LIST OF AVAILABLE MATERIAL

JANUARY – DECEMBER 2018

ITEM NUMBERS – 2180-2200

Absenteeism

2185. The ALJ found that the claimant could perform sustained work on a regular basis, but it did not consider the claimant's frequent absences from work or school. The claimant did graduate from high school as the ALJ noted, but she missed days in his sophomore year, 54 days as a junior, and more than 40 days as a senior. Similarly, her frequent absences for medical attention and tardiness during an internship at Disney World meant she accumulated 25 "points," and interns are usually dismissed once they receive 16 points. In addition, the ALJ decision was not supported by substantial evidence because it did not consider the effects of the claimant's arthritis and inaccurately cited the findings of a consultative examiner in a way that did not reflect the record. The Court could not find support in the record for the ALJ's findings about the claimant's ability to lift, carry, push, or pull. For these reasons, the case was reversed and remanded for further proceedings. The Court ordered the Commissioner to consolidate the claim with new application currently pending at the ALJ hearing level and recommended that the consolidated claim be assigned to a different ALJ. The claimant was represented by Agnes Wladyka of Mountainside, New Jersey.

Dell-Bene v. Colvin, Civ. Action No. 2:15-cv-05578 (JMV) (D.N.J.) (December 2, 2016) – Order

Alcoholism/Substance Abuse

2194. An ALJ found that the claimant met three mental listings. The ALJ said that if the claimant ceased alcohol use he would still have multiple severe physical and mental impairments, but would no longer meet any listing and would have the residual functional capacity to perform a substantial number of jobs. Therefore, the claim was denied. The court found that the ALJ erred in finding that alcoholism was a contributing factor material to a disability determination. There was no medical evidence from an acceptable medical source establishing a substance abuse disorder, as required by SSR 13-2p. The ALJ cited no evidence for her conclusion that the claimant's inability to manage funds related to alcoholism rather than mental illness, and she indicated that alcohol caused his psychosis despite a consultative examination finding current psychosis and alcoholism in long-time remission. Additionally, the court found that the ALJ's reasons for rejecting the claimant's subjective symptom statements when determining RFC were legally insufficient and not supported by substantial evidence. The ALJ discounted the claimant's complaints because of "inconsistent treatment" and "noncompliance with his medication regimen" without exploring the reasons for the alleged noncompliance in accordance with case law and SSR 96-7p. The claimant testified and supplied evidence that he was homeless, lacked insurance, and had no money for consistent treatment, yet the ALJ said there was "no evidence" that the claimant lacked access to medication had he sought it. The ALJ also erred in finding that the claimant's daily activities such as playing video games, looking for a job, and doing laundry undermined his allegations about his functional abilities. Therefore, "the Court cannot confidently say that the ALJ would have made the same evaluation of Plaintiff's symptom statements had she not made these errors." The case was remanded for further proceedings. The claimant was represented by John E. Horn of Tinley Park, Illinois.

Jones v. Berryhill, No. 17 C 05646 (N.D. Ill., E. Div.) (August 10, 2018) – Memorandum Opinion and Order

ALJ's Duties

2192. The plaintiff received SSI benefits as a child, but these benefits were terminated after an age-18 redetermination found he did not meet the adult standard for disability. At a consultative

examination during the redetermination process, the plaintiff disclosed that he had received many years of psychiatric treatment; he also provided the name and contact information of the mental health provider, and other details of his treatment, on various forms he submitted to SSA during the redetermination and subsequent appeals. The plaintiff was unrepresented at the ALJ hearing; he did not supply treatment records and the ALJ did not obtain them. The plaintiff retained counsel to appeal his case to district court, where he argued that the ALJ had not met his duty to develop the record. The district court disagreed, but the circuit court held that an unrepresented claimant with diagnosed intellectual limitations (for which he received SSI until the age-18 redetermination) "is without question the type of situation where we believe the ALJ has a heightened responsibility to develop the record." Furthermore, the circuit court found that the ALJ erred in not asking the plaintiff follow-up questions when he discussed his mental impairments, and in not clarifying the plaintiff's confusing testimony. The court also noted that the ALJ improperly used the medical improvement review standard (for continuing disability reviews) instead of the correct five-step sequential evaluation process to adjudicate age-18 cases under the adult standard but did not find that issue dispositive. The circuit court rejected SSA's argument that the plaintiff needed to demonstrate that the exclusion of the mental health records harmed him, potentially by proffering the records. There is no precedent for requiring proffers in such situations. The court said it is "plainly evident" that the mental health records would be relevant to a determination about the extent to which mental health impairments were disabling. Additionally, a pro se claimant with psychiatric disorders is "particularly vulnerable" and thus the court is satisfied that the plaintiff was prejudiced by the exclusion of mental health records. The case was vacated and remanded for additional proceedings. The claimant was represented in his federal court case by Iván A. Ramos of Hartford, Connecticut.

