' the record, which is improper." For instance, the ALJ found a "consistent" GAF score of 55, while ignoring GAFs of 25 and 30 when the plaintiff was hospitalized for suicide attempts. The ALJ also erred in finding that the plaintiff was able to perform activities of daily living (ADLs). An individual can be markedly limited in ADLs, even if she engages in a wide range, if they are highly structured. See Listing 12.00C.1. Here, the treating psychiatrist recommended close monitoring by the plaintiff's husband. Also, socializing with family and friends does not mean that the plaintiff has the ability to interact appropriately with co-workers, supervisors, and the public. See Listing 12.00C.2. The ALJ also improperly discredited the CE's opinion regarding the plaintiff's moderate to significant limitations in concentration, persistence, and pace. Discounting the CE's opinion because it is from a one-time examination is "both illogical, since such is the inherent nature of a [CE], and ironic in this instance, given that the opinion to which the ALJ ultimately afforded the greatest weight was based on no examination at all. Paul Radosevich, Esq., Denver, CO.

Daniel v. Astrue, Civil Action No. 07-cv-01490-REB (D.Colo. Aug. 13, 2008); 2008 U.S.Dist. LEXIS 62820; 133 SSRS 471Order Reversing Disability Decision and Directing Award of Benefits, Appellant's Opening Brief – 24 pages.

1679. Appeals Council remand for additional development, including a mental status CE, updated school records and teacher assessments regarding the claimant's ability to function in school. The medical record includes a Multiaxial Diagnostic Formulation indicating an Axis V rating of "35," which is indicative of major impairment in several areas under the DSM –IV. This assessment suggests the possibility that the claimant's impairments meet or equal listing 112.04 and 112.11. The record contains no medical evidence to refute the assessment. John Bowman, Esq., Davenport, IA.

Appeals Council Remand on mental impairments (April 24, 2008) – 3 pages

1667. Appeals Council remand because the record was unclear regarding the nature and severity of the claimant's mental impairment and because the ALJ made no effort to obtain updated medical evidence. The ALJ based his finding that the claimant's depression was not "severe" on a record with no current evidence. The claimant has a history of mental illness and evidence in the record indicates that she has been diagnosed with various mental illnesses, including major depression, personality disorders and dysthemia. At the hearing, she testified that her depression had gotten worse. The Appeals Council concluded that updated medical evidence was needed. Because this was

the second remand the case is to be assigned to a new ALJ. Lynn Stevens, Esq., Atlanta, GA.

Appeals Council Remand – 3 pages

1654. District court reversal because the ALJ failed to assign great weight to the VA disability rating as required by *McCartey v. Massanari*, 298 F.3d 1072 (9th Cir. 2002). The VA found that the plaintiff's disability was "permanent and total" and that he is "unable to secure and follow a substantially gainful occupation due to disability." The ALJ's reasons for rejecting the VA rating "are neither persuasive nor valid reasons." The ALJ also relied on periods of stability and missed the fact that the plaintiff lived in a supportive, sheltered situation. The mental impairment listings require that SSA consider the individual's ability to function outside that environment. The court awarded benefits because if all impairments rejected were credited, the plaintiff would be found disabled. Arthur Stevens, III, Esq., Medford. OR.

Kittleson v. Astrue, CV-06-3089-ST (D.Ore. Oct. 30, 2007) – 30 pages

MENTAL RETARDATION – LISTING 12.05C

1816. Appeals Council remand here the ALJ erred in finding that the claimant did not meet or equal listings 112,02, 112,05, 12,02 or 12.05. The claimant's recent IQ test results were 63 to 65, with a diagnosis of mild mental retardation. The claimant had a higher IQ when tested in 1998, but suffered a head injury in 2002. The ALJ should have discussed the criteria of the relevant listings. Thad J. Murphy, Esq., Davenport, IA.

Appeals Council remand (July 15, 2010) – 3 pages

1681. District Court remand to determine whether the plaintiff has deficits of adaptive functioning initially manifested before age 22. The ALJ relied only on the plaintiff's strong work history to determine that this requirement of listing 12.05C was not met. The ALJ's decision lacks any application of a definition or standard used to assess deficits in adaptive functioning, e.g. the DSM IV which provides that deficits are shown by significant limitations in a least two of the following skill areas: communication; self care; home living; social/interpersonal skills, use of community resources; self-direction; functional academic skills; work; leisure; health; and safety. On remand, the ALJ is ordered to specifically address the plaintiff's arguments related to her assessed ability to perform mathematics and language at a level one in her RFC. The plaintiff had alleged that she did not have the level of mathematics or language ability. Paul Radosevich, Esq., Denver, CO.

Rodriguez v. Astrue, Civil Case No. 07-cv-00906-LYB (D.Colo. May 2, 2008); 2008 U.S.Dist. LEXIS 90634 – 42 pages, including the Order, Plaintiff/Appellant's Opening Brief, Plaintiff's Reply Brief.

1678. The Appeals Council remanded the case due to inconsistent I.Q. scores. Testing in October 2006 includes a statement by the psychologist that he was unable to vouch for the reliability of the scores, at least in part due to a lack of background information for review. Testing in September 2007 by a different psychologist and performed at the request of the claimant's attorney resulted in listing level I.Q. scores. That psychologist found the scores to be reliable and valid indicators of the claimant's current intellectual

functioning. It is unclear what, if any, background information the second psychologist reviewed. Additional development is necessary regarding the nature and severity of the claimant's mental impairment, to include mental status examination with updated I.Q. testing by an examiner who has review all of the relevant background information and ME testimony. John Bowman, Esq., Davenport, IA.

Appeals Council remand order on IQ scores (March 27, 2008) – 4 pages

1666. Fully Favorable Appeals Council decision finding that the claimant's impairments met listing 12.05C and 12.05D. The ALJ denied the claim because he found no other impairment imposing "significant work-related limitation of unction" in addition to the listing level IQ score. In fact, the claimant has several other severe impairments, including osteotomy, obesity, and hearing loss. The Appeals Council obtained a medical consultant who found that he claimant's cognitive deficit met the criteria of listings 12.05C and 12.05D.The decision was issued less than two months after the Request for Review was filed. Richard Fischer, Esq., Odessa, TX

Fully Favorable Appeals Council decision (Sept 14, 2007), Notice of Appeals Council Decision, Decision of the Appeals Council, Letter Brief to the Appeals Council – 12 pages

1659. Third Circuit remand where the ALJ did not afford appropriate weight to the appellants' IQ score and her testimony regarding her mental deficiencies prior to age 22. The ALJ erred in finding that she did not meet her burden for establishing mental retardation. The ALJ did not reject the plaintiff's IQ score of 58. He gave the report less weight because there was no record that the appellant was diagnosed with mental retardation prior to age 18. In the Third Circuit, the plaintiff has the burden of establishing the existence of mental retardation prior to age 22. The plaintiff is not required to provide evidence of IQ testing prior to age 22, but only need produce evidence that supports onset before age 22. The plaintiff's testimony was similar to that in *Markle v. Barnhart*, 324 F. 3d 182 (3rd Cir. 203), even thought she was unable to produce actual school records because the school had closed. The ALJ's analysis is insufficient to rebut the plaintiff's evidence regarding onset. The court remanded because the ALJ had no severe impairment due to mental retardation. Eric Fischer, Esq., Elkins Park, PA.

Cortes v. Commissioner of Social Security, No. 06-3562 (3rd Cir. Nov.28, 2007); 2007 US App. LEXIS 27555. Notice of Judgment, Judgment, Opinion of the Court – 22 pages

1641. Eighth Circuit remand to the ALJ for reconsideration of the plaintiff's IQ scores, because it was unclear to the court whether the ALJ expressly rejected the IQ scores, and because the ALJ erroneously credited a lack of mental retardation diagnosis. Contrary to the ALJ's findings, the Eight Circuit found that there is some evidence that the plaintiff's deficiencies manifested before age 22, as required by Listing 12.05. As in *Maresh v. Barnhar*t, 438 F.3d 897 (8th Cir 2006), the plaintiff was a low-grade dropout and had participated in special education classes. A formal diagnosis of mental retardation is not required for listing 12.05. John Bowman, Esq., Davenport, IA

Christner v. Astrue, No. 06-3908 (8th Cir. Aug. 16, 2007); *Published at 498 F.3d 790 (8th Cir. 2007)* – 7 pages

1598. District Court award of benefits because the plaintiff's condition meets listing 12.05C.LiSting 12.05C does not require a formal diagnosis of mental retardation. ***Maresh v. Barnhart***, 438 F.3d 897, 899 (8th cir. 2006) and SSA's response to comments on changes to listing 12.05C (67 Fed. Reg. 20018, 20022 (Apr. 24, 2002). Under ***Maresh***, if the three criteria of 12.05C are met, then the claimant meets the listing, even without a formal diagnosis. The plaintiff met the three 12.05C criteria in this case: 1) she has an IQ between 60 and 70; 2) she has another impairment causing "significant" work-related function; and 3) there is evidence that developmental delays began before age 22. On the third requirement, the plaintiff is not required to show evidence from the period before age 22. It was sufficient to provide IQ tests that were administered at age 40. Under ***Maresh***, absent evidence to the contrary, a person's IQ is presumed to remain stable over time. There is no such contrary evidence in this case. ***Phelps v. Barnhart***, Case4 No.: CV.04-1657-PK (D.Ore. Dec. 20, 2006)

Alan Graf, Esq., Summertown, TN – 13 pages

MULTIPLE SCLEROSIS

1827. District Court award of benefits for a period for 4 years and 2 months, and then for the nine-month trial work period. The plaintiff suffered from Multiple Sclerosis. The ALJ erred in finding her not disabled due to earnings above the SGA level from her part-time work. The plaintiff's primary limitation caused by the MS was fatigue, which the court found to be a constant problem since her onset date. The ALJ failed to give appropriate weight to the opinions of the treating and examining sources who stated that she could not work full time. The plaintiff's MS began as "relapsing-remitting" where she was relatively stable between exacerbations, but later converted to "secondary progressive MS," which results in a continuous downhill course. The ALJ failed to address the treating neurologist's note that the plaintiff was unable to work full time. Further, a statement by a doctor that the exam showed "no change" does not mean that it was "normal." . The plaintiff was represented at the administrative level by Thomas Bush, Esq., Milwaukee, WI and in two federal court civil actions by Fred Daley, Esq. and Heather Freeman Esq., Chicago, IL.

Sucharski v. Astrue, Case No. 089-C-2484 (E.D.Wis. Sept. 25, 2009); 2009 U.S. Dist. LEXIS 95878; 146 SSRS 577 – 35 pages

1820. District court remand, finding that the ALJ erred in finding that the plaintiff's multiple sclerosis did not meet or equal listing 11.09. Based on the court's review, the only possible support for the ALJ's statement that the listing was not met, came from the "similarly summary statement" provided by the medical expert who also found that the plaintiff could perform a full range of sedentary work. "The ALJ's failure to cite to any specific evidence in the record that she uses to support [her] finding is beyond meaningful review." The record includes medical evidence from treating sources that corroborate the diagnosis of multiple sclerosis with symptoms required by listing 11.09. The ALJ also failed to properly consider the plaintiff's credibility, given that evidence of record contradicted the ALJ's finding. Agnes, Wladyka, Esq., Mountainside, NJ.

Palmisano v. Commissioner of Social Security, Civil Action No. 09-03410 (SDW)(D.N.J. Sept 23, 2010); 2010 U.S. Dist. LEXIS 100128 – 14 pages

1651. District Court remand because the ALJ failed to properly consider the fatigue findings by the plaintiff's treating physician as a basis for ht plaintiff's inability to work on a sustained basis. The plaintiff has been diagnosed with multiple sclerosis. The court held "the findings by the ALJ that the Plaintiff had no nonexertional limitations cannot be sustained." As a result, use of the grids to deny the claim was error and a VE should have testified. The failure to recognize the fatigue also impacted the ALJ's ultimate determination as to the plaintiff's credibility. Steven Stepper, Esq., West Palm Beach, FL.

Mendez v. Astrue, Case No. 06-61252-CIV-SEITZ/DUBE (S.D.Fl. Oct. 10, 2007) – 16 pages

NON-ENGLISH SPEAKING

1662. District court remand for another hearing. The ALJ erred by failing to consider the opinion of the treating physician, inadequately reviewing the medical records, making unsupported assumptions about the plaintiff's work history and providing a perfunctory evidentiary hearing at which the plaintiff was not represented. The plaintiff does not read or write English and was assisted at the hearing by his friend and neighbor. Chris Noel, Esq. Bolder, CO.

Altamirano v. Astrue, Civil Action No. 06-cv-02285-RPM (D.Colo. Jan 4, 2008); 2008 U.S. Dist. LEXIS 40619; 125 SSRS 247 – 4 pages

OBESITY

1821. Appeals Council remand because the ALJ decision does not contain an evaluation of the claimant's obesity, as required under SSR 02-1p. The claimant is 4 feet, 11 inches tall and her weight is 158 pounds. Her Body Mass Index is 31.9, which falls under the category of Type I obesity. Consideration of the obesity with other impairments and its functional impact is required by SSR 02-1. The ALJ also failed to provide specific reasons for the credibility finding as required by SSR 96-7p. Thad Murphy, Esq., Davenport, IA.

Appeals Council remand on obesity (Aug. 27, 2010) – 3 pages

1788. Appeals Council remand when the ALJ failed to list obesity as a "severe impairment" yet later stated in his decision that obesity was considered in determining the claimant's RFC. References are made to the claimant's weight and height which suggest a Body Mass Index of around 40, yet the ALJ did not follow an evaluation consistent with SSR 02-1p and also did not discuss how the obesity was factored into the RFC finding. On remand, the ALJ must consider the effect of the claimant's obesity on her overall ability to perform work functions per SSR 02-1p. Michael Depress, Esq., Davenport, IA.

Appeals Council remand on obesity (March 16, 2010) – 4 pages

1775. Appeals Council remand because the ALJ failed to consider the claimant's obesity. Her BMI classified her obesity as "severe" yet the ALJ failed to evaluate obesity as required by SSR 02-1p. This Ruling requires that, in cases of obesity, the claimant's

ability to perform routine movement and the physical activity necessary to function in a work environment must be evaluated. The functional limitations must be incorporated into the RFC assessment and must be considered in vocational evidence. John A. Bowman, Esq., Davenport, IA.

Appeals Council remand on obesity and SSR 02-1p. (Nov. 24, 2009) – 4 pages

1746. Appeals Council remand due to several errors. First, the ALJ did not evaluate the severity of the claimant's obesity as required by SSR 02-1p. The record showed that the claimant was 5 feet 7 inches tall and weight 230 pounds, with a body mass index of 36. Second, the ALJ rejected the treating source opinion, in part, because the signature is illegible. If it is unclear that this was from a treating source, the source should have been re-contacted. Also, the ALJ found the claimant's testimony not credible but did not consider the factors required in evaluating subjective complaints, e.g. intensity, persistence, prior work record, and side effects of medication. John Horn, Esq., Tinley Park, IL.

Appeals Council remand on obesity and SSR 02-1p. (July 1, 2009) – 4 pages

1732. District court remand where the ALJ did not properly consider the plaintiff's obesity as required by SSR 02-1p. The Ruling is binding on the agency. The government argued that the ALJ is excused from considering obesity because the plaintiff did not timely raise it as an impairment. The court "cannot seriously entertain" this argument, since the record is "replete with references" to the plaintiff and it is an impairment that should have been considered by the ALJ. "Plainly, the ALJ committed legal error by completely ignoring SSR 02-1p. . . "The fact that the ALJ may have "factored in" the plaintiff's obesity does not remedy his error since he referred to her obesity at several points in a way that is contrary to law and may have prejudiced her claims, for instance, to find her less credible. The court remanded the case for a new hearing before a different ALJ, because the ALJ's findings were "contaminated by his contagion of legal error." Phyllis E. Rubenstein, Esq., Montpelier, VT.

Macaulay v. Astrue, Case 2:08-CV-32 (D.Vt. Apr. 28, 2009); 262 F.R.D. 381; 2009 U.S.Dist. LEXIS 105409 – 38 pages

1731. District court decision holding that the ALJ failed to follow SSR 02-1p or to consider the plaintiff's obesity, which limited her ability to stand and walk, consistent with a "limited " light work RFC. The court specifically noted that SSR 02-1p states that a claimant may experience more pain and limitation than expected form arthritis when she is obesity. The ALJ also did not consider the side effects of the plaintiff's medication. The court remanded for the ALJ to reevaluate his RFC finding to include the impact of Plaintiff's obesity on her other impairments and her RFC. Dianne Newman, Esq., Akron, OH.

Budd v. Astrue, Case No. 5:08CV1976 (N.D.Ohio May 13, 2009) – 10 pages

1724. District Court decision holding that the ALJ must determine if the combination of impairments is medically equivalent to a listing if the claimant presents evidence to establish equivalence. The plaintiff is diagnosed with obesity, several musculoskeletal

impairments and several mental disorders. Listing 1.00Q requires consideration of the combined effects of obesity with musculoskeletal impairments which can be greater than the effects of each separately. The ALJ failed to give convincing reasons for rejecting the treating physician's opinion that her back problems are compounded by severe morbid obesity and that she is further limited by her mental disorders. The court also ordered that, on remand, the ALJ consider additional evidence submitted to the Appeals Council that was found to be "not material. Arthur Stevens, Esq., Medford, OR.

Delgado v. Astrue, Civil No. 08-30470CL (D.Ore. Feb. 18, 2009)– 21 pages

1677. District Court decision awarding SSI benefits. The ALJ failed to provide good reason for rejecting the opinion of the plaintiff's treating physician. The ALJ found that the fact that the doctor prescribed exercise as a part of the plaintiff's treatment regimen indicated that she was not disabled. The court found that recommending to a morbidly obese individual that she try to lose weight through exercise "is in no was inconsistent with the conclusion that at the time such advice was given the individual was incapable of working." Further, the ALJ "fly-specked" one item from the doctor's notes. "[T]his one line . . . excerpted from the totality of the doctor's patient's notes does not create an inconsistency with the conclusion that the plaintiff is disabled. The court noted other improper findings by the ALJ, including that the treating physician's opinion should have been given great weight. Marcia Margolius, Esq., Cleveland, OH.

Branch v. Commissioner of Social Security, Case No. 1:07CV0026 (N.D.Ohio Nov. 9, 2007) – 35 pages, including Magistrate's Report and Recommended Decision, Order, Judgment Entry, Plaintiff's Brief on the Merits.

1648. District Court reversal and award of benefits. The case had been previously remanded by the Appeals Council to evaluate the plaintiff's obesity in accordance with SSR 02-1p. At the remand hearing, the ME was asked whether the plaintiff's impairment met the cardiac listings and he responded that there was "borderline confirmation" but he was asked no follow up questions. The ME was not asked how obesity affects the plaintiff's cardiac impairment. The VE testified that competitive work would not be possible based on the plaintiff's need to elevate her legs during the workday. Thomas A. Krause, Esq., Des Moines, IA.

Schrader v. Astrue, 4:06-cv-388 RWP-TJS (S.D. Iowa Sept. 29, 2007) – 14 pages

ONSET DATE

1805. District court remand limiting to scope of the remand to the period under appeal. The plaintiff had received a partially favorable decision but appealed the onset date, which he alleged should be March 2006. The ALJ found an onset date of May 17, 2008, the date before the plaintiff's 50th birthday. Although the Commissioner agreed that the case should be remanded, he argued that the scope of the remand should be "unrestricted" per 20 CFR 404.983, which says that "[a]ny issues relating to your claim" may be considered by the ALJ on remand. But cases cited by SSA support the proposition that a remand may be reviewed in its entirety, not that it must be. The settled rule is that courts have the authority to limit the scope of review on remand. Francis Jackson, Esq., South Portland, ME.

Jameson v. Astrue, Civil No. 09-cv-237-JD (D.N.H. Mich 15, 2010); 2010 U.S. Dist. LEXIS 38033 – 10 pages

1797. District Court decision limiting the scope of the Appeals Council remand. The plaintiff had appealed the onset date of the ALJ's decision. The Commissioner conceded in court that there was an "inadequate rationale" for the later onset date and moved for a remand. The Commissioner argued that the scope of remand should be "unrestricted" per 20 CFR § 404.983, which says that "[a]ny issues relating to your claim" may be considered by the ALJ on remand. The court agreed with the plaintiff that the remand should be limited in scope and that the district courts have the power to limit. Instructions with the remand order should turn on the nature of the ALJ's error. In this case, both parties stipulated that the ALJ's error related only to the onset date and they did not identify any errors regarding the award of benefits from the later onset date. "Accordingly, there is no reason for the SSA to expend further resources on that issue, or for [the plaintiff] to face the risk (however remote) of losing the benefits that she has already been granted. Raymond, Kelly, Esq., Manchester, NH.

Warner v. Astrue, Civil No. 09-cv-324-JL (D.N.H. June 3, 2010); 2010 DNH 95; 2010 U.S. Dist. LEXIS 13710 – 4 pages

1745. District Court remand and for an award of benefits. The plaintiff appealed the finding that her disability began after her DLI. On remand from the court, the ALJ failed to follow the second court remand order, which directed that the ALJ give appropriate deference to the treating doctor's opinion. The court had found that the treating doctor's opinion was supported by sufficient medical findings and was not inconsistent with other evidence in the record. The doctor's report included his opinion regarding the plaintiff's limitations before the DLI and was not contradicted by other evidence. This evidence supports a conclusion that the onset date of the plaintiff's disability was August 1993, as she alleged. Arthur Stevens, III, Esq. and Tom Petersen, Esq., Medford, OR.

Murphy v. Astrue, No. CIV S-07-1262 DAD (E.D.Cal. May 5, 2009); 2009 U.S.Dist. LEXIS 41331; 141 SSRS 847 – 15 pages

1740. District court remand where substantial evidence does not support the disability onset date found by the ALJ. The plaintiff's alleged onset date was May 23, 2003. The ALJ found that the plaintiff was disabled only after April 15, 2005 but there is no evidence that this date was a critical one in the history of the plaintiff's mental illness or that his condition changed on that date. None of the many medical opinions in the record singles out that date, including that of the ME who testified at the hearing. The ALJ did not explain why the April 2005 date was critical. While it was the first date that the plaintiff was prescribed lithium at a clinic, the ALJ "could not disregard" the fact that lithium was prescribed as far back as 1995 for bipolar disorder. Other treatment dates also were disregarded by the ALJ. "All of these different dates, coupled with the ALJ's very limited explanation of why April 15, 2005 was the date when [the plaintiff] was first disabled, leave the undersigned convinced that there is not substantial evidence supporting the ALJ's decision." The court remanded for further proceedings. Mark E. Buchner, Esq., Tulsa, OK.

