LIST OF AVAILABLE MATERIAL

JANUARY – DECEMBER 2020

ITEM NUMBERS – 2226-2249

Absenteeism

2243. The ALJ issued a fully favorable decision, finding that the claimant would have an average of five unscheduled absences a month and there was no work that would tolerate this. The Appeals Council reviewed the award on its own motion. The Appeals Council found that although the claimant has severe neck and back impairments and was restricted to sedentary work, there was no narrative discussion explaining the medical evidence supporting to support a finding that she would have five unscheduled absences a month. As a result, the case was remanded to the ALJ. Although NOSSCR's collection of Available Materials usually includes cases that were favorable to the claimant, the representative believes this decision may be useful to NOSSCR members considering how SSA applies SSR 96-8p and how the Appeals Council handles own motion reviews. The claimant was represented by Randolph Baltz of Little Rock, Arkansas.

Order of Appeals Council Remanding Case to Administrative Law Judge (April 10, 2020)

Activities of Daily Living

2228. The Court sustained the claimant's objections to the magistrate judge's Report and Recommendation. The Court noted that while a claimant may be able to perform the physical demands of light work on some days, he may not be able to do so repeatedly or during periods of symptom exacerbation. This is especially true when the claimant's testimony repeatedly expresses difficulties with activities of daily living and the medical records repeatedly reflect a history of frequent, albeit intermittent, episodes of exacerbated pain. Additionally, the Court found that the ALJ erred in denying the claim in part because the claimant, "…has not had the level of treatment one would expect for a disabled individual." The claimant had rejected further back surgery because two previous surgeries had "mixed results" and did not use opioids because they "lead to problems I choose to avoid." The Court wrote, "The ALJ should not automatically penalize a claimant for electing conservative treatment because, 'there may be any number of reasons for a physician to prescribe a conservative course of treatment and it is for that reason that such treatment alone would not necessarily render a claimant ineligible for disability benefits,'" citing *Dunn v. Colvin*, 607 F.App'x 264, 275 (4th Cir. 2015). The Court concluded, "The ALJ should not construe the evidence against the claimant simply because he sought less than the most aggressive treatments and because he refused to risk the hazards of opiates or surgery". Finally, the Court found that the ALJ misstated the standard established by the Fourth Circuit in *Bird v. Commissioner of SSA*, 699 F.3d 337 (4th Cir. 2012) regarding the claimant's VA disability rating. The ALJ summarily concluded that the VA finding was "inconsistent with the medical record as a whole" in light of the claimant's activities of daily living, which the Court had already found the ALJ mischaracterized. The Court wrote that *Bird* requires "not merely good reasons for disregarding the disability rating, but evidence that *clearly demonstrates* the ALJ should deviate from the one-hundred percent disability rating…To demonstrate that it is appropriate to accord less than 'substantial weight' to a disability decision from [the VA] 'an ALJ must give persuasive, specific, valid reasons for doing so that are supported by the record (emphasis in original).'" The claimant was represented by Bruce Billman of Fredericksburg, Virginia.

Saunders v. Saul, Civil Action No. 3:18cv643, E.D.Va., Richmond Div. (January 8, 2020) – Memorandum Opinion

2235. At a 2017 hearing, an ALJ found that the claimant's severe impairments included fibromyalgia, Rocky Mountain spotted fever, chronic obstructive pulmonary disease, irritable bowel syndrome, and chronic fatigue syndrome. She did not meet a listing and could not return to past