Torres-Pagán v. Berryhill, Case No. 17-2146 (1st Cir.) (August 10, 2018) – Decision; published at 899 F.3d 54 (1st Cir. 2018)

Headaches

2184. The claimant listed migraine headaches among her impairments on her application for disability benefits, but the ALJ did find them to be severe because the record of the claimant's headaches was inconsistent, there were no objective findings, and an MRI was "unremarkable." The claimant did receive medication and injections for migraines, and at several points in the record the claimant's treating physicians diagnosed her as having migraines. The court found that the ALJ erred in his "superficial and brief" discussion of migraines. He did not address SSA Question and Answer 09-036 on migraines and he did not consider whether they equaled the epilepsy listing. When he stated that the claimant's headaches were "musculoskeletal" rather than migraines, he referred to page 19 of a 17-page document that does not provide clear support for his conclusion. The court noted that MRIs are used to rule out other causes of headache but do not confirm a diagnosis of vascular headaches. Since the court could not find that the ALJ's determination on claimant's migraines were supported by substantial evidence, the case was remanded for additional proceedings. The claimant was represented by Paul Radosevich of Denver, Colorado.

Armenta v. Berryhill, Case No. 1:16-cv-00995 (D. Colo.) (February 1, 2018) – Order

Mental Impairments

2187. The ALJ found that the claimant's PTSD and depression did not meet any mental listings, because she only had moderate limitations in concentration, persistence, and pace. The ALJ found that the claimant's residual functional capacity limited her to a "low stress" job, which the ALJ defined as having only occasional changes in the work setting and occasional public contact. The ALJ then found that the claimant had the RFC to perform his past relevant work and other jobs. However, the Court found that the ALJ did not properly incorporate the moderate limitation in concentration, persistence, and pace into the residual functional capacity analysis. Simply restricting the claimant to jobs with no more than occasional public contact or changes in the workplace fails the Fourth Circuit *Mascio* standard. The Commissioner cannot rely on the fact that the ALJ said the record shows the claimant had "no more than moderate" limitations: the ALJ specifically stated in

her decision that she found claimant's limitations to be moderate, and the limitations must be accounted for as such in the RFC determination. It was also inappropriate to cherry-pick portions of the record, and to give great weight to DDS evaluators who never met the claimant while rejecting the opinions of treating sources because they examined the claimant once or three times. Because the Court could not say that the ALJ's decision was based on substantial evidence or based on proper legal standards, the case was remanded for further proceedings. The claimant was represented by Lennon, Camak, and Bertics of Raleigh, North Carolina.

Ferris v. Berryhill, 4:16-CV-212-JG (E.D.N.C.) (March 12, 2018) – Order

2199. The ALJ found that the plaintiff had numerous severe physical and mental impairments, but also found 12 conditions to be non-severe impairments with "a conclusory assertion that, '[t]here is no evidence that these impairments impose any significant restrictions on the claimant's ability to perform basic work activities.'" This is insufficient. The record indicates the plaintiff has been diagnosed with Attention Deficit Disorder and her treating mental health providers opined that she would have moderate or marked limitations in maintaining concentration, persistence, and pace, but the ALJ's decision does not discuss why ADD was found to be non-severe, and the ALJ's residual functional capacity analysis does not explain how the ALJ arrived at the figure that the plaintiff would be off-task 5% of the time. Additionally, the ALJ erred in assigning the opinions of the plaintiff's treating psychiatrist and therapist "little weight" simply because the treatment records reflect less than marked limitations. Even moderate limitations can affect an individual's residual functional capacity and cannot be addressed by a limitation to "simple, routine, repetitive tasks." The fact that the plaintiff never discussed her abilities or attendance at work with her treating providers is also no reason to assign little weight to their opinions. The plaintiff stopped working in 2007, so it is understandable that she would not have discussed work with them. The claim was remanded for further proceedings. The plaintiff was represented by Andrew Sindler of Columbia, Maryland.