Springer v. Astrue, Case No. 08-CV-0190-CVE-PJC (N.D.Okla. Feb. 24, 2009) – 19 pages

1718. The issue in this case was whether the plaintiff was disabled prior to his date last insured (DLI). The court stated that the medical evidence supported a finding that the mental impairments existed prior to and shortly after the DLI. "[E]vidence after the DLI can be relevant . . . particularly in this case where the ALJ was determining whether the plaintiff was disabled up to 20 months after the DLI. On remand, the ALJ must address whether the actual onset date was before August 2004, the onset date found in a subsequent SSI application filed in that month. The later SSI onset date does not rule out an earlier onset date in this prior Title II claim. In the subsequent SSI claimant, there was no requirement to determine onset prior to the application date. In this case, the ALJ was required to determine the appropriate onset date if the medical evidence suggested it was prior to August 2004. The court agreed with the plaintiff that the August 2004 onset date was inconsistent with the Plaintiff's allegations and at least some of the medical evidence. On remand, the ALJ cannot refuse to consider the evidence after the DLI when it supports the plaintiff, but then rely on evidence from the same period to find against the plaintiff. The court also discussed the use of GAF scores and other evidence from the treating physician. Chris Noel, Esq., Denver, CO.

Noller v. Astrue, Case No. 07-cv-01796-WYD (D.Colo. Sept. 30, 2008); 2008 U.S.Dist. LEXIS 82854; 135 SSRS 978 – 24 pages.

1697. District Court remand, finding that the ALJ violated SSR 83-20, which requires an ALJ to consult a medical advisor when he finds disability but must infer onset from ambiguous evidence. In this case, the ALJ skipped over the question of present disability and denied the claim by finding that the claimant was not disabled as of her date last insured. The court found no support for the Commissioner's position that the opinion of a medical advisor was not required in this case. SSR 83-20 "does not authorize ALJs to circumvent the ruling by withholding a finding on present disability and denying the claim based upon a determination that he claimant was not disabled as of he date last insured." The agency's interpretation of the ruling also is inconsistent with the public policy it was meant to address. Some progressive impairments, such as Huntington's Disease (the plaintiff's impairment) are not diagnosed until long after the alleged onset date. Defendant's Motion to reconsider the determination is later denied (2008 U.S.Dist. LEXIS 84462, Sept. 19, 2008). Raymond J. Kelly, Esq., Manchester, NH.

Ryan v. Astrue, Civil No. 08-cv-17-PB (D.N.H. Aug. 21, 2008); 2008 DNH 148; 2008 U.S.Dist. LEXIS 65080; 134 SSRS 323; Not for publication – 21 pages

OVERPAYMENTS

1767. ALJ decision waiving the claimant's overpayment of $13,197.32, because recovery of the overpayment "would defeat the purpose of Title II of the Social Security Act." The ALJ found that the SSA's records did not contain any notices of an overpayment from 1989, nor was there an explanation of how or when the alleged overpayment was incurred. Without evidence of the source or cause of the alleged overpayment or that the claimant was notified of the prior alleged overpayment, the ALJ found that the claimant

was without fault and that she did not have the financial means to repay the overpayment. William Zoske, Waycross, GA.

ALJ decision waiving overpayment (Oct 28, 2009) – 7 pages

1717. ALJ decision waiving the claimant's overpayment. The plaintiff was charged with an overpayment of $5,495 in Title II disability benefits due to work activity. He requested waiver of the overpayment, which was denied. The denial was appealed to an ALJ, who found that the claimant was not "at fault." The claimant testified that he believed he was eligible for a return to work program and provided the appropriate paperwork to the local SSA office when he went back to work. The ALJ found that the claimant had advised SSA of his return to work in a timely manner and was misinformed or misunderstood the information provided regarding trial work attempts and honestly believed that he could have a second trial work period. The ALJ also found that the claimant needed all of his income to meet the ordinary expenses of daily living. John Bowman, Esq., Davenport, IA.

ALJ decision on waiver of overpayment (Dec. 23, 2008) – 6 pages.

PAIN

1786. District court remand where the ALJ erroneously found that the plaintiff's allegations of pain were not credible without sufficient explanation. The plaintiff had been diagnosed with various forms of degenerative impairments, inflammatory arthritis, osteoarthritis, and other impairments, due to a genetic pre-disposition causing intense swelling of all joint areas. His pain is supported by medical evidence from various examining physicians and must be given serious consideration under Third Circuit law. Rather than rely on medical reports, the ALJ focused on reports of plaintiff's activities but did not consider that many had been ceased due to pain. The ALJ also erred in failing to obtain the testimony of a VE in light of the plaintiff's nonexertional limitations. Agnes S. Wladyka, Esq., Mountainside, NJ.

Carlone v. Astrue, Civil Action No. 08-3453 (FLW)(D.N.J. Sept 29, 2009); 2009 U.S. Dist. LEXIS 90873; 146 SSRS 433 – 16 pages

1768. District court reversal and remand for benefits. The ALJ found that there was no "medical reason" for the plaintiff's allegations of significant pain, thus rejecting the treating doctor's diagnosis of failed back surgical syndrome. The ALJ found that the plaintiff had severe impairments of degenerative disc disease and migraine headaches. The court noted that the crux of the case was the severity of the pain, not its etiology. The ALJ did not provide legitimate reasons to doubt the credibility of the plaintiff's self reports to his treating physician, or the treating doctor's opinion regarding the plaintiff 's need to lie down. Fluctuations in pain, medically supported statement that surgery was not successful, doctors' chart notes of "no acute distress" do not provide substantial evidence for the ALJ's finding. Further, the CE opinion that the plaintiff showed "a level of dishonesty" was supported by "dubious" evidence, and was not entitled to more weight than the treating physician's opinion. The ALJ's conclusion that there was "a drug-seeking component" was "at best, disingenuous." When all limitations were in the hypothetical to the VE, the plaintiff was precluded from working. The court awarded benefits. Arthur Stevens, Esq., Medford, OR.

Logsdon v. Astrue, Civil No. 09-3004-PK (D. Ore. Nov. 5, 2009) – 44 pages.

1749. District court reversal and remand for benefits. The ALJ erred in denying the case at step 2, finding no severe impairment. The ALJ failed to consider complex regional pain syndrome (CRPS) in the plaintiff's left arm and hand, despite evidence of its diagnosis and treatment by both the treating physician and a neurologist. The court reviewed SSR 03-2p, which provides guidelines for evaluating SRPS, including that it is a medically determinable impairment when properly documented. "SSR 03-2p demonstrates that CRPS has unique aspects that must be taken into consideration in analyzing the claimant's impairments and their severity." CRPS can be established based on persistent complaints of pain out of proportion to the severity of any documented signs in the affected region. The court held that CRPS was a severe impairment and that the plaintiff was disabled at step five. In response to a hypothetical form the plaintiff's attorney, the VE found no jobs that the plaintiff could perform. John V. Johnson, Esq., Chico, CA.

Boulanger v. Astrue, No. CIVS-07-0849 DAD (E.D.Cal. May 15, 2009); 2009 U.S. Dist. LEXIS 44458; 142 SSRS 182 – 27 pages.

1708. District court remand for further proceedings where the ALJ failed to follow SSR 96-7p regarding the two-prong analysis for evaluating subjective statements of pain. The plaintiff has underlying physical conditions that could cause the pain he suffers. The second prong requires the ALJ to investigate "the reasonableness of the alleged debilitating pain." SSR 96-7p provides a list of factors to be considered. The ALJ failed to consider these factors but instead only stated that the alleged pain was out of proportion to the medical findings. The ALJ discussed the plaintiff's medical treatment, which was conservative, but did not look at the other facts, such as daily activity, the intensity of the pain and the types and effectiveness of medication. "Consequently, these omissions result in incomplete consideration and a lack of specific reasons for the ALJ's finding on credibility…" The court also rejects the Commissioner's argument that the numerous inaudible in the medical expert's testimony creates some sort of uncertainly about the extent of the plaintiff's pain. Because the ALJ's decision was "clearly erroneous" the court remands. Margolius, Margolius, and Associates, Cleveland, OH.

Harwood v. Commissioner of Social Security, Case No. 5:07 CV 1383 (N.D.Ohio Sept. 4, 2008) – 9 pages

1691. District court remand because the ALJ did not provide sufficient reasoning why the treating physicians' opinions should not be given great weight. AT the first hearing a medical expert (ME) testified that the plaintiff's lumbar and cervical degenerative disc disease would limit him to sedentary to light work. The opinions of the treating primary care physician and pain specialist were entitled to "great," if not "controlling" weight. The Magistrate Judge relied on Sixth Circuit precedent in *Rogers v. Commissioner*, 486 F.3d 234 (6th Cir. 2007), which further articulated the "treating physician rule." The court found similarities with *Rogers*: although the treating doctors could not give a specific diagnosis to the plaintiff's pain syndrome, they never suggested it was not real' he followed all prescribed treatments; the ability to do some daily activities does not mean he was not disabled by his pain; and the opinion of a long-time treating physician should

not be rejected simply because the doctor is not a pain specialist. On remand, the case was assigned to a different ALJ and a different ME testified. A fully favorable decision was issued. However, the plaintiff died during the court of the appeal, but past-due benefits were obtained for the widow. Gregory R. Mitchell, Esq., Columbus, OH.

Winkler v. Commissioner of Social Security, Case No. 2:06-cv-0662 (S.D.Ohio) Report and Recommendation, Plaintiff's Statement of Errors – 27 pages

1663. District court remand where the ALJ failed to properly assess the plaintiff's credibility under the regulations and Sixth Circuit precedent in *Duncan v. Sec'y of HHS*, 801 F.2d 847(6th Cir. 1986). The ALJ failed to discuss both prongs by not considering whether there was objective medical evidence of an underlying medical condition. He concluded that the plaintiff did not have medical impairments that could reasonably be expected to produce the symptoms alleged and failed to give adequate weight to a neurologist who examined the plaintiff and concluded that his pain would prevent him from working. Margolius, Margolius & Associates, Cleveland, OH.

Smith v. Astrue, Civil Action 2:07-cv-0008 (S.D.Ohio) – 18 pages

1655. Fully favorable ALJ decision relying on Eleventh Circuit precedent regarding the standard used to assess subjective complaints of pain. The claimant has a number of orthopedic problems related to left hip problems. The ALJ found that the claimant's impairments could reasonably be expected to produce the alleged symptoms and that his statements are generally credible. The claimant is limited to light work and cannot maintain concentration for more than two hours at a time. He cannot return to his past semi-skilled medium to heavy work. The VE testified that his skills do not transfer to other occupations within his RFC. The ALJ found that there were no jobs that the claimant can perform because his limitations "so narrow the range or work the claimant might otherwise perform," a finding of disabled is warranted. The ALJ also reviewed the claimant's earnings during the period since onset and the decision includes a detailed discussion of the various criteria for evaluating "substantial gainful activity." Kitty Whitehurst, Esq., Northport, AL.

ALJ decision (Nov. 2, 2007) – 11 pages

1627. District court remand 4th sentence remand where, in evaluating the plaintiff's complaints of pain the ALJ failed to address the threshold question, under *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996), whether the plaintiff established by objective medical evidence an underlying medical impairment reasonably likely to produce the alleged pain. Instead, he proceeded directly to the second step to evaluate the extent to which her symptoms limited the ability to work. Lawrence Wittenberg, Esq., Durham, North Carolina.

Edmundson v. Astrue, Case 5-cv-00119-D (E.D.N.C., Mar. 18, 2007) – 4 pages

1612. District court remand because the ALJ's finding that the plaintiff's testimony was not credible is not supported by substantial evidence. While there is an absence of objective medical evidence supporting her subjective pain testimony, there is no objective medical evidence contrary to her claims. Under Third Circuit caselaw, the ALJ may not discount the claimant's pain testimony without contrary medical evidence. The ALJ may

not discredit subjective complaints because she received only conservative treatment. All of the evidence indicates that the plaintiff has a severe medical problem with her back that is reasonably expected to produce pain. John Grady, Esq., Dover, DE

McMillon v. Barnhart, Civ. No. 05-131-SLR (D.Del. Aug. 11, 2006). Memorandum and Opinion – 21 pages

1610. District Court award of benefits where the ALJ misapplied the test for evaluating pain in *Duncan v. Sec'y of HHS*, 801 F.2d 847 (6th Cir. 1986) and gave inappropriate selective reading to the medical evidence. The ALJ overstated the importance of the plaintiff's daily activities, while understating the significance of the medication regimen, treatment, intensity and frequency of pain, and measures taken to relieve the pain. There is a "profound difference" between an individual with a sedentary *lifestyle* and one having a sedentary RFC. "[T]he ALJ erred in conflating the two concepts." Variations in the intensity of pain do not mean that the testimony is not credible. This unpredictability, along with the intensity of flare-ups, impacts the ability to perform even sedentary work. Kenneth Laritz, Esq., Clinton Township, MI.

Stennett v. Commissioner of Social Security, Case No. 05-cv-74358 (E.D.Mich. March 1, 2007); *Published at 476 F.Supp.2d 665 (E.D.Mich. 2007).* Order Accepting U.S. Magistrate's Report and Recommendation; Report and Recommendation – 20 pages

PARTIALLY FAVORABLE DECISION

1805. District court remand limiting to scope of the remand to the period under appeal. The plaintiff had received a partially favorable decision but appealed the onset date, which he alleged should be March 2006. The ALJ found an onset date of May 17, 2008, the date before the plaintiff's 50th birthday. Although the Commissioner agreed that the case should be remanded, he argued that the scope of the remand should be "unrestricted" per 20 CFR 404.983, which says that "[a]ny issues relating to your claim" may be considered by the ALJ on remand. But cases cited by SSA support the proposition that a remand may be reviewed in its entirety, not that it must be. The settled rule is that courts have the authority to limit the scope of review on remand. Francis Jackson, Esq., South Portland, ME.

Jameson v. Astrue, Civil No. 09-cv-237-JD (D.N.H. Mich 15, 2010); 2010 U.S. Dist. LEXIS 38033 – 10 pages

1797. District Court decision limiting the scope of the Appeals Council remand. The plaintiff had appealed the onset date of the ALJ's decision. The Commissioner conceded in court that there was an "inadequate rationale" for the later onset date and moved for a remand. The Commissioner argued that the scope of remand should be "unrestricted" per 20 CFR § 404.983, which says that "[a]ny issues relating to your claim" may be considered by the ALJ on remand. The court agreed with the plaintiff that the remand should be limited in scope and that the district courts have the power to limit. Instructions with the remand order should turn on the nature of the ALJ's error. In this case, both parties stipulated that the ALJ's error related only to the onset date and they did not identify any errors regarding the award of benefits from the later onset date. "Accordingly, there is no reason for the SSA to expend further resources on that issue, or

for [the plaintiff] to face the risk (however remote) of losing the benefits that she has already been granted. Raymond, Kelly, Esq., Manchester, NH.

Warner v. Astrue, Civil No. 09-cv-324-JL (D.N.H. June 3, 2010); 2010 DNH 95; 2010 U.S. Dist. LEXIS 13710 – 4 pages

PAST RELEVANT WORK

1816. Appeals Council remand where the ALJ's finding that the claimant could return to his past relevant work as a car wash worker was not supported by substantial evidence. This work was not performed at the SGA level. Because the claimant's only work did not rise to the level of SGA and he has no other work history, he has no past relevant work. Thad J. Murphy, Esq., Davenport, IA.

Appeals Council remand (July 15, 2010) – 3 pages

1790. Appeals Council remand for further proceedings. The ALJ gave no reason for finding that the claimant could perform his past work as a fire alarm dispatcher despite the VE's testimony that he would not be able to perform the job. Also, the ALJ made no finding that this work was performed within the last 15 years, was SGA, or lasted long enough for the claimant to learn the job. The ALJ committed other errors by not finding depression as a "severe impairment" despite substantial evidence to the contrary and by failing to evaluate the claimant's obesity under SSR 02-1p. John Bowman, Esq., Davenport, IA

Appeals Council Remand (Mar. 22, 2010) – 4 pages

1662. District court remand for another hearing after the ALJ denied the claim finding that the plaintiff could perform his former work as a hair stylist. There is insufficient evidence to support a finding that he had past work as a hair stylist. The ALJ gave no consideration to the job requirements of a hair stylist, which the plaintiff's limitations would preclude him from performing. Chris Noel, Esq. Bolder, CO.

Altamirano v. Astrue, Civil Action No. 06-cv-02285-RPM (D.Colo. Jan 4, 2008); 2008 U.S. Dist. LEXIS 40619; 125 SSRS 247 – 4 pages

1650. District Court remand where the ALJ failed to consider the functional requirements of the plaintiff's past work as a machine operator as she actually performed it. After working for many years at the same company, her employer allowed her to have additional work breaks and other accommodations so that she could continue to work. While the ability to perform past work can be based on the job as it is generally performed in the national economy, the job "must not be described in two broad a manner . . . Simply categorizing the work as 'sedentary' or light' work is too broad a classification." The VE relied on the DOT but used too general a job category, and his testimony was insufficient to support the ALJ's finding that he plaintiff could return to her past work as generally performed in the national economy. The court remanded for the ALJ to address whether the plaintiff's impairments would require her to miss work often and/or prevent her from working an 8-hour day without rest breaks. N. David Kornfield, Esq., Evanston, IL.

Carter v. Astrue, No. 06 C 5421 (N.D. Ill. Sept 20, 2007); 2007 U.S.Dist. LEXIS 70523; 122 SSRS 672 - 13 pages, including Memorandum Opinion and Order, Docket Entry, Judgment, Cover Letter.

1628. The Appeals Council issued two decisions based on applications filed in September 2003. The claimant alleged an onset date of July 1997. The Appeals Council issued a decision finding that she was disabled as of her 55th birthday, per rule 202.02. The claimant could not return to her past relevant work as a woodworker because of the inability to perform fine manipulation for more than 30 minutes. The ALJ had found she could return to a job as a video store clerk. This work was performed after her alleged onset date, and cannot be considered work she can return to as of the onset date. For the period prior to the claimant's 55th birthday, the Appeals Council found that there was no past work that she could return to as of the alleged onset date and remanded the case with instructions that the ALJ resolve the case at step 5. John Bowman, Esq., Davenport, IA.

Appeals Council decisions on past relevant work (May 18, 2007). Partially Favorable Appeals Council Decision, Order of Appeals Council Remanding Case to ALJ, Determination of Fee Agreement – 15 pages

PAST RELEVANT WORK – PRE-REQUISITES FOR JOB

1813. Ninth Circuit reversal and remand for further proceedings. The plaintiff argued at his ALJ hearing that he could not return to his past relevant work as a courier driver because the job had a mandatory drug testing requirement that his prescribed pain medication (for chronic low back pain and other conditions) would cause him to fail. The ALJ found that he could return to his past work, noting that the DOT does not mention drug testing as a job requirement. The ALJ determined that the requirement that couriers be free of prescription pain medication would be a "mere hiring practice", relevant only to whether Berry could obtain his past work, but not relevant to whether he could perform it. The ALJ rejected as "irrelevant" the plaintiff's offer to prove that his job did have such a requirement.

The Ninth Circuit holds that a mandatory requirement that an employer cannot hire a person with a certain level of pain medication in his/her blood must be considered in determining whether the plaintiff can perform his past job. It is a physical demand of the job and not just a hiring practice. "A mandatory drug testing requirement of the kind Berry alleges is not a mere hiring practice that is irrelevant to the determination of disability . . . The language [in 42 USC sec 423(d)(2)(a)] excluding consideration of whether a claimant who sought work would in fact be hired cannot be construed to include a hiring practice that is directly tied to the claimant's disability."

The court holds that, "[i]f a drug prescription disqualifies a claimant from performing his past relevant work, he is not capable of returning to that work. Therefore, the ALJ erred by precluding Berry from making a record whether his medically required need to take prescription drugs would bar him from working as a courier."

The decision denying benefits is reversed and the case is remanded for further proceedings. On remand, if the plaintiff shows that his former work carries a mandatory drug testing requirement, then the ALJ may reconsider Berry's RFC, including whether the amount of prescribed medication in his system would render him physically unable to pass a drug test. Charles W. Talbot, Esq. Tacoma, WA.

Berry v. Astrue, No. 09-35421 (9th Cir. Sept. 22, 2010) – 14 pages. *Published at 622 F.3d 1228 (9th Cir. 2010).*

PAST RELEVANT WORK v. UNSUCCESSFUL WORK ATTEMPT

1624. District court remand finding that substantial gainful activity means more than just the ability to find a job. (It requires the ability to hold a job for a significant period of time. See *Gatliff v. Commissioner*, 172 F.3d 690 (9th Cir. 1999)). The plaintiff, who was diagnosed with schizophrenia and schizoaffective disorder, had number of jobs, but the longest one lasted only 3 – 4 months. The ALJ found that the plaintiff could return to past relevant work. The plaintiff argued that these jobs were not past relevant work, but rather unsuccessful work attempts. Arthur W. Stevens, III, Esq., Medford, OR.

Trotter v. Astrue, Civil No. 06-3019-TC (D.Ore. April 23, 2007) – 11 pages

See Available Material No, 1735 for the post remand court order.

PAST RELEVANT WORK – 15 YEARS

1635. Appeals Council remand where the ALJ found that the claimant could return to past relevant work as a housekeeper/cleaner. To be "relevant" the work must have been performed during the 15-year period ending on the date of adjudication. An exception applies in Title II claims when the date last insured is earlier than the adjudication date. In this case the claimant performed the work within 15 years of her date last insured (for Title II) but more than 15 years before the ALJ decision. The housekeeping job was relevant for the Title II claim but not for the SSI claim. Since there were no other past jobs, evaluation of the SSI claim must continue to step five. The Appeals Council remanded the SSI claim. John Bowman, Esq., Davenport, IA.