relevant work, but could perform a limited range of sedentary work, including as a scheduler, clerical sorter, or computation clerk. Therefore, her claim for disability benefits was denied. After the Appeals Council upheld the denial, the federal district court held that the ALJ properly found several other impairments to be non-severe, but erred in assessing her activities of daily living. The ALJ found that the claimant "has extensive activities of daily living, including: attending church regularly; spending time with friends; doing housework; driving; grocery shopping; cooking; reading; sewing; and playing the piano." However, the 4th Circuit has held that "An ALJ may not consider the type of activities a claimant can perform without also considering the extent to which she can perform them" and the claimant here reported that she went to church only once a week, visited friends only once or twice a month, did housework two to three times per week for one to two hours at a time, drove three to four times a week, shopped for groceries once a week for one hour, and spent fifteen to thirty minutes cooking dinners with the help of her husband. The ALJ "did not acknowledge the limited extent of those activities as described by [Plaintiff] or explain how those activities showed that [she] could sustain a full-time job." The ALJ also did not consider the vocational expert's testimony about jobs available when a person is frequently off-task or absent. The claim was therefore remanded for additional proceedings. The claimant was represented by Andrew Sindler of Columbia, Maryland.

Debra Ellen L. v. Saul, Civil No. TMD 18-3708, D.Md., S.Div. (March 31, 2020) – Memorandum Opinion Granting Plaintiff's Alternative Motion for Remand

Appeals Council: New Evidence

2230. After receiving an unfavorable ALJ decision that gave less weight to a treating physician's opinion because it was unsupported by treatment records, the claimant submitted 80 pages of such records from that doctor with her Appeals Council request for review. The treating doctor also explained why she had not provided the evidence, which covered the same time period as her opinion, before. The Appeals Council upheld the ALJ's denial, stating that it "did not consider and exhibit this evidence" but also that "this evidence does not show a reasonable probability that it would change the outcome of the decision." The Court reiterated previous holdings criticizing the Appeals Council's boilerplate language, stating "How the Appeals Council can ignore evidence, particularly evidence of the import [of the doctor's] extensive progress notes, and simultaneously state that the same evidence would not change the ALJ's decision is difficult to comprehend." Even though the ALJ provided other reasons for giving less weight to the doctor's opinion, the main reason was the lack of supporting progress notes and the other reasons were also connected with the lack of notes. For this reason alone, remand is necessary. Additionally, it was error for the ALJ to rely more heavily on a non-examining source and the claimant's written statement on a form that she got along "okay" with authority figures than on multiple treating source statements about the claimant's significant difficulties with social functioning, especially without any explanation. The RFC finding was unsupported by substantial evidence and should be reconsidered upon remand. The claimant was represented by Danielle Beaver of Honolulu, Hawaii.

Dano v. Saul, Civil Action No. 18-cv00434-DKW-RT, D.Haw. (November 19, 2019) – Order Reversing Decision of Commissioner of Social Security and Remanding for Further Administrative Proceedings

2244. The Appeals Council remanded because it received evidence it determined was new, material and relevant, and that might have changed the result. The evidence was an MRI of the left shoulder showing a torn labrum, a torn tendon, and rotator cuff tendinopathy. There was good cause for why it was not submitted earlier: the MRI occurred only a week before the ALJ's decision and could not be obtained and submitted quickly enough. On remand, the Appeals Council instructed the ALJ to consider whether the new evidence would change the RFC. This case exemplifies the Appeals Council's recent increase in productivity; the ALJ decision was issued on April 17, 2020 and the Appeals Council remand was issued four months and two days later. The claimant was represented by John Horn of Tinley Park, Illinois.

Order of Appeals Council Remanding Case to Administrative Law Judge (August 19, 2020)

Back Impairments

2232. In the initial ALJ hearing, the ALJ decided that the claimant's degenerative disc disease, arthritis, depression, and anxiety were severe but none met or equaled a listing. The ALJ found that the claimant could perform sedentary work with a sit-stand option, superficial public contact, and only simple instructions, which was found to allow her to return to past work as a billing clerk as well as other jobs. The District Court held that the ALJ failed to consider Listing 1.04(a), even though the claimant's representative specifically raised it at the hearing. The ALJ merely included a boilerplate paragraph that the claimant did not meet any listing. There was evidence that supported the representative's argument, and the Commissioner's argument that the claimant did not meet the listing because her symptoms waxed and waned was incorrect based on the listings and irrelevant to the ALJ's obligation to analyze the evidence and discuss it in the decision. The case was remanded for additional proceedings. The Appeals Council then remanded the case for another hearing. After a hearing with testimony from the claimant and a medical expert, the claimant was found to meet Listing 1.04(A) and received a fully favorable decision. The claimant was represented by Nicholas Coleman of Cave Springs, Arkansas.