Angelina C. v. Commissioner, Social Security Administration, Civil No. SAG-18-682 (D. Md.) (December 12, 2018) – Letter to Counsel from Magistrate Judge

Multiple Sclerosis

2193. The plaintiff worked for several years after being diagnosed with MS. Eventually, his symptoms reduced his productivity on the job and led him to miss one day of work each week due to fatigue. He was ultimately fired after failing a drug test, but believes his absenteeism and the visible symptoms (lack of balance, slurred speech, frequent bathroom visits, slowed thinking, etc.) were what led his employer to test him. The ALJ found that the plaintiff had the residual functional capacity to perform a limited range of sedentary work and denied his claim. However, the court found that the ALJ's determination that the plaintiff did not meet Listing 11.09 was not supported by substantial evidence. The ALJ recited the listing and noted that a physical therapist's opinion would show that the plaintiff met the listing, but gave the opinion only "partial" weight because it relied on the plaintiff's self-reports and was inconsistent with evidence from the plaintiff's nurse specialist. The court held that although the plaintiff completed questionnaires, their answers were supported by the physical therapist's extensive testing. Furthermore, there were no inconsistencies between the physical therapist and the nurse: the former reported sustained gait disturbance; the latter also mentioned ataxia and balance problems and the fact that she also found 5/5 muscle strength and that the plaintiff walked without an assistive device are not contradictory. The court held that the ALJ's "reliance on muscle strength testing to undermine findings of muscle coordination is inapposite." The case was remanded for the Commissioner to reconsider and further explain the step three determination. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Monhart v. Commissioner of Social Security, Case No. 1:17 CV 790 (N.D. Ohio, E. Div.) (August 9, 2018) – Memorandum Opinion and Order and Judgment Entry

Non-English Speaking

2181. The ALJ denied claimant's request for a Creole-speaking interpreter. After conducting the hearing in English, the ALJ issued a denial. The claimant argued that the denial of an interpreter violated her due process rights and did not comport with HALLEX. The Commissioner argued that HALLEX does not have the force of law on ALJs, noncompliance with HALLEX is not subject to judicial review, HALLEX allowed the ALJ to deny this claimant an interpreter, and the claimant was not prejudiced by the lack on an interpreter. The court found that the ALJ's failure to use an interpreter given the facts of the case meant that he did not fully and fairly develop the record. The claimant was unable to provide effective testimony. Therefore, the claim was remanded for a different ALJ to conduct a hearing. The court did not address claimant's arguments about the ALJ's failure to consider other impairments when determining RFC but ordered the new ALJ to reconsider these impairments on remand. The claimant was represented by Carol Avard of Cape Coral, Florida.

Jean v. Commissioner, Case No. 2:16-cv-569-FtM-CM (M.D. Fla., Ft. Myers Div.) (September 29, 2017) – Opinion and Order and Plaintiff's Memorandum in Opposition to the Commissioner's Decision

Past Relevant Work

2180. In issuing a denial, the ALJ rejected many of the claimant's statements using what the court called "a familiar boilerplate:" finding the claimant's statements about the intensity, persistence, and limiting effects of his symptoms not entirely credible. Despite the claimant's testimony that he becomes easily winded when walking and that his medication made him tired, the ALJ found that the claimant could perform unlimited standing and walking and was otherwise able to return to his previous light work. The court found that the claimant's testimony about his, as the court called them, "very minor household tasks" should not have equated to a finding he could walk for an entire eight-hour workday. The ALJ should not have found that the claimant's medical history was "normal" when it referred to the claimant's impairments, which the ALJ found to be severe. The ALJ should not have used the claimant's smoking to discredit his testimony about becoming easily winded, because the claimant stopped smoking The ALJ should not have discounted the claimant's testimony that fatigue was a side effect of one of his blood pressure medications by referring to a statement the claimant made while prescribed a different medication. The claim was remanded for additional proceedings. The claimant was represented by John E. Horn of Tinley Park, Illinois.