Appeals Council remand on past relevant work (June 22, 2007) – 4 pages

POST TRAUMATIC STRESS DISORDER (PTSD)

1804. Fully favorable ALJ decision, finding that the claimants impairments meet the criteria of Listing 1.02A (Major dysfunction of a joint). The claimant was hit by a truck and suffered multiple fractures of the skull. The ALJ also found that she had post-traumatic stress disorder. The claimant tried to work after the alleged onset date, but the ALJ found these jobs to be unsuccessful work attempts. The ALJ found her testimony regarding the ability to stand and walk for only short periods of time to be credible. The medical expert testified at the hearing that her impairments met listing 1.02A and the ALJ agreed. John Horn, Esq., Tinley Park, IL.

Fully favorable ALJ decision (June 15, 2010) – 9 pages

1796. District court reversal and award of benefits. The ALJ failed to consider the degree of the plaintiff's mental impairments in combination with his other impairments. The plaintiff was diagnosed with schizo-typal personality disorder and post-traumatic stress

disorder. He had a GAF score of 45. Psychological testing resulted in a score in the "brain damage" range. His "Trauma Symptom Inventory" was valid and consistent with a PTSD diagnosis. Other testing revealed significant limitations in other areas including social judgment and verbal reasoning. The work performed at a structured VA work program was not SGA, and did not indicate an ability to perform sedentary work. The ALJ also erred in rejecting the opinion of the treating nurse practitioner. Arthur Stevens III, Esq., Medford, OR.

Ellis v. Astrue, Civil No, 09-3040-AA (D.Ore. May 14, 2010) – 8 pages

1603. District court remand for review of all medical findings relating to the plaintiff's GAF score from the disability onset date of January 7, 2002,though the date last insured of December 31, 2002. The court wanted to determine if the score was consistently at 50 or below, and whether the plaintiff's impairment met listing 12.06. The plaintiff alleged he had PTSD caused by his service in the Vietnam War and that listing 12.06 was met. The ALJ ignored several medical reports from the treating psychiatrist that noted GAF scores of 50. Instead, he relied on two state agency psychological consultants who found less serious limitations. The court held that "A GAF score of 50 is considered severe under the Regulations and would change the nature of the ALJ's ruling." Carol Avard, Esq., Cape Coral, FL.

Hall v. Commissioner of Social Security, Case No. 2:05-cv-559-ftM-29SPC (M.D.Fla. Feb 9, 2007) Opinion and Order, Report and Recommendation – 33 pages

PRISONERS' BENEFIT SUSPENSION, including fleeing felon and probation violation

1734. Fully favorable ALJ decision finding that her benefits were erroneously withheld. The claimant was denied retroactive benefits because SSA found that she had an outstanding felony warrant. She requested reconsideration, arguing that the warrants had been satisfied, and that the underlying crimes were misdemeanors, not felonies. SSA reinstated payments of benefits as of the date the warrants were satisfied, but not before that date and the claimant then requested a hearing before an ALJ. The ALJ found that the outstanding warrants were not for felonies and that the reconsideration decision was "erroneous on its face." The outstanding warrants were for violations of city ordinances, not violations of State or federal law as defined by 20 C.F.R. sec. 416.1339. Further, SSA acted inconsistently with AR 06-1(2), implementing *Fowlkes v. Adamec*, 432 F.2d 90 (2nd Cir. 2005), since there as no evidence to suggest that he claimant knew of the outstanding warrant before having it brought to her attention by SSA. Further, there is no evidence that the claimant fled or was fleeing from justice. In addition, the ALJ found mandatory good cause to exempt the claimant from suspension of benefits prior to the date that the warrants were satisfied. Winona W. Zimberlin, Esq., Hartford, CT.

ALJ decision on fleeing felons (April 2, 2009) – 12 pages

1625. The beneficiary's benefits were terminated and an overpayment assessed because SSA found that she had an outstanding arrest warrant for a probation violation. Her attorney submitted a letter brief to the ALJ to support his client's request to reinstate her benefits and to revise the overpayment decision. The ALJ agreed and found she was entitled to discretionary good cause because 1) she did not knowingly flee from a known

warrant (the probation violation occurred in 1992 from an early shoplifting charge, when she was fleeing an abusive domestic relationship); 2) The probation violation and underlying charge were not violent or drug related 3) She was not convicted of nor pled guilty to any subsequent felony rimes and 4) The law enforcement agency that issued the warrant reports it will not extradite the beneficiary. Allan A. Bonney, Esq., Spokane WA.

Fully favorable ALJ decision (2007), Attorney's brief to ALJ – 23 pages

PSYCHOLOGICAL TESTING

1699. Appeals Council remand because the record was unclear regarding the nature of the severity of the claimant' mental impairments. The claimant's attorney obtained a psychological explanation, where the psychologist diagnosed mental retardation, which imposed serious limitations in the claimant's functional ability. Additional evidence from the psychologist, submitted to the Appeals Council "suggest that the claimant's mental impairment may be more severe than previously indicated." In that letter, the psychologist elaborated on his earlier report and reiterated his earlier opinion that the claimant had serious deficits in intellectual functioning and would have difficulty performing most work activities. On remand, the ALJ will obtain additional evidence about the claimant's mental impairments and supplemental evidence from a VE if warranted. John Bowman, Esq., Davenport, IA

Appeals Council Remand of Evaluation of Mental Impairments (May 27, 2008) – 7 pages, including Notice of Order, Order of Appeals Council Remanding Case to ALJ, Letter brief of Claimant to Appeals Council

1619. Appeals Council remand because the ALJ had not properly developed the claimant's past relevant work and for consideration of post-hearing psychological testimony results. The claimant retained a new attorney after the ALJ. The Appeals Council granted his request for additional time to submit the WAIS II test scores, which ranged from 67 – 71. The Appeals Council found that the record contained insufficient evidence regarding the claimant's cognitive functioning and that further evaluation is needed on remand. The attorney notes that the record can be supplemented at the Appeals Council and that additional time to submit new and material evidence will often be granted upon request. John A. Bowman, Esq., Davenport, IA.

Appeals Council Remand Order (May 2, 2007) – 4 pages

QUARTERS OF COVERAGE

1658. ALJ decision, finding that the claimant could be credited with12 additional quarters of coverage. The Appeals Council had previously remanded the case, noting that the claimant testified at his first hearing that he was self-employed and would have sufficient income to extend his insured status from December 31, 2002 to December 31, 2005. [See 2006 Available Material No. 1584]. On remand, the issue before the ALJ was whether the claimant could be credited with the additional quarters. Finding that the 12 additional quarters were warranted, the ALJ issued a fully favorable decision, without the need for a hearing. At the first hearing, a medical expert testified that the claimant was disabled as of 2004. Thus, the ALJ concluded that the claimant was disabled as of July 1, 2004, under rule 201.06. John E. Horn, Esq., Tinley Park, IL.

ALJ decision on quarters of coverage (Nov. 30, 2007) – 9 pages

REASONING LEVEL OF "3"

1787. Favorable ALJ decision, finding that an RFC limitation for understanding and remembering simple routine instructions would preclude jobs requiring a reasoning level of "3." Specifically, the ALJ found that the claimant "can understand and remember simple, 1-2 step instructions and repetitive tasks." The VE testified that the plaintiff could perform the jobs of dispatcher and surveillance system monitor. But a restriction to 1-2 step instructions and repetitive tasks would preclude these jobs with a reasoning level of "3". James Noel, Esq., Boulder, CO.

Favorable ALJ decision (April 16, 2010) – 11 pages including ALJ Decision, Letter from claimant's Attorney to ALJ

REFLEX SYMPATHETIC DYSTROPHY

1710. District court remand where the ALJ failed to provide a food reason for rejecting the treating doctor's opinion. The ALJ had acknowledged that the plaintiff was diagnosed with RSDS, but found that his allegations of pain were not credible. While the ALJ did provide specific reasons for this finding, as required by SSR 96-7p, "these did not match any of the categories under the Social Security Rulings or 20 CFR sec. 416.929(c)." Contrary to SSR 03-2p regarding RSDS, SSR 96-7p, and the pain regulations, the ALJ "focused on the point that the degree of pain reported was out of proportion to the severity of the injury sustained." This rationale failed to consider the subjective pain testimony, which was "based on treatment and admitted capabilities. Essentially the ALJ's reasoning was circuitous and selective. . . "As a result, the ALJ's rejection of the treating physician's opinion, which was based on plaintiff's chronic pain, "was woefully inadequate." Marcia Margolius, Esq., Cleveland, OH.

Smith v. Commissioner of Social Security, Case No. 1:07 CV 2661 (N.D.Ohio Sept. 30 2008) – 18 pages

1696. District Court remand for an award of benefits where the ALJ erroneously rejected the treating doctor's (an orthopedic surgeon) diagnosis of Reflex Sympathetic Disorder (RSD) by misinterpreting the doctor's report. The ALJ also ignore SSR 03-02, which states that conflicting evidence in the record is not unusual in RSD cases. The ALJ erred in basing his decision on "sporadic notes of temporary improvement." In addition, the ALJ erred in finding no objective evidence to confirm the RSD diagnosis, again ignoring SSR 03-02 which states that RSD can be established in the presence of pain out of proportion t the severity to any documented cause if certain criteria are met. In this case, the objective medical evidence confirmed that the plaintiff's symptoms fit the diagnosis of RSD. Kenneth D. Bruce, Esq., Summerville, GA.

Canup v. Astrue, Civil Action No. 4:07-CV-091-WEJ (N.D.Ga. Sept. 3, 208) – 32 pages.

1652. District Court remand with order that SSR 03-02p be properly followed. The plaintiff suffered from residuals of left shoulder rotator cuff surgery, including reflex sympathetic dystrophy (RSD) of the left arm. The ALJ found that the plaintiff retained the ability to perform sedentary work and was not disabled by pain. Evaluation of RSD, a chronic pain syndrome that typically results from trauma to a single extremity, is

governed by SSR 03-2p. Under this SSR, RSD can be established by the presence of persistent complaints of pain that are typically out of proportion to the severity of the original injury that can be associated with certain clinically documented signs in the affected region, including skin changes. The ALJ erred by finding that no skin changes were present. The transitory nature of such findings is not unusual in RSD cases. Also, the diagnosis of RSD does not require one of the clinical signs in addition to the persistent and intense pain. The ALJ failed to ask the treating physician to clarify his inconsistent notes. Instead, the ALJ found that the plaintiff did not suffer from RSD. Margolius, Margolius & Associates, Cleveland, OH.

Markin v. Astrue, Civil Action 2:06-cv-586 (S.D.Ohio July 23, 2007) – 27 pages.

REMAND: NEW EVIDENCE

1642. District Court sentence six remand for consideration of evidence that was both "new" and "material" and for which good cause existed for not submitting it at the ALJ hearing. Ten days after the hearing decision was issued, the plaintiff received test results indicating that he suffers from severe sleep apnea, in addition to the chronic fatigue syndrome that the ALJ found was not disabling. The evidence is new, and there was good cause for not submitting it to the ALJ, as it was not available earlier. The test results are material because they indicate that the sleep apnea could affect the plaintiff's ability to work. The court remanded for consideration of the sleep apnea test results as they relate to plaintiff's allegation of disabling fatigue. Margolius, Margolius & Associates, Cleveland, OH.

Silver v. Astrue, Case No. 1:06CV2659 (N.D.Ohio, July 6, 2007) – 9 pages

REMAND: SCOPE

1805. District court remand limiting to scope of the remand to the period under appeal. The plaintiff had received a partially favorable decision but appealed the onset date, which he alleged should be March 2006. The ALJ found an onset date of May 17, 2008, the date before the plaintiff's 50th birthday. Although the Commissioner agreed that the case should be remanded, he argued that the scope of the remand should be "unrestricted" per 20 CFR 404.983, which says that "[a]ny issues relating to your claim" may be considered by the ALJ on remand. But cases cited by SSA support the proposition that a remand may be reviewed in its entirety, not that it must be. The settled rule is that courts have the authority to limit the scope of review on remand. Francis Jackson, Esq., South Portland, ME.

Jameson v. Astrue, Civil No. 09-cv-237-JD (D.N.H. Mich 15, 2010); 2010 U.S. Dist. LEXIS 38033 – 10 pages

1797. District Court decision limiting the scope of the Appeals Council remand. The plaintiff had appealed the onset date of the ALJ's decision. The Commissioner conceded in court that there was an "inadequate rationale" for the later onset date and moved for a remand. The Commissioner argued that the scope of remand should be "unrestricted" per 20 CFR § 404.983, which says that "[a]ny issues relating to your claim" may be considered by the ALJ on remand. The court agreed with the plaintiff that the remand should be limited in scope and that the district courts have the power to limit. Instructions with the remand order should turn on the nature of the ALJ's error. In this case, both

parties stipulated that the ALJ's error related only to the onset date and they did not identify any errors regarding the award of benefits from the later onset date. "Accordingly, there is no reason for the SSA to expend further resources on that issue, or for [the plaintiff] to face the risk (however remote) of losing the benefits that she has already been granted. Raymond, Kelly, Esq., Manchester, NH.

Warner v. Astrue, Civil No. 09-cv-324-JL (D.N.H. June 3, 2010); 2010 DNH 95; 2010 U.S. Dist. LEXIS 13710 – 4 pages

REMAND v. REVERSAL

1766. District court reversal and remand for benefits because the ALJ did not provide good reasons for not giving the opinions of three treating physicians controlling weight and failed to mention the weight given to these opinions. The court found the record was "replete with evidence" supporting the medical opinions. The treating physicians supported the plaintiff's testimony regarding the frequency and effects of her pain. The plaintiff applied in 1997 and this court action was the 11th proceeding in her case. The court finds that there is no purpose in remanding this case for further evidentiary proceedings and awards benefits. Douglas Brigandi, Esq., Bayside, NY.

King v. Astrue, No. 09-CV-1244 (JG)(E.D.N.Y. Oct. 14, 2009); 2009 U.S.Dist. LEXIS 95938, 146 SSRS 929 – 25 pages.

1742. District Court reversal and remand for an immediate payment of benefits. The plaintiff's treating physicians provided evidence that the plaintiff was disabled due to mental illness, limited to 20 hours of work per month, and that her impairments would cause absence from work more than four days per month. The ALJ improperly rejected these opinions. Under Ninth Circuit law, "[w]here the ALJ 'fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, [the court] credit[s] that opinion as a matter of law.'" The VE testified that with these limitations, the plaintiff would be unable to work. "No further development of the record is required in this matter." Rick Lunblade, Esq., Medford, OR.

Crowe v. Astrue, Case No. 2:07-cv-02529-KJM (E.D.Cal. Mar. 30, 2009) - 7 pages.

1698. District Court remand where the ALJ had denied the claim, finding that the plaintiff had a marked impairment in only one domain. The plaintiff relied on records from non-physician sources, i.e. therapist, teacher's reports, and school records, to argue that she has a marked impairment in a second domain. The therapists' assessments that the plaintiff is markedly impaired in the domain of attending and completing tasks is supported by her treating physician and psychologists. The ME's testimony that the plaintiff's limitations in this domain are "merely isolated or inconsistent" is not supported by the record. The Magistrate Judge recommended remand for an award of benefits. The Commissioner filed objections and the district court determined that further proceedings are needed. On remand, the Commissioner should consider the scope of the limitations in the domain of attending and completing tasks in light of the evidence of record. Margolious, Margolious & Associates, Cleveland, OH.

Jennifer Carson for Leesha Alwood v. Astrue, Civil Action 2:07-CV-281 (S.D.Ohio, Sept 3, 2008); 2008 U.S. Dist. LEXIS 85891 - 27 pages including Order, Judgment in a Civil Case, Defendant's Objections to Magistrate Judge's Report and Recommendation, Report and Recommendation

1683. District Court remand solely for the calculation of benefits from the onset date of March 1993. The plaintiff filed her application in 1995. The Appeals Council remanded twice, and then denied the plaintiff's Request for Review after her third ALJ hearing in 2005. She appealed to federal court. The court rejected the government's argument that the case should be remanded for a fourth hearing. The plaintiff's primary impairment is cervical spine degeneration. The court noted that she started to receive treatment for this problem four years before her onset date. The court rejected the ALJ's finding that there were no physical symptoms to support the treating physicians' opinions and that the plaintiff could perform light work. The court also noted that the VE testified, in response to a hypothetical based on the record, that an individual who could not sit for six out of eight hours and who had psychological restrictions caused by depression would be precluded from engaging in even sedentary work. The court found that there was no evidence to support the ALJ's determination that the plaintiff could perform light work. The plaintiff's attorney points out that two helpful exhibits were attached to the Plaintiff's Memorandum of Law: (1) a list of "Medical Tests, Signs & Maneuvers" and (2) a copy of the ODAR ranking of hearing office processing times that appears regularly in the NOSSCR Forum. The attorney is later awarded 406(b) fees in the amount of $36,125.75 with instructions to refund the $7,426.93 in EAJA fees previously received. (2008 U.S.Dist. LEXIS 101099 (Dec. 15, 2008)). Barry Simon, Esq., Forest Hills, NY.

D'Anna-Calvin v. Astrue, Civil Action No. CV-0606664 (E.D.N.Y. Apr. 7, 2008) – 120 pages including: Transcript of oral argument (March 25, 2008); Memorandum & Order; Judgment; Plaintiff's Memorandum of Law in Opposition to Defendant's Notice of Motion to Remand and in Support of Plaintiff's Cross-Motion; Government's Memorandum of Law in Support of Remand for Further Proceedings; and Government's letter Reply Brief. Note: This material is available only by e-mail in PDF format.

1638. District Court reversal and award of benefits where that the ALJ failed to give significant weight to the opinions of the plaintiff's treating physician regarding his ability to sit, stand, walk or lift, in light of his back impairment, which was originally caused by a 1969 helicopter crash in Vietnam. The doctor essentially limited the plaintiff to less than a full range of sedentary work. The ALJ gave more weight to the CE's assessments which are not supported by better or more thorough evidence Leslie Neuhaus, Esq., Grand Island, NE.

Connelly v. SSA, Case No. 4:06-cv-031012-TDT (D.Neb. 2007) – 25 pages

1622. District court reversal and remand for an award of benefits where the ALJ discredited the treating orthopedic surgeon's opinion that the plaintiff could not work full-time, that her ability to sit was limited by pain, and that she would need to lie down 4 to 5 times per day for up to one hour. The ALJ also discredited similar findings by another treating physician. The ALJ erred in rejecting the opinions because they were similar. Given that both had treated the plaintiff for years, the fact that they would assess

the same limitations "seems logical and beyond reproach." Also, the fact that the plaintiff gave forms to the doctors at her attorney's request is a "permissible credibility determination" in the Ninth Circuit, when supported by objective medical evidence. Because the ALJ's rejection of these opinions was based on incorrect legal standards, they are credited as true as a matter of law. Further, because the court found that "not one of the grounds upon which the ALJ questioned [the plaintiff's] credibility is supported by the record" the ALJ's finding that the plaintiff was not credible is given no weight. Robert F. Webber, Esq., Medford, OR.

Frey v. Astrue, Case No. CV 06-3061-PK (D.Or. May 22, 2007)

1613. District Court reversal and award of benefits where the ALJ gave more weight to a psychological CE than to the plaintiff's treating physician, who stated that her bipolar disorder prevented her from returning to her past work, and that she would be limited to three working hours per day. A psychological CE found that the plaintiff did not have depressive symptoms and did not have a major depressive disorder. The ALJ limited her to unskilled sedentary work due to limitations from multiple know surgeries and "moderate" limitations caused by the mental impairment. The court found that the ALJ erred in discounting the treating physician's opinion. He made very little mention of the mental disorder limitation in the decision and instead gave significant weight to the psychological CE opinion because the CE was familiar with the Social Security regulations. However, the CE said that it was very difficult for him to estimate the extent that the psychiatric disorders would cause functional limitations in such a limited examination. In addition, it was not clear to the court how understanding the regulations "rises to the level that equals significant weight." Remission of symptoms is in the nature of a mental illness and does not mean that a claimant can work. The ALJ also erred in evaluation of plaintiff's subjective complaints and failed to consider her obesity. Leslie Neuhaus, Esq., Grand Island, NE.

Hughes v. SSA, Case:4:06-cv-03109-JFB (D.Neb. Mar.12, 2007) – 12 pages

1606. District court awarding benefits more than ten years after the plaintiff filed his application, and after four ALJ hearings. His primary impairments are a back injury, pain and depression. The court found that the ALJ ignored the medical expert's opinion that the plaintiff's condition equaled the spinal disorder listing: 1.04A. The ALJ also erroneously found that the ME found that the listing was equaled only when depression was considered. Instead of relying on the ME's equivalence opinion, the ALJ "embarked on a concerted effort to discredit" the treating physician's diagnosis of depression. The ALJ placed more weight on the opinions of a psychiatric CE and ME and failed to consider the depression in the context of the other impairments as required by law. The court was also disturbed by the ALJ's "sweeping disregard" of the plaintiff's allegations of pain. Douglas C.J. Brigandi, Esq., Bayside, NY.

El-Shabazz v. Commissioner of Social Security, Case No. 04-CV-3731 (E.D.N.Y. Dec. 6, 2006) - 20 pages

1605. District Court reversal for an immediate award of benefits. The ALJ had erred in basing the RFC determination on the opinions of the ME who had never treated or examined the plaintiff. The court rejected the opinion of this nonexamining medical

expert because he "based his opinions on what the ordinary person could do with the diagnosed physical impairments and not what this particular plaintiff could do." The ALJ also erred in rejecting the opinions of the longtime treating physician, a position that the government did not defend in court. The treating physician had found significant psychiatric impairments and functional limitations, which precluded impairment. The ME did not evaluate the mental limitations in this case. The court found the record to be fully developed. Kenneth Isserlis, Esq., Spokane, WA.

Fry v. Barnhart, No. CV-05-0269-MWL (E.D.Wash. Aug. 11, 2006) – 18 pages

REMEDIABILITY

1677. District Court decision awarding SSI benefits. The ALJ failed to provide good reason for rejecting the opinion of the plaintiff's treating physician. The ALJ found that the fact that the doctor prescribed exercise as a part of the plaintiff's treatment regimen indicated that she was not disabled. The court found that recommending to a morbidly obese individual that she try to lose weight through exercise "is in no way inconsistent with the conclusion that at the time such advice was given the individual was incapable of working." Further, the ALJ "fly-specked" one item from the doctor's notes. "[T]his one line . . . excerpted from the totality of the doctor's patient's notes does not create an inconsistency with the conclusion that the plaintiff is disabled. The court noted other improper findings by the ALJ, including that the treating physician's opinion should have been given great weight. Marcia Margolius, Esq., Cleveland, OH.

Branch v. Commissioner of Social Security, Case No. 1:07CV0026 (N.D.Ohio Nov. 9, 2007) – 35 pages, including Magistrate's Report and Recommended Decision, Order, Judgment Entry, Plaintiff's Brief on the Merits.

1674. District court decision finding that the plaintiff met Listing 11.02. The ALJ erred in discrediting the treating neurologist's reports regarding the plaintiff's seizure condition after concluding that the plaintiff was not compliant in taking her Dilantin. The neurologist had stated that the plaintiff was taking her Dilantin but was not seizure free and would be absent from work at least three times a month. He noted that because of nausea with migraines, she was not always able to hold the medicine down. The court found extensive evidence that the plaintiff was trying to be compliant but was having side effects from the medication. R. Michael Booker, Esq., Birmingham, AL.

Self v. Astrue, Civil Action No. 06-G-1575-J (N.D.Ala. Mar. 24, 2008) – 13 pages including Final Order, Memorandum Opinion

1614. District court remand where the ALJ found that the plaintiff's Crohn's Disease was not a "severe impairment" at step two because the plaintiff had stopped taking prescribed medication. While "[r]emediable impairments do not qualify for disability benefits," there are exceptions. Conditions must be evaluated without regard to remediability if the claimant cannot afford treatment. McKnight v. Sullivan, 927 F.2d 241, 242 (6thCir. 1990). The record was very clear that the plaintiff stopped her medication due to her inability to pay for it. Further, the fact that the plaintiff admitted she had never tried adult diapers for incontinence is not a reason for rejecting her credibility. The real issue was whether the incontinence constituted a non-exertional severe impairment. The court remanded for further consideration. Margolius, Margolius & Associates, Cleveland, OH.

Reis v. Commissioner of Social Security, Case No. 1:06 CV 0774 (N.D.Ohio, Mar. 30, 2007) – Memorandum Opinion, Judgment Entry - 14 pages

REOPENING

1799. Appeals Council decision reopening an earlier application. The ALJ's August 2009 decision found the claimant disabled as of October 2002, the alleged onset date. The decision also reopened a prior Title II claim filed in March 2005, pursuant to 20 CFR § 404.988(a). The Appeals Council reopened two other prior applications First, it reopened the prior 2005 SSI initial determination, based on the concurrent application filed in March 2005. The current SSI application, filed in April 2006, was filed within 12 months of the August 2005 initial determination and provides a basis for reopening per 20 CFR 416.1488(a). Thus the claimant is disabled based on the March 2005 application and entitled to benefits. Second, the Appeals Council found good cause to reopen a Title II initial determination form October 2003 (claim field August 2003)because the current application of April 2006 was filed within four years of that date and had new and material evidence. Based on the August 2003 application, the Appeals Council found the claimant disabled for Title II benefits since October 2002. Conditions to reopen the August 2003 SSI claim did not exist. William Alge, Jr. Esq., Findlay, OH.

Appeals Council decision on reopening. (Apr. 26, 2010) – 6 pages

1668. District court decision remanding to determining whether the father's earlier application could be reopened under 20 CFR § 404.989 to establish an earlier application date for the daughter. The issue is whether the application filed by the child's father/wage earner, naming only one of two children, should serve as an effective application for benefits to entitle the second child to survivor's benefits form the time of her father's death in April 2003. The father's 2002 application for disability benefits did not name the daughter. There was no question of paternity. The mother filed an application in March 2005 when she learned of the father's death and the daughter was granted benefits effective 2004. The appeal alleged eligibility as of the father's death. The court distinguished this from cases where no application had ever been filed by the wage earner, and also rejected reliance on the POMS. The court remanded for further consideration John Bednarz, Esq., Wilkes-Barre, PA.

Duggins o/b/o A.N.W. v. Astrue, Civil Action No. 3:07-CV-560 (M.D.Pa. Feb. 28, 2008) – 17 pages

RESIDUAL FUNCTIONAL CAPACITY

1763. District court remand because the ALJ failed to accord the treating physician's opinion "great weight" regarding the plaintiff's limitations due to her cardiac impairment. He had been her physician for many years, saw her on many occasions, and submitted numerous reports on her condition. The ALJ gave greater weight to a CE by an internist who found the plaintiff's exertional capacity "more than moderate." The court found the conclusion vague and that the use of the term "moderate" does not permit the ALJ, a "layperson" to infer that the claimant can perform sedentary work, as found by this ALJ. The court also held that the ALJ failed to properly consider whether the plaintiff's

impairments met or equaled Listings 4.02, 4.04 or 4.05. The LJ did not explain what, if any, listings he considered. Irwin M. Portnoy, Esq., New Windsor, NY.

Fuentes v. Astrue, Case 2:08-cv-02146-ADS (Sept 26, 2009) – 34 pages.

1762. Appeals Council remand for a new hearing, finding conflicts in the ALJ's decision regarding the claimant's RFC. The ALJ found that he could perform a full range of light work and denied benefits under Grid Rule 202.21. However, in the body of the decision the ALJ found less than a full range of light work, limited to simple and routine tasks and no more than occasional contact with others. The findings also indicated that the mental impairments were not severe. However, discussion in the decision suggests that the mental impairments are severe. The ALJ also used the wrong date last insured. And the decision does not properly apply the guidelines in SSR 96-7p for evaluating subjective complaints. John Bowman, Esq., Davenport, IA.

Appeals Council remand on RFC (Sept 25, 2009) – 4 pages.

1711. Appeals Council fully favorable decision where the ALJ's RFC finding represented less than full time work, i.e. the ability to work only 6 hours per day, because the claimant could stand and walk for two hours and sit for four hours. SSRs 83-10 and 96-8p refer to an eight hour work day. To perform other work at step 5, a claimant must be able to work full time, which is an 8 hour day. The Appeals Council concluded that, in light of the evidence of record, the claimant was restricted to a narrow range of sedentary work that was less than full time. The Appeals Council accorded no weight to the VE's testimony regarding sedentary jobs because the ALJ's hypothetical question included the 6-hour restriction, but he VE's responses did not address the issue of less than full-time work activity. Robert Ishikawa, Esq., Fresno, CA.

Appeals Council decision on ability to perform full-time work. (Nov. 18, 2008) – 8 pages

1653. Appeals Council remand for a new hearing. The ALJ violated SSR 96-8p by determining that the claimant was limited to sedentary work without first identifying the severe impairments. The ALJ also did not adequate evaluate the claimant's alleged mental impairments under the special technique in 20 CFR § 404.1520a because there was no discussion of the "A", "B", or "C" criteria. Finally, the ALJ found that the claimant could return to past work, without first comparing the claimant's RFC with the physical and/or mental demands of the past relevant work as the claimant performed it, or as generally performed in the national economy. John Bowman, Esq., Davenport, IA.

Appeals Council Remand (October 3, 2007) – 5 pages

1637. District Court decision finding that the ALJ erred by "failing to state with particularity" the weight accorded to a psychologist CE and a treating nurse practitioner regarding the plaintiff's mental RFC. "[H]is failure to do so constitutes reversible error." The ALJ did not explicitly discount either opinion and the limitations in both mental RFCs exceeded those found y the ALJ, as demonstrated in his hypothetical questions to the VE. In agreeing with the plaintiff, the court notes that the SSA definition of "fair," i.e. the individual can perform the activity satisfactorily some of the time, is inconsistent with

SSR 96-8p, which states that the claimant must have the RFC to perform work on a "regular and continuing basis" which means "8 hours a day for 5 days a week" or the equivalent. See also 96-9p. Carol Avard, Esq., Cape Coral, FL.

Jackson v. Astrue, Case No. 8:06-cv-1631-T-26TBM (M.D.Fla. Aug. 17, 2007); 2007 U.S. Dist. LEXIS 62711 – 14 pages

1616. Appeals Council remand because the ALJ's RFC finding for a full range of sedentary work was "marginally rationalized." To reach his erroneous RFC finding, the ALJ also erred in rejecting the treating physician's opinion, especially since there was no other functional assessment from another treating or examining source. The ALJ relied on Rule 201.15 to direct a finding of "not disabled" but failed to identify any jobs to which the claimant's skills could be transferred within the RFC found by the ALJ. The ALJ also wrote in the decision that he did not write the decision and he expressly disavowed his responsibility for its content. The Appeals Council noted this language is improper. (February 16, 2006)

Gil Laden, Esq., Mobile, AL – 13 pages including Order of Appeals Council and Letter Brief to Appeals Council

RESIDUAL FUNCTIONAL CAPACITY – BENDING/ STOOPING

1792. District court remand for a reconsideration of the plaintiff's RFC. Substantial evidence does not support the ALJ's finding that the plaintiff had the RFC to stoop occasionally. The ALJ gave little or no weight to the treating physician's opinion that her ability to stoop was markedly limited. The VE testified that there were no sedentary jobs she could perform if there was a marked limitation in stooping, bending and reaching. [The court equated bending with stooping.] The ALJ said the treating physician's opinion on stooping was inconsistent with other evidence; however, no other opinions were offered on stooping. Marcia Margolius, Esq., Cleveland OH.

Collett v. Commissioner of Social Security, Case No. 5:08 CV 2929 (N.D.Ohio Mar 31, 2010); 2010 U.S. Dist. LEXIS – 8 pages

RESIDUAL FUNCTIONAL CAPACITY – MENTAL

1793. District Court remand because the Court is unable to determine how the ALJ reached his conclusion, and or whether his findings were supported by substantial evidence and were consistent with the regulations. The CE psychologist found that the plaintiff had "moderate" limitations in a number of work-related activities, including the ability to perform simple, repetitive tasks. The state agency psychologist found the only limitation was "moderate" for understanding, remembering and carrying our instructions. When the ALJ included the VE's limitations in the hypothetical question to the VE, there were no jobs the individual could perform. When the ALJ used the state agency's mental RFC, the individual could perform 75% of unskilled sedentary work. Yet in the decision the ALJ said that the VE's and state agency psychologist's RFCs were "reasonably consistent." In fact, the difference between the two opinions was the difference between disability and non-disability. Margolius, Margolius, and Associates, Cleveland OH.

Conkey v. Commissioner of Social Security, Case No. 2:08-cv-1058 (S.D.Ohio Feb. 24, 2010); 2010 U.S. Dist. LEXIS 16727 – 10 pages

1703. Appeals Council remand for a new hearing. The ALJ found that the claimant has severe impairments of depression and carpal tunnel syndrome and rated the claimant's mental status as mildly to moderately limited. However, the ALJ's RFC findings limited the claimant to performing light work, but the RFC does not contain any mental functional limitations. On remand, the ALJ will further evaluate the claimant's mental impairment and functional limitations. John Bowman, Esq., Davenport, IA.

Appeals Council remand on RFC and mental functional limitations (Sept. 15, 2008) – 4 pages.

1597. District Court remand finding that the ALJ erred in posing a hypothetical question to the VE which indicated that the plaintiff could not perform work requiring "close concentration." It is "not apparent" how such a restriction related to the conclusion of two state agency psychologists that the plaintiff "often" had deficiencies in concentration. In addition, the ALJ's restriction to jobs that did not involve assembly line work or fast pace "is not clearly related to the reviewers' statement that plaintiff often had deficiencies of persistence and pace." The ALJ found that the claimant had only "moderate" deficiencies, but did not explain why the state reviews' opinions were rejected. The ALJ also erred in his evaluation of the plaintiff's memory impairment. There was a difference between the extremely low scores on the Wechsler memory test and a statement that she could remember simple or basic instructions. This inconsistency required the Commissioner to make some further inquiry about the plaintiff's ability to perform the basic memory tasks required by the jobs cited by the VE in response to the ALJ's hypotheticals. A hypothetical question referring to the inability to perform jobs involving detailed or complex instructions does not adequately describe the memory deficits in the record. ***Sanders v. Barnhart***, Case No. 2:04-cv-0726 (S.D.Ohio, Nov. 15, 2006).

Timothy F. Cogan, Esq., Wheeling, West Virginia – 13 pages

RES JUDICATA

1704. District court remand where the ALJ erred in applying *Drummond v. Commissioner*, 126 (F.3d 837 (6th Cir. 1997) and in determining the plaintiff's RFC. In *Drummond*, the Sixth Circuit held that res judicata applied and that absent evidence of improvement, a subsequent ALJ is bound by the findings of a previous ALJ. There is a *Drummond* Acquiescence Ruling AR 98-4(6). The ALJ in this case erred in adopting the prior ALJ's mental RFC findings. The ALJ relied on the findings of the DDS examiners and consultant that were completed well after the plaintiff's date last insured, but rejected the treating doctor's findings because some were made after the DLI. The ALJ did not explain why post-DLI evidence was relevant when pre-DLI evidence was not. The ALJ "cannot pick and choose the medical evidence that favors his position and reject the rest as outside of the relevant time period when the evidence upon which he himself relies is outside of the insured time period." As a result, the ALJ did not provide sufficient reasons for ejecting the treating doctors' opinions on this basis. The court's decision also includes an extensive discussion why the ALJ improperly applied the treating physician rule. Margolius, Margolius, & Associates, Cleveland, OH.

Mickens v. Astrue, Case No. 1:07CV2706 (N.D.Ohio Sept. 26, 2008) – 24 pages

1675. District court remand where the ALJ did not explain the reason that her conclusions after two hearings were markedly different. In a 2003 decision, the ALJ concluded that the claimant was generally credible and that his depression was "severe," and that he was disabled as of 1998, but benefits were denied based on DA&A. The Appeals Council reversed in part and remanded the case to the same ALJ. In a 2005 decision, despite evidence that the plaintiff's condition had worsened, the same ALJ found that he was not disabled as of April 1998, that his testimony was not credible, and that his depression was not "severe." The court concluded that the 2005 decision was not supported by substantial evidence and remanded the case. Raymond J. Kelly, Esq., Manchester, NH.

Barriault v. Astrue, Civil No. 07-cv-176-SM (D.N.H. Apr. 2, 2008); 2008 DNH 75; 2008 U.S.Dist. LEXIS 26916. Not for publication – 20 pages

RESPIRATORY IMPAIRMENTS

1802. Appeals Council favorable decision awarding childhood benefits based on the SSI application filed in 2005. The Appeals Council submitted the record to its medical support staff for analysis. The two medical consultants found that the claimant met the childhood listings for asthma - listing 103.03B, through September 2008, but they could not determine the claimant's eligibility for SSI childhood disability benefits using a domain evaluation after September 2008. The Appeals Council relied on a subsequent application filed in May 2010, which revealed that the claimant was still requiring emergency room visits and physician intervention, despite following prescribed treatment. John Bowman, Esq., Davenport, IA.

Fully Favorable Appeals Council Decision (July 9, 2010) – 7 pages

RETROSPECTIVE MEDICAL OPINION

1600. District court finding that the plaintiff was disabled as of her date last insured, which was December 31, 1993. The plaintiff had alleged disability since 1988 due to lupus. At the initial hearing and at the second hearing after a court remand, the testimony focused on the plaintiff's limitations prior to her date last insured, although the lupus was not definitely diagnosed until after that date. The ALJ improperly found the claimant not credible because her subjective complaints were not consistent with her daily activities. The court found that the record does not support the ALJ's description of her daily activities and concluded that the ALJ did not state clear and convincing reasons for rejecting her credibility. The court also rejected the ALJ's reasons for rejecting testimony regarding the plaintiff's daily activities provided by a neighbor. Lay testimony is competent evidence which the ALJ must take into account unless he gives legitimate reasons for the rejection. The court "credited as true" the testimony of the plaintiff and her neighbor. And also relying on the delay due to the first remand, the court concluded that the plaintiff was disabled and a second remand would not shed any additional light on the issue. ***Tabacchi v. Barnhart***, Case No. Cv 05-3104-KI (D.Ore. Sept. 28, 2006)

Robert F. Webber, Esq., Medford, OR – 17 pages

SCOPE OF REMAND

See REMAND: SCOPE

SEIZURE DISORDER

1778. Magistrate Judges' recommended remand because the ALJ's decision was "internally inconsistent." While the court noted that the ALJ's decision could be affirmed on the basis of the evidence in the record, the court "should be concerned with fairness." The ALJ based his denial on credibility findings, yet did not state his reasons. The ALJ's findings were also contradictory and possibly confused. The ALJ found that the plaintiff could not tolerate exposure to heights, moving parts or operating a car. Yet he noted that the plaintiff drives a car, but there is no evidence to support this critical finding. The ALJ found that the plaintiff did not meet listing 11.03 because the record did not support a finding that she had petit mal seizures more than once weekly. The ALJ found the testimony of the plaintiff and her daughter that she did have seizures of the required frequency to be not credible. The court noted that the credibility determination had a "devastating impact" on the plaintiff's claim at step 3 and on her RFC. The plaintiff's financial reasons prevented her from regular medical treatments, which is why she lacked corroborating medical records. Ivan Katz, Esq., New Haven Ct.

Sholun v. Astrue, Civil No,. 03-09-CV-609 (CFD) (TPS) (D.Conn. Nov. 20 2009); 2009 U.S. Dist. LEXIS – 7 pages

1680. District Court decision where the ALJ failed to consider the side effects of the plaintiff's medications for her seizure disorder. She testified that she lost her last job after falling asleep due to the medications prescribed by her treating physicians. A VE testified that if the side effects of the medications caused the plaintiff to doze off two or three times daily for 10 to 30 minutes each time, as she testified, that would be enough to preclude any employment. The ALJ's decision did not discuss any of this evidence. The court remanded the case for the ALJ to address this issue, including the taking of additional evidence, if appropriate. John E. Horn, Esq., Tinley Park, IL.

Racicik v. Astrue, No. 07C 3297 (N.D.Ill. May 8, 2008) – 20 pages

1674. District court decision finding that the plaintiff met Listing 11.02. The ALJ erred in discrediting the treating neurologist's reports regarding the plaintiff's seizure condition after concluding that the plaintiff was not compliant in taking her Dilantin. The neurologist had stated that the plaintiff was taking her Dilantin but was not seizure free and would be absent from work at least three times a month. He noted that because of nausea with migraines, she was not always able to hold the medicine down. The court found extensive evidence that the plaintiff was trying to be compliant but was having side effects from the medication. R. Michael Booker, Esq., Birmingham, AL.

Self v. Astrue, Civil Action No. 06-G-1575-J (N.D.Ala. Mar. 24, 2008) – 13 pages including Final Order, Memorandum Opinion

SEVERITY

1822. Appeals Council remand due to several ALJ errors. The ALJ found the following "severe" impairments; fibromyalgia, Tourette's syndrome, and anxiety disorder. However, in formulating the claimant's RFC, the ALJ decision did not state what, if any, limitations were caused by the fibromyalgia and anxiety disorder. "Considering that any severe impairment causes vocational restrictions, the hearing decision must explain what restrictions result from each sever impairment." The ALJ also erred in discounting the

testimony of the claimant's daughter and friend because they do not reside with the claimant. There is no requirement that testimony of lay witnesses is valid only if they reside with the claimant. The ALJ also failed to explain what effect the claimant's speech limitations would have on her ability to work. Randolph Baltz, Esq., Little Rock, AR.

Appeals Council remand (July 23, 2010) – 6 pages

1783. District Court remand for further proceedings. The plaintiff argued that the ALJ gave insufficient weight to the opinion of the treating physician, failed to follow SSR 83-20 to establish the onset date, and failed to consider the combination of the plaintiff's impairments in finding she lacked a severe impairment. John Horn, Esq., Tinley Park, IL

Schneider v. Astrue, No. 09-cv-3717 (N.D. Ill Mar. 4, 2010) – 13 pages including the Order, Plaintiff's Motion for Summary Judgment and Memorandum in Support

1749. District court reversal and remand for benefits. The ALJ erred in denying the case at step 2, finding no severe impairment. The ALJ failed to consider complex regional pain syndrome (CRPS) in the plaintiff's left arm and hand, despite evidence of its diagnosis and treatment by both the treating physician and a neurologist. The court reviewed SSR 03-2p, which provides guidelines for evaluating SRPS, including that it is a medically determinable impairment when properly documented. "SSR 03-2p demonstrates that CRPS has unique aspects that must be taken into consideration in analyzing the claimant's impairments and their severity." CRPS can be established based on persistent complaints of pain out of proportion to the severity of any documented signs in the affected region. The court held that CRPS was a severe impairment and that the plaintiff was disabled at step five. In response to a hypothetical form the plaintiff's attorney, the VE found no jobs that the plaintiff could perform. The ALJ erred in giving little weight to the treating physician's opinion "solely on the stated ground that he 'attempts to make the ultimate conclusion of disability,' which is reserved to the Administrative Law Judge. John V. Johnson, Esq., Chico, CA.

Boulanger v. Astrue, No. CIVS-07-0849 DAD (E.D.Cal. May 15, 2009); 2009 U.S. Dist. LEXIS 44458; 142 SSRS 182– 27 pages.

1738. District court remand for an explanation of the ALJ's finding that the plaintiff's depression did not amount to a "severe impairment" and for further development of the record concerning the plaintiff's depression. Only those claimants with slight abnormalities that do not significantly limit any "basic work activity" can be denied at Step Two. The ALJ referenced only one medical report concerning the plaintiff's mental state in finding that there was no severe impairment and did not explain his rejection of or failure to mention the other reports concerning the plaintiff's depression. Agnes S. Wladyka, Esq.

Santillana v. Astrue, Civil Case No. 07-3684 (FSH) (D.N.J. Feb. 22, 2009), Order – 5 pages.

1639. Partially favorable Appeals Council decision reversing the ALJ's finding that there was no severe impairment and granting benefits as of the date the SSI application was

filed. The Appeals Council found that the claimant had severe degenerative arthritis and that the plaintiff's subjective complaints were credible. A medical consultant to the Appeals Council limited the claimant to medium work. Given the claimant's vocational factors, he was found disabled under Rules 203.10 and 203.02. The Appeals Council did not disturb a favorable determination on a subsequent SSI application. Winona Zimberlin, Esq., Hartford, CT.