Williams v. Berryhill, Civil Action No. 17-1043 (7th Cir.) (November 8, 2017) – Order; reported at 707 Fed. Appx. 402 (7th Cir. 2017)

Remand: "Good Cause"

2190. The claimant retained representation approximately two weeks before the scheduled hearing. The representative immediately requested postponement of the hearing, but it was denied. The representative was not given access to the electronic file until the day before the hearing. For these reasons and because the client had limited English proficiency, some evidence was submitted fewer than five business days before the hearing. The ALJ excluded this evidence and denied the claim. The Appeals Council found that the ALJ did not include the rationale required by HALLEX I-2-3-12 when denying the request for postponement, and that a representative's conflict may constitute good cause for postponement. Furthermore, they found that there was at least one good cause for late submission of evidence and that the evidence must be considered. Due to the ALJ's abuse of discretion and errors of law, the hearing decision was vacated, and the case was remanded to the ALJ for additional proceedings. The claimant was represented by Carol Avard of Cape Coral, Florida. This was the case presented by attorneys Douglas Mohney and Michael Sexton in the mock hearing about the "five-day rule" presented at the spring 2018 NOSSCR conference.

Appeals Council Decision Remanding Case to ALJ (June 14, 2018).

Residual Functional Capacity

2197. An ALJ found that the claimant did not meet any mental listings in part because the claimant's limitations in maintaining concentration, persistence, and pace were moderate rather than marked or extreme. However, the ALJ did not incorporate this moderate limitation into the

claimant's residual functional capacity or hypotheticals posed to the vocational expert. This violates the 4th Circuit's precedent in *Mascio v. Colvin*, which notes that merely restricting a claimant to simple, routine work does not accommodate a moderate limitation in concentration. The ALJ in the instant case also added to the RFC that that the claimant be off task 10% of the time, but did not explain why that percentage was appropriate, and only made the RFC determination after the VE testified that no jobs are available to an individual who is off-task 15% of the time. Remand is therefore required. Additionally, the Court advised the ALJ to fully address the other issues raised by the claimant: the ALJ's failure to fully explain his other findings when determining the claimant's RFC, inaccurate assessment of the claimant's credibility, failure to assess whether the claimant's sporadic treatment was a result of inability to afford more medical care, giving improper weight to the opinion of her treating physician, and concluding that the claimant could perform a job that the VE initially testified to but stated after questioning from the claimant's representative would be "an inappropriate position" for someone with the claimant's limitations in social functioning. The case was remanded for further proceedings. The claimant was represented by Andrew Sindler of Columbia, Maryland.

Sherri B. v. Berryhill, Civil Action No. 5:17-cv-00027 (W.D. Va., Harrisonburg Div.) (June 29, 2018) – Magistrate Judge's Report and Recommendation

2198. The District Court reversed the ALJ's decision and a Magistrate Judge's Report and Recommendation because the ALJ failed to explain which portions of Plaintiff's consultative examiner's opinion she accepted versus rejected in concluding Plaintiff was capable of performing light work. The Court relied upon Third Circuit case law reversing decisions where an ALJ's determination that a claimant was capable of light work was not supported by substantial evidence. See e.g., *Doak v. Heckler*, 790 F.2d 26 (3d Cir. 1986) and *Patton v. Berryhill*, No. 3:16-cv-2533 (M.D. Pa. Oct. 27, 2017). In this case, the Court determined that the ALJ's findings were not supported by substantial evidence, and no portion of the findings that the ALJ cited established that Plaintiff was capable of performing light work. Further, the Court explained that the ALJ did not satisfactorily consider the opinion of Plaintiff's treating physician, which found the Plaintiff had limitations beyond those discussed by the consultative examiner. Therefore, the District Court reversed and remanded for calculation and payment of benefits dating back to Plaintiff's alleged onset date in 2014. The plaintiff was represented by Silver & Silver of Ardmore, Pennsylvania.