Appeals Council partially favorable decision (July 16, 2007) – 4 pages

1633. Appeals Council remand because the ALJ erred in finding that the claimant had no "severe" mental impairment. Opinion evidence from a treating psychiatrist and from a CE psychologist indicates that the claimant's mental impairments are at least "severe." It was also error for the ALJ to give more weight to the therapist's opinion than to the psychiatrist, who also stated that the claimant could not work. "The claimant's therapist is not an acceptable medical source, and an opinion from a therapist should not be given greater weight than that of a treating psychiatrist." Lynn Stevens, Esq., Atlanta, GA.

Appeals Council remand (May 4, 2007) – 3 pages

1614. District court remand where the ALJ found that the plaintiff's Crohn's Disease was not a "severe impairment" at step two because the plaintiff had stopped taking prescribed medication. While "[r]emediable impairments do not qualify for disability benefits," there are exceptions. Conditions must be evaluated without regard to remediability if the claimant cannot afford treatment. McKnight v. Sullivan, 927 F.2d 241, 242 (6thCir. 1990). The record was very clear that the plaintiff stopped her medication due to her inability to pay for it. Further, the fact that the plaintiff admitted she had never tried adult diapers for incontinence is not a reason for rejecting her credibility. The real issue was whether the incontinence constituted a non-exertional severe impairment. The court remanded for further consideration. Margolius, Margolius & Associates, Cleveland, OH.

Reis v. Commissioner of Social Security, Case No. 1:06 CV 0774 (N.D.Ohio, Mar. 30, 2007) – Memorandum Opinion, Judgment Entry - 14 pages

1611. The court remanded because the ALJ failed to address plaintiff's arthritis in her knees at step two as a "severe impairment." "Contrary to the defendant's suggestion, this court may not speculate as to findings the ALJ would have made or to make findings for the ALJ." The plaintiff's arthritis was also not considered at step three. The failure to analyze the arthritis at steps two and three "invalidates the ALJ's RFC determination, which is based in part on the preceding steps." The ALJ also failed to consider the plaintiff's obesity, as required by SSR 02-1p. Larry Wittenberg, Esq., Durham, NC.

Young v. Astrue, Case No. 4:05-cv-00142-D (E.D.N.C. March 16, 2007) – 5 pages

SIT/STAND OPTION

1733. District court award of benefits. The plaintiff has chronic deep vein thrombosis and her treating physician recommended against long periods of standing or sitting. However, the ALJ's RFC failed to be specific and consistent about the frequency of the plaintiff's need to alternate sitting and standing, which is contrary to the requirements of SSR 96-9p. "[W]hen the full range of sedentary work is eroded by temporal limitations

on standing and sitting, or alternation of same, precision is required, as SSR 96-9p explicitly states," relying on hourly measures. The ALJ's failure to make specific findings regarding the sitting/standing limitations resulted in a RFC finding that was not supported by substantial evidence and a defective hypothetical to the VE. Joseph R. Oelkers, III, Esq., Lake Charles, LA.

Griffin v. Astrue, Civil Action 07-1636 (W.D.La. Mar. 20, 2009) – 12 pages

1712. District court remand where the ALJ relied on old medical evidence to determine that the plaintiff retained the RFC for sedentary work with the option to alternate between sitting and standing every half-hour. There is no evidence of the plaintiff's RFC after her surgery, or after her doctor noted that her initial early progress had slowed and that she continued to experience pain and marked back problems. Dianne Newman, Esq., Akron, OH.

Cowgill v. Astrue, Case No. 5:07 cv 3407 (N.D.Ohio May 6, 2008) – 19 pages

1656. District court decision relying of SSR83-12 and SSR 96-9p. Under SSR 96-9p, the frequency of the need to alternate sitting and standing and the length of time needed to stand depend on the facts of the case. When a sit/stand option is necessary, the testimony of a VE is required to carry the Commissioner's burden. There are two considerations under the sit/stand option – frequency and duration. Here, the plaintiff needed a 2 to 3 minute break every 30minutes. The VE testified that this would preclude her return to past work as an administrative assistant, but that a break every hour would allow her to perform the work. The ALJ found that she could perform the work. The ALJ misinterpreted the VE's response. The ALJ's finding that the plaintiff could perform her past work as an administrative assistant with the limitations in his decision is incorrect. The case was remanded so the VE could consider the effect of the sit/stand restrictions on the other jobs noted by the VE. Margolius, Margolius & Associates, Cleveland, OH.

Waiters v. Commissioner of Social Security, Case No. 1:06-CV 1071 (Sept. 28, 2008) – 11 pages

SLEEP DISORDERS

1823. District Court remand because the ALJ erred in disregarding evidence from the plaintiff's counselor, a non-medical treating source, and failing to articulate the reasons as required by SSR 06-03p. The counselor had provided evidence that the plaintiff had eleven "marked" or "extreme" limitations due to sleep apnea and anxiety. The treating physician had expressed a similar opinion. While the counselor's opinion is not entitled to either controlling or substantial weight under 20 CFR § 404.1527(d), "that does not mean that such opinions can be totally disregarded." SSR 06-3p states that information from non-medical treating sources, such as social workers and therapists, must be reviewed and evaluated using the same factors in the regulation. The ALJ must explain the weight given to the opinion from these sources, or at least discuss the evidence and provide a rationale. IN this case, the only basis for rejecting the counselor's evidence in its totality is a "boilerplate recitation" that the Commissioner considered the evidence. The "primary deficiency" in the decision was the failure to articulate the reason for the weight given. "[S]ome of this failure constitutes a deviation from the Commissioner's own regulations

or rulings. . . [T]he Commissioner ought to follow his own procedural regulations." Eric Cole, Esq., Columbus, OH.

Ellinger v. Astrue, Case No. 2:08-cv-986 (S.D.Ohio Jan 27, 2010) – 49 pages, including Decision, Plaintiff's Statement of Errors, Defendant's Memorandum in Opposition; 2010 U.S. Dist. LEXIS 6800.

SPASMODIC TORTICOLLIS

1647. ALJ decision finding that the claimant suffered from cervical dystonia and migraine headaches. The neurological disorder caused her head to turn to the right involuntarily, which was diagnosed as spasmodic torticollis. There was considerable pain associated with this condition and there is no cure. The ALJ found that the claimant's allegations of pain were generally credible and would preclude her form performing SGA on a sustained basis. He also found that she would be unable to return to her past work as vice president of an automobile repair shop. Based on her exertional imitations, the ALJ applied rule 201.06 of the Medical Vocational Guidelines and found the claimant disabled. J. Michael Matthews, Esq., Altamonte Springs, Fl.

Fully Favorable ALJ decision (July 20, 2007) – 9 pages

SPEECH IMPAIRMENT

1822. Appeals Council remand due to several ALJ errors. The ALJ found the following "severe" impairments; fibromyalgia, Tourette's syndrome, and anxiety disorder. However, in formulating the claimant's RFC, the ALJ decision did not state what, if any, limitations were caused by the fibromyalgia and anxiety disorder. "Considering that any severe impairment causes vocational restrictions, the hearing decision must explain what restrictions result from each sever impairment." The ALJ also erred in discounting the testimony of the claimant's daughter and friend because they do not reside with the claimant. There is no requirement that testimony of lay witnesses is valid only if they reside with the claimant. The ALJ also failed to explain what effect the claimant's speech limitations would have on her ability to work. Randolph Baltz, Esq., Little Rock, AR.

Appeals Council remand (July 23, 2010) – 6 pages

SOCIAL SECURITY RULING 96-9p

1733. District court award of benefits. The plaintiff has chronic deep vein thrombosis and her treating physician recommended against long periods of standing or sitting. However, the ALJ's RFC failed to be specific and consistent about the frequency of the plaintiff's need to alternate sitting and standing, which is contrary to the requirements of SSR 96-9p. "[W]hen the full range of sedentary work is eroded by temporal limitations on standing and sitting, or alternation of same, precision is required, as SSR 96-9p explicitly states," relying on hourly measures. The ALJ's failure to make specific findings regarding the sitting/standing limitations resulted in a RFC finding that was not supported by substantial evidence and a defective hypothetical to the VE. Joseph R. Oelkers, III, Esq., Lake Charles, LA.

Griffin v. Astrue, Civil Action 07-1636 (W.D.La. Mar. 20, 2009) – 12 pages

SSI - LOAN

1602. ALJ decision on the issue of whether the difference between what the claimant pays her parents as rent and the rent they would have charged on the open market constitutes unearned income to the clamant for SSI purposes. If they have an oral contract to repay the difference, the difference is a loan, which is not income for SSI purposes, and not in-kind support and maintenance. The ALJ concluded that here was an oral contact that is enforceable under Iowa law and requires the claimant to repay the difference if financially able to; thus the difference between the fair market rental value and the amount the claimant is paying is a loan. Since it is a loan, SSA cannot count the difference in determining the claimant's monthly income and resources. The ALJ focused on a form that SSA used that only asked whether the stepfather expected that the claimant would repay the difference (he did not, because she had no money). The form did not ask whether he considered the $50 difference to be a debt, which he did. (Jan. 10, 2007).

John Bowman, Esq., Davenport, Iowa – 7 pages

SUBSEQUENT APPLICATION

1826. Appeals Council remand after the District Court remanded the first application. While the appeal to district court was pending, the claimant filed a subsequent application for childhood SSI benefits. This was allowed by the DDS. On the subsequent application, the DDS found that the claimant's impairments functionally equaled the listing. The district court remanded the first claim, alluding to the fact that the claim was not fully developed. The claimant's attorney had argued in court that remand was necessary so the ALJ could address and analyze additional evidence. Notably, the Appeals Council affirmed the subsequent allowance by the DDS. "The Administrative Law Judge, without disturbing the subsequent allowance. . ., will determine what, if any, impact evidence considered in the subsequent claim has on the instant case and consider the issue of disability for the period prior to [the date of the subsequent SSI application], consistent with the court order." Michael DePree, Esq., Davenport, IA.

Appeals Council remand. Nov 6, 2010 – 4 pages.

1815. Favorable Appeals Council decision on a subsequent application. The ALJ had denied the 2005 concurrent application, and the claimant requested review by the Appeals Council in 2007. She also filed a subsequent application for SSI benefits in February 2008 and was awarded benefits because her impairment met listing 12.05. In July 2010, the Appeals Council granted the request for review on the 2005 claims. The Appeals Council considered comments and new evidence and used a decision finding the claimant disabled as of June 12, 2006. The Appeals Council did not disturb the favorable decision on the 2008 application. Albert, Carrozza, Esq., Olney, MD.

Appeals Council decision (August 4, 2010) and Letter Brief– 16 pages

1629. Appeals Council remand where the ALJ's rationale in denying the claim on the basis of DA&A was inadequate with respect to considering the severity of claimant's impairments without consideration of the substance abuse, as required by the regulations. The ALJ also was directed to hold another hearing with a VE. The Appeals Council affirmed the state agency allowance in the subsequent claim and clearly limited the ALJ,

on remand, to considering the period of disability before the date of the subsequent allowed application. Winona Zimberlin, Esq., Hartford, CT.

Appeals Council remand (June 13, 2007) – 4 pages

SUBSTANCE ABUSE

1824. Fully favorable ALJ decision, finding that DA&A was not a contributing factor material to the determination of disability. The claimant's impairments met the criteria of listings 12.03 and 12.06 The ALJ noted the claimant "appears to be high functioning" and often tries to work. A post-hearing CE and additional hospital records indicated that she had paranoid delusion with obsessive fixations, which cause significant functional limitations. The post-hearing CE psychologist diagnosed schizophrenia, paranoid type. At a psychosocial assessment shortly before the hearing was held, the claimant reported drinking every other day, but her behavioral issues were noted to not be attributable to her substance abuse. The final assessment summary indicated that the claimant suffers primarily from a delusional disorder. John E. Horn, Esq., Tinley Park, IL.

Fully Favorable ALJ decision (Aug. 17, 2010) – 11 pages

1818. District court reversal and remand for an immediate award of benefits. The court relied extensively on the 1996 Teletype and found that the ALJ failed to follow the proper procedure for evaluating Drug Addiction and Alcoholism (DAA). He ignored the diagnosis of personality disorder, which could be a cause of the DAA. The court's decision also addressed how the ALJ distorted the record to favor a non-treating physician over the opinions of two treating sources whose reports were very detailed and thorough. There are no medical opinions that support the ALJ's conclusion that the plaintiff's remaining impairments are not disabling if she stopped using drugs or alcohol. The ALJ improperly rejected the two opinions from the plaintiff's long time treating mental health professionals, who opined that plaintiff's substance and alcohol abuse is not her primary diagnosis, and that even without such abuse, her mental impairments would be significant and would impact her ability to work. Paul Radosevich, Esq., Denver. CO.

Strawberry v. Astrue, Civil Action No 09-cv-02261-WYD) D.Colo. Sept 27, 2010) – 26 pages

1810. Appeals Council remand where the ALJ failed to apply the basis DA&A analysis in accordance with its regulations and policy. The ALJ found that the claimant's dementia was alcohol-induced and dismissed any limitation it would cause because "he would not have memory-related restrictions if he were to cease consuming alcohol." The ALJ's decision stated no medical support for this statement. The ALJ found the claimant was not credible, but the evaluation did not comply with the regulations or SSR 96-7p. On remand, among other requirements, the ALJ will follow the regulatory DA&A sequential evaluation and obtain evidence from a medical expert regarding the nature and severity of the claimant's impairments. Paul Radosevich, Esq., Denver, CO.

Appeals Council remand on Drug Addiction and Alcoholism. 2010 Order of Appeals Council Remanding Case to ALJ, Letter Brief to Appeals Council from the claimant's attorney

1808. Appeals Council remand for several reasons, including the ALJ's failure to properly evaluate the claimant's mental impairments and limitations, including DA&A. Kenneth Isserlis, Spokane, WA

Appeals Council remand, July 23, 2010 – 4 pages

1789. District court remand when the ALJ erred in rejecting the treating psychologist's opinions. While the plaintiff admits to past heavy alcohol use, there is no evidence in the record that excessive use of alcohol occurred at any point during the alleged period of disability except a two- week period. The treating psychologist had inquired about the plaintiff's period of alcohol abuse, yet the ALJ gave her opinions less weight because she "did not have an accurate understanding of claimant's alcohol consumption." The ALJ instead relied on a non-examining physician who noted that plaintiff had admitted to drinking one-half pint of alcohol nightly. On remand, the ALJ should reconsider the treating psychologist's evaluation in light of the level of alcohol use demonstrated in the record and by her testing results. Arthur Stevens, III, Esq., Medford, OR.

Jensen v. Astrue, Case No. 09-CV-3020-TC (D.Ore. Apr. 13, 2010) – 13 pages

1761. Following remand by the district court, the ALJ found that the claimant was disabled through the date of his death. His death was caused by intravenous drug use. The court remanded for several reasons: (1) The ALJ erred in giving greater weight to the ME who testified at the hearing than to two examining psychologists regarding the plaintiff's anxiety-related disorder; (2) the ALJ erred in ignoring evidence of the plaintiff's PTSD; (3) The ALJ erred in assessing Plaintiff's credibility as there was no affirmative evidence of malingering; and (4) The ALJ failed to properly consider lay witness evidence. At the remand hearing, the ALJ found that he plaintiff's impairments met the criteria of Listings 12.04 and 12.06. The ALJ also found that the plaintiff's substance use disorder was not a contributing factor material to the determination of disability. The ME testified that the plaintiff had bipolar disorder and PTSD, even without the substance abuse, even though the substance abuse likely exacerbated the bipolar disorder. Charles W. Talbot, Esq., Tacoma, WA.

Boyd v. Astrue, No. C08-5514KLS (W.D.Wash. May 20, 2009); 2009 U.S.Dist. LEXIS 46669- 35 pages, including Order Remanding the Commissioner's Decision to Deny Benefits, Appeals Council Order Remanding Case to ALJ, Fully favorable ALJ Decision (Sept 28, 2009)

1754. Fully favorable Appeals Council decision, concurring with the finding of disability by the DDS in a subsequent application, based on the claimant's pancreatitis and other impairments. The ALJ had denied benefits, finding that drug addiction and alcoholism (DA&A) was a contributing factor material to the disability determination. During the course of the appeal, the claimant died, and her sister was substituted as the party in the claim. The ALJ failed to follow the sequential evaluation in a DA&A case, 20 CFR 404.1535, i.e. he did not determine which of the claimant's limitations would have remained in the absence of DA&A. The Appeals Council concluded that the claimant's panceatitis was disabling and prevented her from performing even sedentary work. Using Grid Rule 201.21 as a framework, she was unable to perform SGA on a "regular and continuing basis per SSRs 96-8p and 96-9p). Douglas Brigandi, Esq., Bayside, NY.

Appeals Council favorable decision. (Sept. 18, 2009) – 8 pages.

1706. District Court remand because that the ALJ failed to follow the regulations regarding the analysis that must be used to determine whether the plaintiff's alcohol abuse was a contributing factor material to the disability determination. The ALJ considered the history of alcohol abuse only as part of his credibility assessment during the sequential analysis and not after finding that the plaintiff is disabled, as required by 20 CFR sec. 404.1535. In remanding the case, the court relied on other court decisions holding that remand is required where the ALJ considers the impact of a claimant's alcohol abuse before making an initial disability determination. The court also remanded for other reasons including the ALJ's failure to provide specific reasons for finding the plaintiff's statements not credible and the ALJ's failure to provide specific reasons for rejecting the treating physician's opinions. Dianne Newman, Esq. Akron, OH.

Adorjan v. Astrue, Case No. 1:07-CV-1795 (N.D.Ohio Sept 30, 2008) – 17 pages

1682. District Court remand for additional information from the treating physician and the ME regarding limitations related to alcoholism and those related to his other impairments. The ALJ failed to give legally sufficient consideration to the treating physician's opinion that the plaintiff's impairments, separate from his alcoholism, rendered him disabled. The plaintiff also was diagnosed with HIV, chronic obstructive disease, depression, reflux disease, and chronic pancreatitis. The ALJ adopted the opinion of the treating physician but concluded that the alcoholism was a contributing factor material to the plaintiff's disability. The ALJ erred when she stated that the evidence of record does not document any consistent complaints of poor energy or fatigue when the treating physician's treatment notes has numerous notations of the plaintiff's complaints of fatigue. Marcia Margolius, Esq., Cleveland, OH.

Hinerman v. Astrue, Case No. 2:07-cv-00280 (S.D.Ohio Apr. 30, 2008); 2008 U.S.Dist. LEXIS 35713 – 23 pages

1629. Appeals Council remand where the ALJ's rationale in denying the claim on the basis of DA&A was inadequate with respect to considering the severity of claimant's impairments without consideration of the substance abuse, as required by the regulations. The ALJ also was directed to hold another hearing with a VE. The Appeals Council affirmed the state agency allowance in the subsequent claim and clearly limited the ALJ, on remand, to considering the period of disability before the date of the subsequent allowed application. Winona Zimberlin, Esq., Hartford, CT.

Appeals Council remand (June 13, 2007) – 4 pages

1615. Appeals Council remand because the ALJ "simply concurs" with the DDS's finding that DA&A was material without following the sequential evaluation required pursuant to 20 CFR secs. 404.1520 and 416.920. The regulations require consideration of all impairments, including DA&A. If, the claimant is found to be disabled, there is then a separate evaluation to determining whether DA&A is a contributing factor material to the finding of disability, i.e., would the claimant be disabled if the use of drugs or alcohol stopped. John Bowman, Esq., Davenport, IA.

Appeals Council order remanding case. (March 21, 2007) – 4 pages

SUBSTANTIAL GAINFUL ACTIVITY

1722. ALJ decision finding that the beneficiary continued to be disabled because he is receiving subsidized pay and this is not working at the substantial gainful activity level. The beneficiary works for his father's company, which lays carpets. His mother insisted that he be hired so he could live independently. The parents supervise all of his work, which he would not be able to otherwise perform. He is allowed to leave the job any time he feels stressed due to contact with new people or any confusion. The behavior has cause problems with other workers and the father has lost jobs due to his son's behavior. The ALJ concluded that the work did not constitute SGA. The work is a subsidy that helps him survive and is not competitive employment. In light of the finding that disability continues, there was no overpayment. John Bowman, Esq., Davenport, IA.

Fully Favorable ALJ decision (Feb. 10, 2009) – 7 pages

1655. Fully favorable ALJ decision relying on Eleventh Circuit precedent regarding the standard used to assess subjective complaints of pain. The ALJ also reviewed the claimant's earnings during the period since onset and the decision includes a detailed discussion of the various criteria for evaluating "substantial gainful activity." The claimant has a number of orthopedic problems related to left hip problems. The ALJ found that the claimant's impairments could reasonably be expected to produce the alleged symptoms and that his statements are generally credible. The claimant is limited to light work and cannot maintain concentration for more than two hours at a time. He cannot return to his past semi-skilled medium to heavy work. The VE testified that his skills do not transfer to other occupations within his RFC. The ALJ found that there were no jobs that the claimant can perform because his limitations "so narrow the range or work the claimant might otherwise perform," a finding of disabled is warranted. Kitty Whitehurst, Esq., Northport, AL.

ALJ decision (Nov. 2, 2007) – 11 pages

1624. District court remand finding that substantial gainful activity means more than just the ability to find a job. (It requires the ability to hold a job for a significant period of time. See *Gatliff v. Commissioner*, 172 F.3d 690 (9th Cir. 1999)). The plaintiff, who was diagnosed with schizophrenia and schizoaffective disorder, had number of jobs, but the longest one lasted only 3 – 4 months. The ALJ found that the plaintiff could return to past relevant work. The plaintiff argued that these jobs were not past relevant work, but rather unsuccessful work attempts. Arthur W. Stevens, III, Esq., Medford, OR.

Trotter v. Astrue, Civil No. 06-3019-TC (D.Ore. April 23, 2007) – 11 pages

SUBSTANTIAL GAINFUL ACTIVITY – STRUCTURED ENVIRONMENT

1796. District Court reversal and award of benefits. The ALJ failed to consider the degree of the plaintiff's mental impairments in combination with his other impairments. Even at the structured and sheltered work setting at a VA work program, he was only able to work four hours a day and required accommodations. The court found no evidence in the record that work at this sheltered workshop indicated the ability to perform full-time sedentary work. Such programs are not considered SGA, per SSR 83-33. Arthur Stevens, III, Esq., Medford, OR.

Ellis v. Astrue, Civil No. 09-3040-AA (D.Ore. May 14, 2010) – 8 pages

SUPPLEMENTAL HEARING

1800. Appeals Council remand ordering the ALJ to offer the opportunity for a supplemental hearing and to obtain a response from the CE to the representative's request for additional information from the CE. The ALJ had obtained a post-hearing CE from a psychologist. The report was proffered to the claimant's attorney who requested a supplemental hearing to ask the VE another hypothetical question. He also sent a letter to the ALJ, asking to have the CE respond to an article. The ALJ did not hold a supplemental hearing or recontact the CE. HALLEX I-2-7-30H requires the ALJ to grant a request for a supplemental hearing and to determine if questioning the VE is necessary through testimony or written interrogatories. John Bowman, Esq., Davenport, IA.

Appeals Council remand on supplemental hearing. (April 29, 2010) – 3 pages

1645. Appeals Council remand order for a supplemental hearing. After the original hearing, the ALJ referred the claimant to a psychological CE. The ALJ proffered the report to the claimant through his representative, who requested a supplemental hearing if a favorable decision could not be issued. A supplemental hearing was not held and the ALJ denied the claim. HALLEX I-2-7-30 H provides that a request for a supplemental hearing in response to proffered evidence must be granted unless a fully favorable decision is issued. In addition, the ALJ decision does not contain an adequate evaluation of the claimant's mental impairments, finding that his major depression was not "severe." Also, the ALJ's RFC finding was not consistent with the evidence of record and was not reached in accordance with SSR 96-8p. John Bowman, Esq., Davenport, Iowa.

Appeals Council Remand Order (Aug.27, 2007)- 4 pages

1617. Appeals Council remand, finding that the ALJ erred in refusing to grant a supplemental hearing. The plaintiff's attorney had requested a supplemental hearing to consider evidence from a CE psychiatric evaluation, performed after the hearing. HALLEX I-2-7-30 H states that if a claimant requests a supplemental hearing, the ALJ must grant the request unless a fully favorable decision can be issued. Further consideration of the proffer requests submitted by the claimant's attorney is warranted. David Tilton, Esq., Coos Bay, OR.

Appeal Council Remand Order (April 13, 2007) – 3 pages

SURVEILLANCE SYSTEM MONITOR

1787. Favorable ALJ decision, finding that an RFC limitation for understanding and remembering simple routine instructions would preclude jobs requiring a reasoning level of "3." Specifically, the ALJ found that the claimant "can understand and remember simple, 1-2 step instructions and repetitive tasks." The VE testified that the plaintiff could perform the jobs of dispatcher and surveillance system monitor. But a restriction to 1-2 step instructions and repetitive tasks would preclude these jobs with a reasoning level of "3". James Noel, Esq., Boulder, CO.

Favorable ALJ decision (April 16, 2010) – 11 pages including ALJ Decision, Letter from claimant's Attorney to ALJ

1725. District Court decision finding that the ALJ erred in relying on the VE's testimony that conflicted with the DOT. The ALJ limited the plaintiff to jobs involving simple and or repetitive tasks, i.e. a reasoning level in the DOT of 1, but the only occupation the VE listed was surveillance system operator. This job has DOT reasoning level of 3 and requires the ability to understand and perform more complex instructions. A reasoning level of two or higher requires the individuals to be capable of more than simple or repetitive tasks. Chantal Harrington, Esq. Neptune Beach, FL

Marchitto v. Commissioner of SSA, Case No. 2:08-cv-148-FTM-29DNF (M.D.Fla. Mar. 30, 2009); 2009 U.S. Dist. LEXIS 26053 – 21 pages

SURVIVOR'S BENEFITS/DEPENDENCY

1646. The issue in this District Court case was whether the plaintiff was "dependent upon" the wage earner, her step-father, at the time of his death. The statute and regulations, 20 CFR 404.366 require that the child was receiving at least one-half of her support from the wage earner. To determine the percentage of support, SSA uses the "pooled-fund method" which is a rebuttable presumption that all household income is pooled and that each member shares equally. The plaintiff is an adult and has been receiving SSI based on autism. Under the pooled fund method, the plaintiff's SSI exceeded one-half of the amount required for her support. The ALJ did not use the method, and allowed the claim, finding that it would cost more money to support the claimant because of the expenses incurred due to her autism. The Appeals Council took own motion review, and reversed the claim, finding that repairs caused by the plaintiff's behavior were paid for from the family's pooled income. The court reversed and remanded for further factual findings for several reasons, First, the conclusion that 100% of the plaintiff's SSI benefits were available for her support was not supported by substantial evidence. Second, there is no evidence supporting the finding that the repairs were paid from the family's pooled income. It is unclear what percentage of the plaintiff's income was available for her support because the ALJ failed to adequately develop the record on this point. Joseph Hughes, Esq., Berrien Springs, MI.

Johnson v. Commissioner of Social Security, Case No. 1:06-cv-82 (W.D.Mich. Aug. 15, 2007) – 25 pages included the Judgment, Magistrate Judge's R&R, and Plaintiff's Brief.

TRANSFERABLITY OF SKILLS

1640. Fully Favorable Appeals Council decision finding the claimant disabled within Rule 202.06. At the hearing, the VE testified that the claimant had transferable skills to light jobs but not to sedentary jobs and that he could not perform semi-skilled jobs if he could not stand and walk at least 6 hours in an 8 hour day. A medical consultant to the Appeals Council found that the claimant could stand and walk no more than 4 hours per day. Thus, the claimant could not perform the jobs listed by the VE with the identified transferable skills. Johns Horn, Esq. Tinley Park, IL.

Appeals Council decision (July 20, 2007) – 6 pages

UNSKILLED WORK

1795. Appeals Council remand because the ALJ failed to consider the medical opinion of a treating source regarding the claimant's significant work-related limitations. The ALJ found that the claimant had severe mental impairments which limit him to unskilled work, but did not address the treating source's medical opinion. The ALJ's finding that the mental impairments would not preclude unskilled work is "confusing" since the claimant's past work was at least semi-skilled. "Unskilled work" is a vocational consideration, not a limitation found in the RFC assessment. Based on SSR 85-15 (basic mental demands of competitive, remunerative, unskilled work), the ALJ should consider the claimant's mental impairments and required consistency between "severe' mental impairments at step 2, what limitations they cause, and the specific impact of those limitations of the claimant's ability to meet the basic demands of work. Randolph Baltz, Esq., Little Rock, AR.

Appeals Council Remand order (April 23, 2010) – 5 pages

VETERANS' BENEFITS

1813. Ninth Circuit remand. The ALJ's finding that the SSA is not bound by the VA's disability determination because the governing rules differ, and that the VA based its determination on the fact that the plaintiff's failure to pass a drug test would discourage employers from hiring him are not "persuasive, specific, valid reasons" for discounting the VA determination. The ALJ's reasons for disagreeing with the VA's determination that the plaintiff's sleep apnea and back pain were partially disabling are sufficiently persuasive, specific, valid, and are supported by the record. However, they do not represent a complete basis for discounting the VA's determination. On remand, the ALJ should reconsider, with appropriate deference the effect, if any, of the other bases for the VA's disability determination. Charles W. Talbot, Esq., Tacoma, WA.

Berry v. Astrue, No. 09-35421 (9th Cir. Sept 22, 2010) – 14 pages. *Published at 622 F.3d 1228 (9th Cir. 2010).*

1757. Appeals Council remand to determine the appropriate weight to be given the VA determination. The ALJ found that the claimant had no "severe" impairment. The ALJ failed to consider the VA determination that the claimant had service-connected disabilities of migraine headaches, depressive disorder, and chronic folliculitis, entitling him to an individual "unemployability" rating by the VA. While not bound by the VA's determination, the ALJ must address it and weigh that finding per SSR 06-3p. On remand, the ALJ must address whether the claimant has an impairment that could reasonably be expected to produce the migraines and evaluate the pain under the factors in the regulations and SSR 96-7p. Also on remand, the ALJ must evaluate the VA's disability determination, per SSR 06-3p; the claimant's mental impairments, and the claimant's subjective complaints. The Appeals Council decision is the Order t the ALJ following a remand by the district court. Albert Carrozza, Esq., Olney, Md.

Appeals Council Remand (June 29, 2009) – 4 pages.

1670. District court remand holding that, although the VA decision is not binding on the Commissioner, the Commissioner must, at a minimum, consider the decision. SSR 06-3p requires an SSA adjudicator to explain the consideration given to disability decisions

made by governmental agencies and to articulate the reasons if the decision is rejected. The plaintiff was found to have a 100% service connected disability by the VA, but there is no indication that the ALJ considered this decision. The case is remanded fir further consideration of the VA's determination of total disability. Rita Fuchsman, Esq., Chillicothe, OH

Peoples v. Astrue, Case No. 2:07-cv-00019 (S.D.Ohio Feb. 26, 2008) – 9 pages

1654. District court reversal because the ALJ failed to assign great weight to the VA disability rating as required by *McCartey v. Massanari*, 298 F.3d 1072 (9th Cir. 2002). The VA found that the plaintiff's disability was "permanent and total" and that he is "unable to secure and follow a substantially gainful occupation due to disability." The ALJ's reasons for rejecting the VA rating "are neither persuasive nor valid reasons." The ALJ also relied on periods of stability and missed the fact that the plaintiff lived in a supportive, sheltered situation. The mental impairment listings require that SSA consider the individual's ability to function outside that environment. The court awarded benefits because if all impairments rejected were credited, the plaintiff would be found disabled. Arthur Stevens, III, Esq., Medford. OR.

Kittleson v. Astrue, CV-06-3089-ST (D.Ore. Oct. 30, 2007) – 30 pages

VOCATIONAL EXPERT TESTIMONY

1736. District Court award of benefits where the ALJ failed to fully credit the treating physician's findings and failed to give appropriate consideration to plaintiff's severe debilitating pain, including the side effects of the potent medications taking by the plaintiff. The ALJ based a hypothetical question to the VE on a RFC assessment from a nurse practitioner in the treating physician's practice. The VE responded that given these limitations, there was no work that the plaintiff would be able to perform. The VE gave a similar response to a prior RFC assessment from the treating physician, when asked by plaintiff's attorney. The ALJ's other hypothetical was based on a state agency physician's RFC made three years before the hearing and that did not include several significant limitations and impairments found by the treating source. Lawrence Wittenberg, Esq., Durham, NC.

Walker v. Astrue, Civil No. 1:07CV335 (W.D.N.C. Mar. 3, 2009), Memorandum and Order – 30 pages

1728. District Court remand where the government agreed that the ALJ relied on VE testimony that lacked an adequate foundation. The plaintiff's attorney had objected to the VE testimony at the hearing and submitted a written brief with the objections. Both the ALJ and the Appeals Council ignored the objections. In the remand memorandum, the government agrees that the ALJ shall conduct a new hearing and if the VE testifies again, "then the ALJ should rely upon such testimony only if, upon questioning by counsel, a sufficient foundation is established." Winona Zimberlin, Esq., Hartford, CT.

J.S. v. Astrue, Case No. 3:08-cv-01723-AWT (D.Conn. Mar. 16, 2009) – 45 pages including order and memorandum, Plaintiff's brief to the Appeals Council, post-hearing brief, and transcript of the VE testimony.

1690. District court remand finding problems with the step five analysis. In response to the ALJ's hypothetical, the VE had found three jobs that the claimant could perform. However, at oral argument, the government conceded that two jobs were not within the RFC found by the ALJ. The third job, a flagger, had job requirements that were not consistent with the limitations in the ALJ's hypothetical question. The ALJ failed to question the VE regarding this inconsistency and failed to follow SSR 00-4p. The court also rejected the government's *post hoc* rationalization that there was a fourth job identified by the VE, since it was not included in the ALJ's decision. The ALJ also erred in his finding regard the plaintiff's SVP level about following instructions. Daniel Emery, Esq. Yarmouth, ME.

Leighton v. Astrue, Docket No. 07-142-B-W (D.Me. June 30, 2008) – 8 pages

1634. District court remand where it was "unclear as to what the [vocational] expert was being asked to assume." The ALJ in some questions asked the V to disregard any "mental impairment" but in another question asked the VE to consider mental limitations found by a medical expert at the hearing. The ME's findings were not incorporated in the ALJ's actual RFC findings. The court found a "fundamental inconsistency" between the ALJ's RFC and the VE's testimony because the hypothetical did not incorporate the ALJ's findings. "Thus, there is no way to know whether the jobs identified by the vocational expert are consistent with the mental limitations found by the Commissioner." Margolius, Margolius & Associates, Cleveland, OH.

Lightle v. Commissioner of Social Security, No. 2:06-cv-0664 (S.D.Ohio, July 3, 2007) – 13 pages

1620. Appeals Council remand for consideration of two issues related to vocational evidence. First, it required the ALJ to address the attorney's request that a subpoena duces tecum be issued to the VE for the materials he relied on in forming his opinion. Second, the Appeals Council discussed the DOT requirement of reasoning level 2, defined as the ability to carry our "detailed but uninvolved written or oral instructions." The Appeals Council found that this is not the same as a restriction to perform short, simple insurrections learned in 30 days or less with a short demonstration. This finding may eliminate many of the reasoning level 2 jobs relied upon by VEs. Winona W. Zimberlin, Esq., Hartford, CT.

Appeals Council Remand order (April 27, 2007) – 4 pages

VOCATIONAL EXPERT TESTIMONY – CONFLICTS WITH DOT

1828. District court remand order where the ALJ failed to obtain a reasonable explanation from the VE for the conflict between his testimony and the DOT, and the record did not contain persuasive evidence to support the contradiction.. The VE testified that the plaintiff could perform two jobs – information clerk and fundraiser II. However, according to the DOT, the information clerk job required level 4 reasoning skills on a scale of General Education Development and the fundraiser job required level 3 reasoning skills. Those levels are not compatible with the plaintiff's limitation to simple, repetitive tasks, which is level 1. Because the ALJ failed to resolve the conflict, his

reliance on the VE's testimony was improperly. Michael Hurley, Esq., Rancho Cucamonga, CA.

Cota v. Astrue, Case No. EDNV 10-0220 AN (C.D.Cal. Dec. 6, 2010) – 7 pages

1758. District Court remand because the VE's testimony conflicted with the DOT. SSA conceded that the plaintiff could not perform one of the jobs listed by the VE. The DOT stated it is light work, but the VE testified that it is sedentary. The ALJ agreed with the VE, without explaining the discrepancy. The ALJ failed to explain how the plaintiff could perform other jobs the VE identified that required reaching overhead. The hypothetical question did not include all of the plaintiff's limitations. The ALJ failed to resolve conflicts between the VE testimony and the DOT, in violation of SSR 00-4p. Gregg M. Hobbie, Esq., Eatontown, NJ.

Casatelli v. Commissioner of Social Security, Civil Action No. 08-3662 (FLW) (D.N.J. Aug. 31, 2009); 2009 U.S. Dist. LEXIS 78110; 145 SSRS – 19 pages.

1756. District Court remand because the ALJ erred in relying on the VE's statement that his testimony was consistent with the DOT, when if fact, as pointed bout by the plaintiff, it was not consistent. Jobs listed by the VE had requirements that were explicitly excluded in the ALJ's hypothetical to the VE. The hypothetical included limitations with a level "1" reasoning level, yet the VE listed jobs with reasoning levels of "2" and "3." "While not entirely clear, it does appear that the DOT descriptions are not consistent with [sic] opinion of the VE that a claimant limited to simple repetitive tasks could perform work at reasoning level 2 and 3." The court agreed with the plaintiff that this is inconsistent with SSR 00-4p, which requires the ALJ to resolve conflicts between the DOT and a VE's testimony. *Miller v. Commissioner*, 246 Fed. Appx 660 (11th Cir. 2007), which allows and ALJ to rely on VE testimony does not control in this case because the VE incorrectly stated that his testimony was consistent with the DOT. "The ALJ did not resolve the conflict, because he was not aware that any conflict existed. . . Thus, the ALJ did not make a *choice* in finding that the testimony was consistent with the DOT; he was misinformed. Chantal Harrington, Esq., Neptune Beach, FL.

Akins v. Commissioner of Social Security, Case No. 6:08-cv-1575-DAB (M.D.Fla. Sept. 10, 2009); 2009 U.S.Dist. LEXIS 82640 – 14 pages.

1657. Appeals Council remand where the majority of the region used by the VE in Iowa but the plaintiff lives in Illinois. The Appeals Council ordered the ALJ to "[e]nsure that the region for where the claimant is living is used in obtaining the availability of the jobs cited." The ALJ must also identify and resolve any conflicts between the occupational evidence provided by the vocational expert and the information in the DOT and its companion publication, the Selected Characteristics of Occupations, as per SSR 00-4p. John Bowman, Esq., Davenport, IA.

Appeals Council Remand (July 16, 2007) – 4 pages

1621. This is a further decision after the remand order in LAM 1609 below. The court denied the governments Rule 59(e) motion to alter or amend the judgment. The court disagreed with the government's arguments that the court "clearly erred" in its prior judgment when it determined that the VE's testimony conflicted with the DOT because

the GED reasoning level in the DOT relates to the educational level needed to perform a job, not the work requirements. The court holds that the GED reasoning level does pertain to work requirements of a job. Carol Avard, Esq., Cape Coral, FL

Leonard v. Astrue, Case No. 2:05-cv-00499-MMH-SPC (M.D.Fla. May 1, 2007*);* 2007 U.S. Dist. LEXIS 38411. *Published at 487 F. Supp. 2d 1333 (M.D.Fla. 2007)* – 7 pages

1609. District court decision rejecting the magistrate judge's report and recommendation to affirm the denial of benefits. This case involved a second DIB application. In the first claim, the ALJ found that the plaintiff could return to past work as a telemarketer, and the plaintiff did not appeal that claim. At the hearing on the first claim, the VE indicated that plaintiff could perform telemarketing work, classifying it as "borderline unskilled to semi-skilled with an SVP of 3." The DOT classifies the job as having a reasoning level of 3. The ALJ had limited the plaintiff to performing simple, repetitive tasks, consistent with a reasoning level of 1 or 2. Thus, the VE's testimony conflicts with the DOT. SSR 00-4p requires an explanation by the ALJ when such a conflict exists. The hearing on the second claim took place in April 2004, and a decision was issued in July 2004, while SSR 00-4p was in effect. The ALJ at the 2004 hearing was obliged to comply with SSR 00-4p. In this case, the ALJ failed to obtain the reasonable explanation for the conflict. Carol Avard, Esq., Cape Coral, FL.

Leonard v. Astrue, Case No. 2:05-cv-499-FtM-34SPC (M.D.Fla. March 30, 2007); 2007 U.S. Dist. LEXIS 28041; 119 Soc. Sec. Rep. Service 328. *Published at 487 F.Supp.2d 1333 (M.D. Fla. 2007)* – 13 pages. For further proceedings, see LAM 1621.

VOCATIONAL EXPERT TESTIMONY: "REGIONAL ECONOMY"

1657. Appeals Council remand where the majority of the region used by the VE in Iowa but the plaintiff lives in Illinois. The Appeals Council ordered the ALJ to "[e]nsure that the region for where the claimant is living is used in obtaining the availability of the jobs cited." The ALJ must also identify and resolve any conflicts between the occupational evidence provided by the vocational expert and the information in the DOT and its companion publication, the Selected Characteristics of Occupations, as per SSR 00-4p. John Bowman, Esq., Davenport, IA.

Appeals Council Remand (July 16, 2007) – 4 pages

VOCATIONAL EXPERT TESTIMONY: UNSCHEDULED BREAKS

1729. Appeals Council remand for a new hearing. The claimant testified that she needed unscheduled breaks during the day due to fatigue. The VE testified that if the claimant needed unscheduled breaks, she would not be able to perform the jobs the VE previously identified. The Appeals Council found that the ALJ erred by failing to address the claimant's allegations and her credibility on this issue. The ALJ also failed to consider the side effects of the claimant's medications, which she testified caused fatigue and dehydration. Testimony about these side effects must be acknowledged and the claimant's credibility addressed. In addition, the ALJ improperly relied on the RFC finding of the DDS physician, even though that doctor did not have the more recent medical evidence and testimony. On remand, the ALJ will also determine whether work performed after the alleged onset date was SGA. John Bowman, Esq., Davenport, IA.

Appeals Council remand (February 20, 2009) – 5 pages

WEIGHT OF MEDICAL EVIDENCE - ATTORNEY-HIRED/ FAMILY FRIEND

1760. District Court reversal and award of benefits. The court found that the ALJ did not provide "clear and convincing reasons" to reject the treating doctor's uncontroverted opinion. The treating doctor, who had been treating the plaintiff since he was one year old, documented physical and mental limitations caused by his primary disorder, Ehlers-Danlos Syndrome, a hereditary connective tissue disorder. The fact that the doctor was a family friend was not a proper reason to reject his opinion. "[T]he ALJ may not reject a properly supported physician's opinion based upon the source of a referral. The family friendship "does not discredit [the doctor's] opinion so far as it is supported by his clinical notes and findings." Arthur Stevens, III, Esq., Medford, Or.

Mendoza v. Astrue, Civil No. 08-3090-HU (D. Ore. Sept. 30, 2009) – 23 pages.

1685. District court remand because the ALJ failed to give appropriate weight to the opinions of the treating physicians. The ALJ's conclusion that the medical source statement (MSS) should be given no weight because it was obtained by counsel is unsupported by the record. The MSS form was not created by counsel nor is there any evidence suggesting that counsel somehow controlled its contents. Also, there is no evidence to support the ALJ's finding that the treating doctor's objectivity was compromised even if he and the plaintiff's husband were "well acquainted. The ALJ also erred in discounting the opinion of another treating doctor because the signature was unclear and the report did not define "intermittent rest periods." However, based on other evidence in the record, the doctor's identity was readily discernible. Further, the fact that "intermittent rest periods" was stated, without further explanation, is not an independent basis for disregarding the entire opinion, although it could affect the weight given to the report. The court rejected the government's argument that the opinion was inconsistent with the state agency doctor. The ALJ also failed to properly analyze the plaintiff's credibility. John Horn, Esq., Tinley Park, IL.