Moye v. Berryhill, Case No. 17-cv4776 (E.D. Pa.) (Oct. 1, 2018) – Plaintiff's Brief and Statement of Issues in Support of Request for Review, Notice of Motion, Plaintiff's Motion for Summary Judgment, Defendant's Response to Request for Review of Plaintiff, Plaintiff's Brief in Reply to Defendant's Response to Plaintiff's Request for Review, Magistrate Judge's Report and Recommendation, Plaintiff's Objections to the Report and Recommendation of the United States Magistrate Judge, and Opinion

Significant Number of Jobs

2183. In this ERISA case, a transferable skills analysis found that the plaintiff could do jobs including Surveillance System Monitor (SSM). The plaintiff submitted evidence from a vocational expert in an unrelated Social Security case that the unskilled, sedentary SSM job no longer existed: similar jobs require a higher level of skills. The Sixth Circuit found that it was not clear error for the district court to disregard the transferable skills analysis conclusion that the plaintiff could work as a SSM because "the district court determined that the Surveillance-System Monitor job description, which dates to the 1991 edition of the Dictionary of Occupational Titles, is obsolete. *See Cunningham v. Astrue*, 360 Fed. Appx. 606, 616 (6th Cir. 2010) (reaching the same conclusion). Further, no such job description exists in O*NET, the online database that replaced the Dictionary of Occupational Titles in 2001." The claimant was represented by Randall Phillips of Bingham Farms, Michigan.

Mokbel-Aljahmi v. United Omaha Life Insurance Co., 706 Fed. Appx. 854, 866 (6th Cir. 2017) – Order and Opinion

Skin Disorders

2191. The case was pending at OHO when it received a "Smartmand" back to DDS. At that point, a state agency medical consultant found that the claimant met listing 8.04 on the day that a biopsy of his foot showed squamous cell carcinoma; he had nonhealing ulcers in that spot for several years and later had two toes amputated. The date the medical consultant believed the claimant met the listing was after the alleged onset date, but before the date last insured. Because DDS could not make a fully favorable decision, it sent the case back to OHO. After consulting with the claimant, the representative amended the alleged onset date to the date of onset determined by the medical consultant and the ALJ issued a fully favorable decision on the record. This allowed the homeless claimant to obtain benefits sooner than if a hearing had been required. The claimant was represented by John E. Horn of Tinley Park, Illinois.

Fully favorable ALJ Decision (June 28, 2018)

Subjective Symptom Evaluation

2200. The plaintiff applied for disability benefits with an alleged onset date in February 2013. In 2015, an ALJ issued a decision finding her not disabled, and in 2017 a federal court remanded the case for another hearing. That hearing occurred in October 2017 and resulted in a decision that the plaintiff had been disabled from her alleged onset date until November 30, 2014. The plaintiff again appealed to federal court. There was evidence of medical improvement in late 2014: the plaintiff told her cardiologist she was not short of breath, and she did not have edema or labored breathing during some examinations. Her left ventricular function did improve. However, the ALJ did not address other medical evidence from the period after December 1, 2014, including the plaintiff's report to her primary care physician that she was experiencing shortness of breath, pain at her defibrillator site, and fatigue. The court held that the ALJ's rejection of the primary care doctor's July 2014 opinion based on test results from 2016 was improper. Results from 2016 shed little light on the plaintiff's condition in 2014, and consistency with other evidence in the file is only one of many factors the ALJ should have used in assigning weight to a treating physician's opinion. The claim was remanded for further proceedings. The plaintiff was represented by John E. Horn of Tinley Park, Illinois.

Thompson v. Berryhill, No. 18 C 1756 (D. Ill., E.Div.) (October 31, 2018) – Memorandum Opinion and Order

Substantial Gainful Activity

2195. Evidence submitted before, and obtained at, the hearing indicated that the claimant would meet a listing or lack the RFC to work, but the ALJ denied the claim at step one of the sequential evaluation process, finding the claimant was performing substantial gainful activity. The claimant earned nearly $17,000 in 2013 and slightly more than $13,000 in 2014, but she testified that her employer allowed her to take frequent breaks, she often napped in an empty room during the work day despite this being against the rules, she could leave work early if she found someone to cover her shift, and she was currently on the payroll for three days a week even, though she often worked less. SSA's regulations state that being allowed to work irregular hours or take frequent rest periods qualify as special conditions that can reduce countable earnings for the purposes of determining SGA. The ALJ did not address any of the evidence showing the claimant's work may have been performed under special conditions, though the court found there was "substantial evidence that may support such a finding." Therefore, the case was remanded for additional proceedings to determine whether the claimant performed work under special conditions, and, if so, whether she was performing SGA. The claimant was represented by Max D. Leifer of New York, New York.

Croce v. Acting Commissioner of Social Security, Case No. 17-CV-440 (RRM) (E.D.N.Y.) (September 27, 2018) – Judgment and Memorandum and Order

Survivors' Benefits

2189. The claimant alleges that she and the wage earner entered into a common law, same-sex marriage in Texas in 1987. The couple moved to Oklahoma in 1994 and lived there until the wage earner died there in 2014. Both states recognize common-law marriage. The claimant testified at an ALJ hearing about the ceremony she and the wage earner conducted. She provided evidence of her

marriage, including joint state and federal tax returns the couple filed, joint ownership of a home and vehicles; joint bank accounts and utility bills, a death certificate referring to the claimant as the wage earner's "life partner," love letters, and affidavits from the wage earner's relatives and doctors. Based on this evidence, the Appeals Council agreed that a common law marriage existed; the only question is "whether the fact that the claimant had a same-sex marriage to the wage earner prior to the formal legalization of such marriages precludes her from asserting the existence of a valid marriage for purposes of entitlement to benefits on the wage earner's record." The Appeals Council notes that the 2015 Obergefell Supreme Court decision found unconstitutional Texas and Oklahoma laws restricting marriage to opposite-sex couples. "The Administration's policy which the hearing decision has cited to (GN 02210.002) specifically states that the Administration will recognize a valid same-sex marriage as of the date of the marriage, including during periods when the number holder's state of domicile did not recognize same-sex marriages." The dates listed in the POMS are not the earliest dates such a marriage could have occurred; they are merely the dates after which SSA will automatically assume a same-sex marriage to be valid. In this case, a valid marriage occurred in 1987 in Texas and the claimant is entitled to survivor benefits on the wage earner's record. The claimant was represented by Ramona Hanson of Edmond, Oklahoma.

Fully favorable Appeals Council decision (May 8, 2018)

Terminations

2188. Ten years after the plaintiff was awarded disability benefits, her benefits were terminated because SSA determined she had medically improved. The plaintiff disputed this, and at an ALJ hearing she testified that the effects of seizures, migraines, COPD, shoulder pain, bipolar disorder, kidney failure, and other conditions indicate that her disability continues. However, the ALJ credited the opinion of non-examining state agency doctors who found that she had "no exertional, postural, manipulative, visual, communicative, or environmental limitations" and that her mental impairments caused no more than moderate limitations. The ALJ used language that is often found in denials to say the plaintiff's "current medically determinable impairment could reasonably be expected to produce the alleged symptoms; however, [Plaintiff's] statements concerning the intensity, persistence and limiting effects of these symptoms are credible only to the extent of the established [RFC] assessment for the reasons explained" in the decision. The Court discussed the Medical Improvement Review Standard applied in continuing disability reviews, noting that a "decrease in the medical severity of an impairment sufficient to constitute medical improvement must be substantiated by changes in signs, symptoms, or laboratory findings." Here, the ALJ used the plaintiff's testimony to find that her migraines were severe and caused moderate limitations in several areas of function but disregarded the vocational expert's testimony that symptoms of the kind the plaintiff described would preclude work. The Court said, "Absent an 'accurate and logical bridge' from the evidence to the ALJ's conclusion that Plaintiff's testimony was not credible, the Court cannot say that substantial evidence supports the ALJ's decision" The ALJ's decision fails the *Mascio* standard, which "requires the ALJ to articulate which of a claimant's individual statements are credible, rather than whether the claimant is credible as a general matter." The matter was remanded for additional proceedings. The claimant was represented by Andrew Sindler of Severna Park, Maryland.

LaRoche v. Berryhill, Civil No. TMB 16-3214 (D.Md. S.Div.) (March 9, 2018) – Memorandum Opinion Granting Plaintiff's Alternative Motion for Remand

Vocational Expert Testimony

2186. The ALJ asked the VE for jobs that only involved simple instructions. The VE identified several jobs with reasoning levels of 2 (including addresser and checker I), which require detailed instructions. The VE testified to the conflict between the Dictionary of Occupational Titles' descriptions of these job and the ALJ's hypothetical. The ALJ nonetheless denied the case. The Court held that the ALJ failed to follow SSR 00-4p, which requires adjudicators to resolve conflict between VE testimony and the DOT. It is therefore unclear how many, if any, addresser or checker jobs the claimant is capable of doing, and the only other job discussed had fewer than 2,500 positions

available in the national economy. Therefore, the Commissioner did not meet her burden of proof at step 5 of the sequential evaluation process and the case was remanded for further proceedings. The claimant was represented by Carol Avard of Cape Coral, Florida.