Michael v. Astrue, Case No. 07-cv-03490 (N.D.Ill. Jan 18, 2008); *published at 543 F.Supp.2d 860 (N.D.Ill. 2008)* – 19 pages

WEIGHT OF MEDICAL EVIDENCE – DOCTOR'S FINDING OF DISABILITY

1811. District court remand for further proceedings The ALJ erred by rejecting the treating physician's opinion and finding the plaintiff could return to past work. The ALJ gave little weight to the statement of the treating physician that the plaintiff was "totally incapacitated for the kind of work he did in the past." The ALJ found this was an issue reserved to the Commissioner under 20 CFR 404.1527(e)(1). An ALJ must provide good reasons for the weight he gives to the opinion of a treating physician. A statement on issues reserved to the Commissioner may not be determinative. "Thus, while the treating physicians' ultimate opinion may not be controlling, the ALJ is required . . .to give controlling weight to the treating physician's opinions on the functional capacity that Plaintiff retains. The ALJ also failed to provide a function by function analysis of the plaintiff's limitations, failed to properly evaluate the plaintiff's credibility and placed

undue reliance on the opinion of the consultative examiner and DDS physician. Irwin Portnoy, Esq., New Windsor, NY.

Sava v. Astrue, Case NO. 06-CV-3386 (KMK)(GAY)(S.D.N.Y. Aug. 12, 2010); 2010 U.S. Dist. 82389; 155 SSRS – 41 pages

1750. Circuit court remand "urging" that a new ALJ hear the case, after finding that this case was "not the first case in which this particular ALJ has misstated the treating-physician rule." The ALJ had held that the treating physician opinion was not entitled to significant weight because it concerned "issues reserved to the Commissioner." The ALJ confused these two standards. A treating physician's opinion is entitled to controlling weight if well supported by objective medical evidence and consistent with other substantial evidence in the record. In contrast, the treating doctor's administrative opinion, e.g. that the claimant has the RFC for sedentary work, is not entitled to significant weight. Here, the doctor limited himself to a medical opinion and gave only as assessment of the plaintiff's physical limitations. Such a medical opinion is presumptively entitled to controlling deference per 20 CFR 404.1527(a)(2). William Jenner, Esq., Madison, IN.

Collins v. Astrue, No. 0-2663 (7th Cir. May 7, 2009), 2009 WL 1247188 (C.A.7 (Ind)); 2009 U.S.App. LEXIS 9980; 324 Fed. Appx. 516 – 11 pages.

1749. District court reversal and remand for benefits. The ALJ erred in denying the case at step 2, finding no severe impairment. The court held that complex regional pain syndrome (CRPS) was a severe impairment and that the plaintiff was disabled at step five. In response to a hypothetical form the plaintiff's attorney, the VE found no jobs that the plaintiff could perform. The ALJ erred in giving little weight to the treating physician's opinion "solely on the stated ground that he 'attempts to make the ultimate conclusion of disability,' which is reserved to the Administrative Law Judge. John V. Johnson, Esq., Chico, CA.

Boulanger v. Astrue, No. CIVS-07-0849 DAD (E.D.Cal. May 15, 2009); 2009 U.S. Dist. LEXIS 44458; 142 SSRS 182 – 27 pages

WEIGHT OF MEDICAL EVIDENCE – MEDICAL EXPERT'S OPINION

1808. Appeals Council remand for several reasons, including the fact that the ME's specialty was not consistent with the claimant's impairment. The ME was an orthopedic surgeon. The claimant's main impairment was sensory idiopathic neuropathy, which is usually treated by a neurologist. Kenneth Isserlis, Spokane, WA

Appeals Council remand, July 23, 2010 – 4 pages

1781. District court remand ordering that the case be heard by a different ALJ. The ALJ had already issued two hearing decisions with reversible error. The transcript raised the possibility that the ALJ "was not seeking neutrally to develop the record" but was seeking support for his first decision, where he alluded to the fact that the claimant was seeking benefits as salary replacement while she raised her child. The government moved to remand the case for a new hearing because the ALJ's decision relied on the testimony of a ME who, shortly after the ALJ decision, agreed to stop treating patients due to

multiple malpractice charges. The government conceded that the ALJ placed "significant weight" on the ME's testimony, which may no longer be considered "reliable," and did not properly consider opinion evidence from the treating physician. The court found no evidence that the ALJ deliberately used an unreliable expert, thus held that remand for a new hearing, rather than for the payment of benefits, was appropriate. Douglas Brigandi, Esq., Bayside, NY.

Gross v. Astrue, Case No. 1:08-cv-00578-NG (E.D.N.Y. Jan. 20, 2010); 2010 U.S. Dist. LEXIS 4292 – 7 pages

1606. District court awarding benefits more than ten years after the plaintiff filed his application, and after four ALJ hearings. His primary impairments are a back injury, pain and depression. The court found that the ALJ ignored the medical expert's opinion that the plaintiff's condition equaled the spinal disorder listing: 1.04A. The ALJ also erroneously found that the ME found that the listing was equaled only when depression was considered. Instead of relying on the ME's equivalence opinion, the ALJ "embarked on a concerted effort to discredit" the treating physician's diagnosis of depression. The ALJ placed more weight on the opinions of a psychiatric CE and ME and failed to consider the depression in the context of the other impairments as required by law. The court was also disturbed by the ALJ's "sweeping disregard" of the plaintiff's allegations of pain. Douglas C.J. Brigandi, Esq., Bayside, NY.

El-Shabazz v. Commissioner of Social Security, Case No. 04-CV-3731 (E.D.N.Y. Dec. 6, 2006) - 20 pages

1605. District Court reversal for an immediate award of benefits. The ALJ had erred in basing the RFC determination on the opinions of the ME who had never treated or examined the plaintiff. The court rejected the opinion of this nonexamining medical expert because he "based his opinions on what the ordinary person could do with the diagnosed physical impairments and not what this particular plaintiff could do." The ALJ also erred in rejecting the opinions of the longtime treating physician, a position that the government did not defend in court. The treating physician had found significant psychiatric impairments and functional limitations, which precluded impairment. The ME did not evaluate the mental limitations in this case. The court found the record to be fully developed. Kenneth Isserlis, Esq., Spokane, WA.

Fry v. Barnhart, No. CV-05-0269-MWL (E.D.Wash. Aug. 11, 2006) – 18 pages

WEIGHT OF MEDICAL EVIDENCE – MENTAL IMPAIRMENTS

1823. District Court remand because the ALJ erred in disregarding evidence from the plaintiff's counselor, a non-medical treating source, and failing to articulate the reasons as required by SSR 06-03p. The counselor had provided evidence that the plaintiff had eleven "marked" or "extreme" limitations due to sleep apnea and anxiety. The treating physician had expressed a similar opinion. While the counselor's opinion is not entitled to either controlling or substantial weight under 20 CFR § 404.1527(d), "that does not mean that such opinions can be totally disregarded." SSR 06-3p states that information from

non-medical treating sources, such as social workers and therapists, must be reviewed and evaluated using the same factors in the regulation. The ALJ must explain the weight given to the opinion from these sources, or at least discuss the evidence and provide a rationale. IN this case, the only basis for rejecting the counselor's evidence in its totality is a "boilerplate recitation" that the Commissioner considered the evidence. The "primary deficiency" in the decision was the failure to articulate the reason for the weight given. "[S]ome of this failure constitutes a deviation from the Commissioner's own regulations or rulings. . . [T]he Commissioner ought to follow his own procedural regulations." Eric Cole, Esq., Columbus, OH.

Ellinger v. Astrue, Case No. 2:08-cv-986 (S.D.Ohio Jan 27, 2010) – 49 pages, including Decision, Plaintiff's Statement of Errors, Defendant's Memorandum in Opposition; 2010 U.S. Dist. LEXIS 6800.

1818. District court reversal and remand for an immediate award of benefits. The court relied extensively on the 1996 Teletype and found that the ALJ failed to follow the proper procedure for evaluating Drug Addiction and Alcoholism (DAA). He ignored the diagnosis of personality disorder, which could be a cause of the DAA. The court's decision also addressed how the ALJ distorted the record to favor a non-treating physician over the opinions of two treating sources whose reports were very detailed and thorough. There are no medical opinions that support the ALJ's conclusion that the plaintiff's remaining impairments are not disabling if she stopped using drugs or alcohol. The ALJ improperly rejected the two opinions from the plaintiff's long time treating mental health professionals, who opined that plaintiff's substance and alcohol abuse is not her primary diagnosis, and that even without such abuse, her mental impairments would be significant and would impact her ability to work. Paul Radosevich, Esq., Denver. CO.

Strawberry v. Astrue, Civil Action No 09-cv-02261-WYD) D.Colo. Sept 27, 2010) – 26 pages

1720. The court found that "the ALJ's excessively jaundiced view of plaintiff caused her to incorrectly reject the legitimate information in the record indicating she is disabled." The record had several mental RFCs with varying opinions from examining physicians but the ALJ's assessment was erroneous. An ALJ cannot reject a doctor's opinion that relies on the plaintiff's complaints if the doctor does not discredit those complaints, and supports the opinion with his/her own observations. The three examining doctors whose opinions were dismissed by the ALJ relied to some extent on the plaintiff's subjective reports of symptoms, yet none of them questioned her credibility. They agreed in their diagnosis of the plaintiff "to a certain extent." As a result, the ALJ erred in rejecting the opinion of the treating doctor with the most severe limitations, since no other doctor administrated as thorough an examination. The court reversed and awarded benefits, finding that the record was fully developed and the evidence was not sufficient to support the Commissioner's decision. Arthur W. Stevens, III, Esq., Medford, OR.

Hernandez-Devereaux v. Astrue, CV-08-3007-ST (D.Ore. Jan. 23, 2009); *Published at 614 F.Supp.2d 1125 (D.Or. 2009)* – 13 pages.

1714. Circuit court decision that the child was disabled at step five. The ALJ erred in ignoring the examining doctors' opinions in favor of the non-examining psychologist's opinion. The DDS non-examining psychologist did not have the full medical record and his opinion was contradicted by the report of the psychologist who performed a consultative examination, and by the opinions of the treating physician. The ALJ rejected the treating doctor's opinion because it was inconsistent with his treatment notes, although it was similar to the psychologist CE's findings. A doctor's observation that a patient is doing well due to medication does not mean that the individual can work. The ability to function well during an evaluation does not necessarily reflect the ability to function in a work setting. The court reversed, rather than remand, finding that the record was fully developed. Robert Rains, Esq., Carlisle, PA

Brownawell v. Commissioner of Social Security, No. 07-4405 (3rd Cir. Dec. 9, 2008) *Published at 554 F.3d 352 (3rd Cir. 2008)* – 11 pages.

1707. Appeals Council remand where the ALJ failed to properly evaluate the mental RFC and questionnaires completed by the claimant's counselor and psychiatrist regarding the ability to perform mental work-related functions, as required by 20 CFR sec. 404.1527 and SSRs 96-2p and 06-3p. Both sources found the claimant to have "marked" and "extreme" limitations. The ALJ provided a rationale for the weight given to these opinions but did not recontact the treating sources to clarify their opinions. In addition, hospital records revealed GAF scores of 20 and 25, which indicate some evidence of danger to self or others and serious impairment of judgment. In addition, the ALJ found that he claimant could perform jobs with an SVP of 3. However, the limitations found by the ALJ correspond to unskilled work, which requires little or no judgment and corresponds to an SVP of 2. John Bowman, Esq., Davenport, IA.

Appeals Council remand (Oct. 24, 2008) 5 pages.

1669. Appeals Council remand because the ALJ failed to follow the guidelines in SSR 06-03 for evaluating evidence from sources who are not "acceptable medical sources" when he did not give sufficient weight to a treating mental health therapist. The ALJ also erred by finding that the claimant's depressive disorder was not "severe" and imposed only "mild" limitations in contrast to the State Agency medical consultant's findings. The Appeals Council ordered that the case be assigned to a new ALJ on remand because this was the second remand. David Harr, Esq., Greensburg, PA

Appeals Council remand (Feb. 2008) – 3 pages

WEIGHT OF MEDICAL EVIDENCE – NON-TREATING DOCTOR

1807. District court decision remand for further proceedings where the ALJ improperly relied on the opinion of a non-examining medical expert and rejected the treating doctors' opinions. The ME provided his opinions in interrogatories posed by the ALJ, after the ALJ provided the ME with "undisclosed" medical records. It was legal error '[f]or the ALJ to elevate the opinion of that non-examining physician over those of the plaintiff's longstanding health care provider. . .' This error was "compounded" by the ALJ's failure to indicate what weight he accorded the treating doctor's opinion and by his rejection, without reason, of evidence from a more recent treating doctor. The ALJ erred in not

giving controlling weight to the treating physicians' opinions given the length of their relationship with the plaintiff, the frequency of examinations, the extensive nature of their treating relationship with her, and the fact that their opinions were consistent with the record. Further, one treating doctor was a specialist. Only the opinion of the ME contradicted these opinions. "[T]here exists a reasonable basis for doubt whether the 'goof reasons' required by [the regulations] for lack of weight attributed to a medical opinion were provided in the ALJ's decision. Judith Pareira, Esq., Saranac Lake, NY.

Kennedy v. Astrue, Case 8:09-cv-00143 (GTS/DEP) (N.D.N.Y. June 14, 2010); 2010 U.S. Dist. LEXIS 86945 – 54 pages

1772. District court reversal finding that the ALJ erred in basing the disability determination on the opinion of a non-treating, non-examining, non-physician DDS disability examiner instead of the treating physicians' reports. As stated by the court, this is "bordering on ludicrous." The ALJ simply concluded that the treating neurologist was lying and ignored his statements. The court chided the ALJ for inferring that the treating doctors provided their opinions because "patients can be quite insistent and demanding." An ALJ "may not arbitrarily substitute his own hunch or intuition for the diagnosis of a medical professional." The rejection on the uncontroverted treating physician's opinion in favor of the RFC completed by the DDS examiner was "error requiring reversal." The plaintiff met listing 9.08 and is found disabled. Michael Booker, Esq., Birmingham, AL.

Chambers v. Astrue, Case No. CV-09-J-1011-NE (N.D.Ala. Nov. 19, 2009) – 22 pages including Order, Memorandum Opinion, Letter from Plaintiff's Attorney.

1771. District Court remand where the ALJ rejected the opinion of the treating physician in favor of an opinion from a non-examining physician. The ALJ sent interrogatories to the non-examining physician but did not identify what documentation he sent to that doctor. The non-examining physician's responses did not identify the basis of his opinion other than to say that it was based on the record he received. The court required the ALJ to specifically reveal what records the non-examining physician had reviewed and whether he had sufficiently supported his opinions. The ALJ also misapplied the treating physician rule. The plaintiff's attorney notes that the non-examining physician used by SSA lost his license to practice medicine shortly after reviewing this case, but had permission to do record reviews. Judith A. Pareira, Esq., Saranac Lake, NY.

Bechler v. Astrue, Case No. 07-CV-0380 (LEK) (N.D.N.Y. Nov. 30, 2009); 2009 U.S.Dist. LEXIS 121363 - 17 pages including Report and Recommendation and Letter from Plaintiff's Attorney.

WEIGHT OF MEDICAL EVIDENCE – NURSE PRACTITIONER

1796. District Court reversal and award of benefits. One of the errors was that the ALJ rejected the conclusions of a VA Nurse Practitioner because she is not an "acceptable medical source." Pursuant to SSR 06-03p, such opinions are significant and should be evaluated regarding impairment severity and functional limitation. Arthur Stevens, III, Esq., Medford, OR.

Ellis v. Astrue, Civil No. 09-3040-AA (D.Ore. May 14, 2010) – 8 pages

1702. District Court award of benefits from the time the plaintiff's drug use ended. The ALJ rejected the nurse practitioner's opinion because she is not an "acceptable medical source" and because it was contrary to the opinions of the treating psychiatrist working with the nurse. The ALJ erred because he failed to discuss the weight he have the nurse's opinion, as required by SSR 06-03p, and because his explanation for rejecting the treating psychiatrist's reports "was an extremely selective distortion of those reports." The ALJ's selective review did not provide a good reason to reject the doctor's reports. Margolius, Margolius & Associates, Cleveland, OH.

Padgett v. Commissioner of Social Security, Case No. 1:07 CV 1382 (N.D.Ohio, Sept. 30, 2008) – 14 pages.

WEIGHT OF MEDICAL EVIDENCE – POST HOC ARGUMENTS

1809. District court remand for further proceedings where the ALJ did not provide specific reasons for rejecting the majority of the functional limitations in the treating physician's opinions, as required by the regulations. The ALJ failed to cite provide "good reasons" for rejecting those opinions by citing other evidence inconsistent with the opinions. The court rejects the Commissioners post hoc arguments in support of the ALJ's findings. While the arguments may have been sufficient reason to reject the treating physician's opinions, the ALJ failed to state them. "In his brief, the Commissioner attempts to justify the ALJ's rejection of [the treating doctor's] opinion; however, such a recitation is purely conjecture upon the part of counsel and cannot serve as the basis for review by a court. "The Sixth Circuit has expressly held that where the ALJ fails to give good reasons for his rejections of a treating source's opinion, remand is required even if substantial evidence in the record otherwise supports the ALJ's decision. Margolius and Associates, Cleveland, OH.

Ortiz v. Astrue, Case No. 1:09 CV 2166 (N.D.Ohio, July 30, 2010); 2010 U.S. Dist. LEXIS 77134 – 17 pages

WEIGHT OF MEDICAL EVIDENCE – RETROSPECTIVE OPINION

1673. Fully favorable ALJ decision for a claimant who alleged disability since 1972 and whose insured status expired in 1977. In response to a request from the claimant's attorney, the claimant's current treating neurosurgeon submitted a letter in February 2007 stating that she was unemployable as of the 1972 medical problems and that "there is not any question that she was disabled long before March 1977, although she apparently did not apply for benefits prior to that time." The ALJ gave the letter great weight and found that the State Agency doctors' opinions should be given little weight. The ALJ also found that the testimony of the claimant and her husband was credible. He concluded that she has met Listing 12.20(A)(2) and (B)(1), (2) and (3) since February 1972. Kevin Pflepsen, Esq., Albany, GA

Favorable ALJ decision on retrospective opinion (Feb. 27, 2008) – 13 pages including Notice of Decision, Decision, Letter from treating neurologist

WEIGHT OF MEDICAL EVIDENCE – STATE AGENCY OPINION

1791. ALJ decision that the claimant was disabled under Grid Rule 202.09. The claimant had multiple right hand surgeries due to a workplace injury, resulting in amputation of several digits and skin grafts. His treating orthopedic hand surgeon restricted the claimant

from heavy lifting and repetitive manipulation with the right upper extremity. The ALJ gave "little weight" to the opinions of the state agency doctors because other medical opinions were more consistent with the record as a whole and evidence at the hearing showed that the claimant was more limited than determined by the state agency doctors. The ALJ found the claimant limited to light work, with the ability to perform right arm gross manipulations "frequently" but fine/finger manipulation only "occasionally." As the claimant is closely approaching advanced age, is illiterate, and has an unskilled work history, he is disabled under Rule 202.09. Steven G. Rosales, Esq., Sante Fe Springs, CA.

ALJ decision on upper extremity manipulation (Mar. 22, 2010) – 12 pages including Decision and Counsel's letter to claimant.

1780. District Court remand, holding that the ALJ did not properly assess the opinion of the treating physician and instead relied on the opinion on the non-examining state agency physician. The court found it "troubling" that the state agency reviews, upon which the ALJ relied, were done without taking into account a single record concerning the plaintiff's most disabling condition, fibromyalgia. The court noted that the existence of fibromyalgia and its severity are not readily susceptible to objective determination. In adopting the Magistrate Judge's Report and Recommendation, the court found that the ALJ's reasons for rejecting the treating physician's opinion were inadequate under 6th Circuit precedent. Rita S. Fuchsman, Esq., Chillicothe, OH.

Ginther v. Astrue, Case No. 2:09-cv-00189 (S.D.Ohio Mar 12, 2010); 2010 U.S. LEXIS 23128 – 16 pages

1777. District Court remand because the ALJ failed to state that he had considered the opinions of the state agency physicians or to articulate the weight given to those opinions. The fact that the ALJ is not bound by the state agency opinions does not mean that he can ignore them. Two state agency physicians and the treating physicians stated that the plaintiff could lift no more than five pounds. The state agency physicians also stated that she could only occasionally reach with her right arm. 20 C.F.R. sec. 416.927(f)(2) and SSR 96-6p require that the ALJ explain the weight to be given the opinions of state agency physicians unless the treating doctor's opinion is given controlling weight. Because the treating doctor did not discuss the "reaching" issue, SSR 96-6p requires the ALJ to consider the state agency opinion. This was not harmless error, because the ALJ failed to include a limitation on reaching in the hypothetical question. Marcia Margolius, Esq., Cleveland, OH.

Tarver v. Astrue, Case No. 1:08 CV 2831 (N.D.Ohio Dec. 9, 2009) – 11 pages.

1704. District court remand where the ALJ erred in applying *Drummond v. Commissioner,* 126 (F.3d 837 (6th Cir. 1997) and in determining the plaintiff's RFC. In *Drummond,* the Sixth Circuit held that res judicata applied and that absent evidence of improvement, a subsequent ALJ is bound by the findings of a previous ALJ. There is a *Drummond* Acquiescence Ruling AR 98-4(6). The ALJ in this case erred in adopting the prior ALJ's mental RFC findings. The ALJ relied on the findings of the DDS examiners and consultant that were completed well after the plaintiff's date last insured, but rejected the treating doctor's findings because some were made after the DLI. The ALJ did not

explain why post-DLI evidence was relevant when pre-DLI evidence was not. The ALJ "cannot pick and choose the medical evidence that favors his position and reject the rest as outside of the relevant time period when the evidence upon which he himself relies is outside of the insured time period." As a result, the ALJ did not provide sufficient reasons for ejecting the treating doctors' opinions on this basis. The court's decision also includes an extensive discussion why the ALJ improperly applied the treating physician rule. Margolius, Margolius, & Associates, Cleveland, OH.

Mickens v. Astrue, Case No. 1:07CV2706 (N.D.Ohio Sept. 26, 2008) – 24 pages

1693. District court remand. The ALJ's finding that the plaintiff could perform a full range of sedentary work conflicted with the treating orthopedic surgeon's medical source statement indicating that she could perform only less than a full range of sedentary work. The plaintiff's testimony at the hearing was consistent with the treating physician's statement. The opinion of the non-examining DDS physician was "dramatically at odds" with the treating physician's opinions and the plaintiff's statements. Yet the ALJ adopted the DDS physician's opinions without addressing the treating physician's opinions. The ALJ should have explained why the latter was discounted. The ALJ also failed to consider the plaintiff's obesity as required by SSR 02-1. Raymond Kelly, Esq., Manchester, NH.