Stockman v. Comm'r of Soc. Sec., 2:17-cv-FtM-38MCR (M.D.Fla.) (December 18, 2017) – Judgment in a Civil Case, Opinion and Order, and Magistrate Judge's Report and Recommendation

2196. An ALJ found that the plaintiff had not engaged in substantial work activity, had several severe impairments, did not meet a listing, and could not return to her past relevant work in fast food service. The ALJ found that the plaintiff's residual functional capacity was for light work with only occasional stooping or crouching, restricted to carrying out "simple tasks and instructions." When asked to identify jobs an individual with such an RFC could perform, the vocational expert identified jobs with a reasoning level of 2, which require the ability to carry out detailed written or oral instructions. However, the Court did not find that the Commissioner failed to meet her burden here, because the ALJ asked the VE whether his testimony was consistent with the Dictionary of Occupational Titles and was told that it was: the jobs identified had an Specific Vocational Level (SVP) of 2, which corresponds to unskilled work. Case law does not require ALJs to independently identify inconsistencies, especially when the claimant was represented at the hearing and the representative did not identify any conflicts between the testimony and the DOT. And in this case, there was no inconsistency with the DOT because the 11th circuit has found that jobs with reasoning levels of 2 or 3 can be performed by individuals limited to performing simple tasks, as long as the jobs have SVPs of 2. However, the Court found that the plaintiff's due process rights were violated because the ALJ did not allow her attorney to question the VE about the source of the number of jobs the VE testified were available. During an extended discussion of the topic, the attorney stated at the hearing "in order for the Agency to meet its Step 5 burden, we need to establish that her numbers come from administratively permitted sources." The ALJ responded "we're not going to go there…if you want to pay for those interrogatories you're more than welcome to send her interrogatories….If you do not want to maybe finish up this hearing with Ms. Martin, I'm going to have to ask you to leave." The Court found that the ALJ erred in not permitting this testimony and that the error was prejudicial: it resulted in a situation where substantial evidence does not support the ALJ's finding that there are a significant number of jobs the plaintiff could perform. The court upheld the magistrate judge's report and recommendation, remanding the case under sentence four of 42 U.S.C. §405(g) with instructions for the ALJ to permit questioning of the VE regarding the source of the number of jobs in the national economy a person with the plaintiff's limitations could perform, and any other further proceedings deemed appropriate. The plaintiff was represented by Avard Law of Cape Coral, Florida.

Martin v. Commissioner of Social Security and SSA, Case No. 2:17-cv-496-FtM-38CM (M.D. Fla., Ft. Myers Div.) (July 18, 2018) – Judgment in a Civil Case, Opinion and Order, and Magistrate Judge's Report and Recommendation

Weight of Medical Evidence

2182. The claimant's treating physician completed a questionnaire about the claimant's mental capacity, and on it noted that the claimant would rarely be able to respond appropriately to changes in work routines and settings, could only pay attention for two minutes at a time, and thought that others were out to get her, among other limitations. Two psychologists reviewing the file for the state agency found fewer limitations and the ALJ made an RFC determination that more closely matched the non-examining doctors. The ALJ did not explain what weight was given to the treating doctor but noted that the doctor's opinion "appears to be a reflection of the claimant's statements and not [the doctor's] observations." The court held that this rejection was "poorly explained." The Commissioner argued that the doctor's use of quotation marks around the words "two minutes" showed that they only reflected the claimant's statements, but the court was not convinced, and held that even if they did quote the claimant, there were other portions of the doctor's statement that had no quotation marks and were not addressed in the ALJ's decision. Therefore, the case was reversed

and remanded for further proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Thrasher v. Commissioner of Soc. Sec., Case No. 1:16-cv-2684 (N.D. Ohio, E.Div.) (November 17, 2017) – Magistrate Judge's Report and Recommendation and Judgment Entry