Brouillard v. Astrue, Civil No. 0-cv-367-SM (D.N.H. Aug 6, 2008); 2008 DNH 134; 2008 U.S.Dist. LEXIS 60726 – 15 pages.

1601. District court remand where the ALJ erroneously gave greater weight to the opinion of the state agency physician than to the treating physician. It is unclear how much weight was given to the treating physician's opinion. The ALJ may not rely on the absence of evidence to discredit an opinion. "Rather, an ALJ confronted with an incomplete record must seek out additional information sua sponte, even where the claimant is represented by counsel." (citations omitted). The absences of an opinion about specific function is a gap to be filled, "not a reason to discredit or disregard" the treating physician's opinion. While under 96-5p, treating physician's opinions on issued "reserved to the Commissioner" are not entitled to controlling weight, they are opinions that must be considered. And SSR 96-5p requires the adjudicator to make "every reasonable effort" to recontact the medical source for clarification when opinions are given on an issued reserved to the Commissioner. Max Leifer, Esq., New York, NY

Tornatore v. Barnhart, Case No. 05 Civ. 6858 (GEL) (S.D.N.Y. Dec. 12, 2006); 2006 U.S.Dist. LEXIS 90397; 115 SSRS 393. – 15 pages

WEIGHT OF MEDICAL EVIDENCE – TREATING PHYSICIAN'S OPINION

1801. District Court remand where the ALJ relied on the opinion of the non-treating consultative psychologist instead of the opinion of the treating physician. A cursory statement in the decision that the ALJ considered opinion evidence in accordance with the requirements of the regulations and SSRs is not sufficient. "Certainly no one reading this administrative decision would understand why that opinion was not credited. Margolius, Margolius and Associates, Cleveland OH.

Kazee v. Astrue, Case No. 2:09-cv-717 (S.D.Ohio, June 29, 2010); 2010 U.S. Dist. 65018 – 17 pages

1784. First Circuit remand because the ALJ failed to properly evaluate the plaintiff's fibromyalgia and failed to give proper weight to the treating rheumatologist's RFC assessment. The decision includes some very good language regarding the evaluation of fibromyalgia. The ALJ's "unpersuasive reasons" for giving little weight to the treating doctor's opinion were "significantly flawed." The ALJ gave no explanation why a relationship of three visits at three month intervals was too short for the doctor to offer an informed opinion. The ALJ also misread the record regarding the doctor's statement on the relief provided by injections. Third, the ALJ found that the RFC was not consistent with the doctor's prescription for physical therapy and aerobic exercise. These treatments are appropriate for fibromyalgia but typically start at a very low level and low impact. Finally, the ALJ said that the RFC was based on the plaintiff's subjective allegations. Such allegations are an essential diagnostic tool for fibromyalgia and reliance on such complaints does not undermine the treating doctor's opinion. The ALJ also erred in relying on non-examining physicians and in disregarding the claimant's allegations of pain. David Green, Esq., Providence, RI.

Johnson v. Astrue, No. 08-2486 (1st Cir. July 21, 2009). Per Curiam Opinion – 12 pages, *published at* 597 F.3d 409 (1st Cir. 2010)

1776. District Court remand due to the ALJ's rejection of the treating physician's opinion without good cause. The treating physician's opinion must be given substantial weight unless good cause is shown to the contrary. The doctor's notes, which stated that the plaintiff's prognosis was good and that he could engage in activities of daily living, do not contradict her opinion that the plaintiff was disabled. The ALJ must specify the weight given to the treating doctor's opinion, articulate reasons why it is assigned less weight, and specify what evidence is inconsistent with the opinion. In this case, the Magistrate Judge recommended that Plaintiff's Motion for Summary Judgment be denied. However, after objections were filed, the district court held that the Plaintiff's Motion should be granted. Jan Elizabeth Read, Esq. Miami, FL.

Stroman v. Astrue, Case No, 08-22881-CV-KING/DUBE (S.D.Fla. Nov. 4 2009) – 10 pages, including Order Granting Plaintiff's Motion for Summary Judgment, Letter from Plaintiff's Council; 2009 U.S. Dist. LEXIS 10491; 147 SSRS 73

1766. District court reversal and remand for benefits because the ALJ did not provide good reasons for not giving the opinions of three treating physicians controlling weight and failed to mention the weight given to these opinions. One doctor treated the plaintiff for six years and there was "ample evidence" to support his diagnosis and findings regarding functional limitations. The ALJ also misstated the doctor's statements. The court found the record was "replete with evidence" supporting the medical opinions. The treating physicians supported the plaintiff's testimony regarding the frequency and effects of her pain. The plaintiff applied in 1997 and this court action was the 11th proceeding in her case. The court finds that there is no purpose in remanding this case for further evidentiary proceedings and awards benefits. Douglas Brigandi, Esq., Bayside, NY.

King v. Astrue, No. 09-CV-1244 (JG)(E.D.N.Y. Oct. 14, 2009); 2009 U.S.Dist. LEXIS 95938, 146 SSRS 929 – 25 pages.

1742. District Court reversal and remand for an immediate payment of benefits. The plaintiff's treating physicians provided evidence that the plaintiff was disabled due to mental illness, limited to 20 hours of work per month, and that her impairments would cause absence from work more than four days per month. The ALJ improperly rejected these opinions. Under Ninth Circuit law, "[w]here the ALJ 'fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, [the court] credit[s] that opinion as a matter of law.'" The VE testified that with these limitations, the plaintiff would be unable to work. "No further development of the record is required in this matter." Rick Lunblade, Esq., Medford, OR.

Crowe v. Astrue, Case No. 2:07-cv-02529-KJM (E.D.Cal. Mar. 30, 2009) - 7 pages

1737. District Court remand so the medical evidence from the plaintiff's treating physicians can be properly weighed. The record clearly established that the plaintiff had headaches and migraines, as documented by the treating doctors. "Incredibly, the ALJ disregarded almost all of this evidence, finding that there was no objective medical evidence to support this disorder." The court noted that migraines are generally not proved through diagnostic tests but through medical signs and symptoms. But in this case, there were diagnostics tests – two MRIs and a blood test – that supported the diagnosis. The ALJ also erred in finding the "lack of any workup" and then concluding that the headaches were nonsevere. Evidence also indicated that the headaches caused work-related restrictions. The court also found that the ALJ did not properly assess the plaintiff's mental impairments, discrediting the opinions of three treating doctors. The court remanded so that the. On remand, the actual weight given to each source must be clarified. To reject treating physicians' opinions, there must be actual inconsistencies or lack of medical findings to support the opinions. EAJA fees are later awarded. The plaintiff was represented by Chris Noel, Esq., Boulder, CO.

Meyers-Schreiner v. Astrue, Civil Action No. 08-cv-00573-WYD (D.Colo. Mar. 31, 2009); 2009 U.S. Dist. LEXIS 31751; 141 SSRS 375. Order – 31 pages.

1723. District Court remand where the ALJ failed to follow the holding of *Rogers v. Comm'r of Social Security*, 486 F.3d 234 (6th Cir. 2007) which requires the commissioner to "clearly articulate both the weight given to the treating physician's opinion and the reasons for giving it that weight." Failure to follow this procedural requirement is legal error. The ALJ's rationale in this case is insufficient to satisfy Rogers and the Commissioner's post hoc rationalization is prohibited. Even if other evidence is inconsistent with the treating physician's opinion, those inconsistencies must be articulated and the weight given to the inconsistent opinions must be explained. The court also notes that the hearing was a video hearing, which "appears to have substantially interfered with the production of an accurate record." On at least 50 occasions, the ALJ's statements were inaudible to the transcriber. If there are future difficulties in producing an accurate record, "the Court may well consider a remand in order that an intelligible record can be created." Marcia Margolius, Esq., Cleveland, OH.

Estill v. Astrue, Case No. 2:07cv1095 (S.D.Ohio. Jan. 20, 2009); 2009 U.S.Dist. LEXIS 82640 – 18 pages.

1716. Appeals Council remand for another hearing with an orthopedic medical expert because "[t]he hearing decision does not contain an evaluation of treating source opinions. . ." Two treating physicians stated that the claimant could not stand more than 20 minutes at a time or lift more than 10 pounds. The hearing decision does not mention these opinions in finding that e claimant had an RFC for light work. The claimant would be found disabled if limited to sedentary work. The ALJ also failed to properly assess the claimant's credibility. John E. Horn. Esq., Tinley Park, IL.

Appeals Council decision (December 12, 2008). 4 pages

1691. District court remand because the ALJ did not provide sufficient reasoning why the treating physicians' opinions should not be given great weight. At the first hearing a medical expert (ME) testified that the plaintiff's lumbar and cervical degenerative disc disease would limit him to sedentary to light work. The opinions of the treating primary care physician and pain specialist were entitled to "great," if not "controlling" weight. The Magistrate Judge relied on Sixth Circuit precedent in *Rogers v. Commissioner*, 486 F.3d 234 (6th Cir. 2007), which further articulated the "treating physician rule." The court found similarities with *Rogers*: although the treating doctors could not give a specific diagnosis to the plaintiff's pain syndrome, they never suggested it was not real' he followed all prescribed treatments; the ability to do some daily activities does not mean he was not disabled by his pain; and the opinion of a long-time treating physician should not be rejected simply because the doctor is not a pain specialist. On remand, the case was assigned to a different ALJ and a different ME testified. A fully favorable decision was issued. However, the plaintiff died during the court of the appeal, but past-due benefits were obtained for the widow. Gregory R. Mitchell, Esq., Columbus, OH.

Winkler v. Commissioner of Social Security, Case No. 2:06-cv-0662 (S.D.Ohio) Report and Recommendation, Plaintiff's Statement of Errors – 27 pages

1671. District Court remand for further proceedings when the ALJ failed to explain the weight he gave to the opinions of the plaintiff's treating physician or the reasons for rejecting his opinion that the plaintiff was limited to no more than sedentary work. "Given the large disparity between the ALJ's RFC assessment and [the treating physician's] conclusions," the court could not agree with the government's position that the ALJ's reasons for rejecting the opinion amounted to harmless error. Margolius, Margolius & Associates, Cleveland, OH.

McArthur v. Astrue, Case No. 1:07 CV 1560 (N.D.Ohio Feb 5, 2008) – 21 pages

1661. District court remand where the ALJ failed to articulate sufficient reasons for rejecting the opinions of the plaintiff's three treating physicians. One doctor stated that the plaintiff's knee pain caused severe limitations on her ability to work, bend, walk, stoop and stand His opinion was entitled to controlling weight because it met the regulatory requirements. The ALJ inferred that the opinion was inconsistent because the

doctor stated that pain medication helped the plaintiff's symptoms and no surgeries were planned. "Under Sixth Circuit precedent, improvements in a condition are insufficient reasons for rejecting a treating physician's opinion . . .The finding that a patient's condition has improved does not render a physician's finding of disability inconsistent." Also, the ALJ did not explain why he adopted the conclusions of a physical therapist over those of the treating doctor. Finally, the ALJ failed to consider whether the plaintiff's impairments met listing 12.05 when IQ testing revealed a full scale IQ of 58. Marcia Margolius, Esq., Cleveland, OH.

Holliman v. Commissioner of Social Security Administration, Case No. 1:06CV2992 (N.D.Ohio, Oct. 25, 2007), Memorandum Opinion & Order, Judgment Entry – 27 pages

1638. District Court reversal and award of benefits where that the ALJ failed to give significant weight to the opinions of the plaintiff's treating physician regarding his ability to sit, stand, walk or lift, in light of his back impairment, which was originally caused by a 1969 helicopter crash in Vietnam. The doctor essentially limited the plaintiff to less than a full range of sedentary work. The ALJ gave more weight to the CE's assessments which are not supported by better or more thorough evidence Leslie Neuhaus, Esq., Grand Island, NE.

Connelly v. SSA, Case No. 4:06-cv-031012-TDT (D.Neb. 2007) – 25 pages

1633. Appeals Council remand because the ALJ erred in finding that the claimant had no "severe" mental impairment. Opinion evidence from a treating psychiatrist and from a CE psychologist indicates that the claimant's mental impairments are at least "severe." It was also error for the ALJ to give more weight to the therapist's opinion than to the psychiatrist, who also stated that the claimant could not work. "The claimant's therapist is not an acceptable medical source, and an opinion from a therapist should not be given greater weight than that of a treating psychiatrist." Lynn Stevens, Esq., Atlanta, GA.

Appeals Council remand (May 4, 2007) – 3 pages

1631. Appeals Council remand because the ALJ failed to discuss the severity of the claimant's diabetes in his decision. At the hearing, the claimant testified that she had numbness and tingling in her feet from the diabetes. Also, the ALJ decision does not contain an adequate evaluation of the treating doctor's opinion. The treating doctor stated that the claimant is unable to do any lifting and is not able to engage in gainful employment. John Horn, Esq., Tinley Park, IL

Appeals Council remand (June 1, 2007) – 3 pages

1630. District court remand for a new hearing where the ALJ failed to give weight to the workers' compensation records that showed hand injury and limitations. It was error to ignore the opinions of examining physicians who saw the plaintiff for his workers' compensation case simply because their opinions were not the most recent. The ALJ rejected the opinions of four examining physicians that the plaintiff was limited to performing non-repetitive work with his left hand. Instead, the ALJ relied on the opinion of a fifth physician, who had seen the plaintiff more recently, that the plaintiff was exaggerating his symptoms. The fifth doctor did not address the question of repetitive

motion. “The single reason for the rejection, that the evidence was older, is not a specific and legitimate reason supported by substantial evidence in the record.” It is one factor that can be considered, but here was outweighed by the opinions of the other four specialists and the fact that they had reviewed the plaintiff’s full medical record. Arthur Stevens, III, Esq., Medford, OR.

Allison v. McMahon, Civil Case No. 06-3050-KI (D.Or. March 14, 2007)

1622. District court reversal and remand for an award of benefits where the ALJ discredited the treating orthopedic surgeon’s opinion that the plaintiff could not work full-time, that her ability to sit was limited by pain, and that she would need to lie down 4 to 5 times per day for up to one hour. The ALJ also discredited similar findings by another treating physician. The ALJ erred in rejecting the opinions because they were similar. Given that both had treated the plaintiff for years, the fact that they would assess the same limitations “seems logical and beyond reproach.” Also, the fact that the plaintiff gave forms to the doctors at her attorney’s request is a “permissible credibility determination” in the Ninth Circuit, when supported by objective medical evidence. Because the ALJ’s rejection of these opinions was based on incorrect legal standards, they are credited as true as a matter of law. Further, because the court found that “not one of the grounds upon which the ALJ questioned [the plaintiff’s] credibility is supported by the record” the ALJ’s finding that the plaintiff was not credible is given no weight. Robert F. Webber, Esq., Medford, OR.

Frey v. Astrue, Case No. CV 06-3061-PK (D.Or. May 22, 2007)

1613. District Court reversal and award of benefits where the ALJ gave more weight to a psychological CE than to the plaintiff’s treating physician, who stated that her bipolar disorder prevented her from returning to her past work, and that she would be limited to three working hours per day. A psychological CE found that the plaintiff did not have depressive symptoms and did not have a major depressive disorder. The ALJ limited her to unskilled sedentary work due to limitations from multiple know surgeries and “moderate” limitations caused by the mental impairment. The court found that the ALJ erred in discounting the treating physician’s opinion. He made very little mention of the mental disorder limitation in the decision and instead gave significant weight to the psychological CE opinion because the CE was familiar with the Social Security regulations. However, the CE said that it was very difficult for him to estimate the extent that the psychiatric disorders would cause functional limitations in such a limited examination. In addition, it was not clear to the court how understanding the regulations “rises to the level that equals significant weight.” Remission of symptoms is in the nature of a mental illness and does not mean that a claimant can work. The ALJ also erred in evaluation of plaintiff’s subjective complaints and failed to consider her obesity. Leslie Neuhaus, Esq., Grand Island, NE.

Hughes v. SSA, Case No. 4:06-cv-03109-JFB (D.Neb. Mar.12, 2007) – 12 pages

1608. District court remand because the ALJ did not adequately explain why he rejected the treating physician’s opinion that the plaintiff would be limited to performing sedentary work and could further damage her spine by lifting and pulling any amount of weight. The ALJ instead relied on the opinions of nonexamining physicians who found

the plaintiff could perform light work. After rejecting the treating physician's opinions, the ALJ stated that the DDS doctors' opinions were "well supported" by the evidence and were not inconsistent with other substantial evidence of record. But the ALJ did not explain what medical evidence was inconsistent with the treating physician's opinion. The ALJ also erroneously found that the plaintiff was not receiving counseling. The record was "replete" with evidence of treatment. The ALJ also failed to explain why he discounted the plaintiff's credibility. John S. Grady, Esq., Dover, DE.

Ayers v. Barnhart, Civ. No. 05-129-SLR (D.Del. Sept. 29, 2006); 2006 U.S.Dist. LEXIS 71001; 113 SSRS 445 – 54 pages

1607. Appeals Council remand for proper consideration of the treating source opinions under the regulations and SSRs. The ALJ stated that his RFC finding was consistent with the treating physician's opinion; however, the ALJ found the claimant could perform light work with occasional overhead reaching and the treating doctor restricted the claimant to no overhead reaching. The ALJ's decision does not address the treating physician's opinion that the claimant was limited to sedentary work. Paul Radosevich, Esq., Denver, CO.

Appeals Council Remand Order (July 5, 2007) – 6 pages, including letter brief from Claimant's Attorney

1604. Appeals Council remand because the ALJ made several errors in evaluating the evidence. First, although he cited the proper standard for evaluating the credibility of the claimant's subjective complaints and found that his impairments could reasonably be expected to produce the alleged symptoms, he then found the claimant's statements "not entirely credible." The ALJ "provided little additional evaluation of the credibility of claimant's subjective complaints or discussion of the regulatory factors." The ALJ also did not explain the weight he gave to the opinion provided by the treating physician regarding the duration of certain impairments. And, the ALJ erred in discounting the diagnosis of dementia and did not explain whether or not the diagnosis of peripheral neuropathy was "severe." Paul Radosevich, Esq., Denver, CO.

Appeals Council Remand Order; Letter brief from Claimant's Attorney – 5 pages

1599. District Court remand because proper weight was not given to the treating physician's opinions. The ALJ denied the claim based on the grids and VE testimony, finding that the plaintiff could perform a "significant" range of light work. The plaintiff argued that he was limited to less than a full range of sedentary work, and that his nonexertional limitations precluded any substantial gainful activity, based on evidence from the treating sources. The plaintiff submitted additional medical records with the request for review by the Appeals Council. The state agency physician found that the plaintiff could perform medium work and acknowledged that his opinion differed from the treating physician's opinion, but gave no explanation for the difference, other than it was an issue "reserved for the Commissioner." The court found "this is [not] the kind of explanation or rationale the regulations require . . . to overcome the weight afforded the evidence offered by treating sources. . ." Further, the state agency physician could not offer a reliable opinion since he did not review all the evidence in the record. And, the

Appeals Council failed to give the new evidence appropriate weight, since it was "material and relevant to determining plaintiff's residual functional capacity." Roger A. Ritchie, Jr. Harrisonburg, VA.

Lucas v. Barnhart, Civil Action No. 5:05CV00023 (W.D.Va. Jan 12, 2006); 2005 U.S. Dist. LEXIS 35645 – 10 pages

WEIGHT OF MEDICAL EVIDENCE – TREATING PSYCHOLOGIST/PSYCHIATRIST

1789. District court remand when the ALJ erred in rejecting the treating psychologist's opinions. While the plaintiff admits to past heavy alcohol use, there is no evidence in the record that excessive use of alcohol occurred at any point during the alleged period of disability except a two- week period. The treating psychologist had inquired about the plaintiff's period of alcohol abuse, yet the ALJ gave her opinions less weight because she "did not have an accurate understanding of claimant's alcohol consumption." The ALJ instead relied on a non-examining physician who noted that plaintiff had admitted to drinking one-half pint of alcohol nightly. On remand, the ALJ should reconsider the treating psychologist's evaluation in light of the level of alcohol use demonstrated in the record and by her testing results. Arthur Stevens, III, Esq., Medford, OR.

Jensen v. Astrue, Case No. 09-CV-3020-TC (D.Ore. Apr. 13, 2010) – 13 pages

1787. Favorable ALJ decision, finding that an RFC limitation for understanding and remembering simple routine instructions would preclude jobs requiring a reasoning level of "3." The ALJ properly gave "substantial weight" to the opinion of the treating psychologist who said that the claimant had moderate limitation of function. This report was consistent with other medical evidence but was given more weight because the treating psychologist viewed all of the medical evidence. The VE testified that the plaintiff could perform the jobs of dispatcher and surveillance system monitor. But a restriction to 1-2 step instructions and repetitive tasks would preclude these jobs with a reasoning level of "3". James Noel, Esq., Boulder, CO.

Favorable ALJ decision (April 16, 2010) – 11 pages including ALJ Decision, Letter from Claimant's Attorney to ALJ

1785. District Court remand when the ALJ failed to properly consider and evaluate the mental capacity evaluation of the plaintiff's treating psychiatrist. The court found that the ALJ failed to give "good reasons" for not according controlling weight to the treating psychiatrist, in violation to Sixth Circuit precedent in *Wilson v. Commissioner*, 378 F.3d 541 (6th Cir. 2004). Rita Fuchsman, Esq., Chillicothe, OH.

Karshner v. Astrue, Civil Action 2:08-CV-526 (S.D.Ohio Jan 8, 2010); 2010 U.S. Dist. 6254 – 14 pages

1649. District Court decision finding that the record was fully developed and remanding the case for payment of benefits. The ALJ erred by filing to provide legitimate reasons for rejecting the opinions of the plaintiff's treating psychologists and physician. The ALJ's reason – that the claimant's credibility was "suspect' is not a basis to reject the opinions of the treating physicians. One treating psychologist found that the plaintiff's impairments met the criteria for listings 12.04 and 12.06. A second treating psychologist

made similar findings. Their opinions were consistent with the longtime primary care physician's diagnoses of severe depression and an anxiety disorder. Arthur Stevens III, Esq. Medford, OR.

Hastings v. Astrue, Civil No. 06-3056-HA (D.Or. Sept 28, 2007) – 11 pages