Rodriguez v. Berryhill, No. 3:18-CV00163-JTR, D.Ark, Jonesboro Div. (June 4, 2019) – Order Remanding to the Commissioner; Notice of Appeals Council Action (July 22, 2019); Fully Favorable ALJ Decision (January 31, 2020)

Headaches

2231. The ALJ held another hearing after a District Court remanded the case with instructions to further consider listing 11.02 for equivalence with the claimant's migraines and 14.09 for inflammatory arthritis. With the testimony of a medical expert, the ALJ decided that claimant's migraines equaled listing 11.02 beginning March 26, 2015, which was the day the claimant attended a consultative examination and reported an ongoing headache that had lasted four days and was unresponsive to prescribed medication. The medical expert testified that he could not find that the claimant equaled the listing after August 19, 2016 since he had not reviewed any evidence from after that date. However, the ALJ found that after that date, the claimant could perform a full range of sedentary work physically but would be off task 20% of the work day. The Vocational Expert testified that would preclude work. The claimant was represented by John Horn of Tinley Park, Illinois.

Partially Favorable ALJ Decision [by ALJ Kimberly S. Cromer at the Oak Brook (IL) OHO] (March 9, 2020)

2242. The claimant's severe headaches were found to equal listing 11.02(B) and (D). The claimant had an MRI and CT scan and underwent mental and physical consultative examinations. The ALJ notes that although the claimant must stop using a computer during a headache, "I do not confuse that with a situation where a limitation against use of a computer monitor would solve the problem" especially since the headaches continued after the claimant stopped working. The ALJ also noted that even if the claimant did not equal the listing, a finding of disability would be appropriate within the framework of SSR 96-8p. The claimant was represented by John Horn of Tinley Park, Illinois.

Fully Favorable ALJ Decision [by ALJ Michael R. Dunn at the Flint (MI) OHO] (September 17, 2020)

2247. The claimant, who was in her late 40s on her alleged onset date, had impairments including a heart defect, back pain, fibromyalgia, and migraines. At the ALJ hearing, a vocational witness testified that the claimant could not perform her past relevant work but that there were other jobs she could do; however, missing two or more days of work per month would be work-preclusive. The ALJ found that the claimant was not disabled. After the Appeals Council upheld the decision, the claimant appealed to federal court, alleging that SSA failed to properly assess her migraines. The ALJ found that they were not severe and did not consider the pain and absences caused by them in

combination with her other impairments when determining her residual functional capacity. The Court agreed, finding that the step-two error was not harmless because it permeated the RFC determination. The case was reversed and remanded for additional proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Friscone-Repasky v. Com'r of Social Security, Case No. 1:19 CV 2526, N.D.Ohio, E.Div. (October 26, 2020) – Memorandum Opinion and Order

Heart Conditions

2248. The ALJ held a hearing after Appeals Council remand. The Appeals Council had remanded because evidence of claimant's shoulder impairment was submitted that was new and material. The ALJ called a medical expert who testified that claimant's degenerative disc disease, obesity, degenerative joint disease, depression and coronary artery disease equaled listing 4.04. The claimant was represented by John Horn of Tinley Park, Illinois.

Fully Favorable ALJ Decision [by ALJ David R. Bruce at the Orland Park (IL) OHO] (December 9, 2020)

Lupus

2239. After two court remands, an ALJ had a medical expert testify about the evidence submitted since the last state agency review. The ME testified that the claimant's chronic discoid lupus erythematosus met listing 8.04 (chronic infections of the skin or mucous membranes) and equaled 14.02 (Systemic lupus erythematosus) from the alleged onset date in March 2013 until claimant went back to work at the SGA level and the ALJ agreed. The claimant testified she received accommodations from her employer but the ALJ found there was no evidence of this and thus granted benefits for a closed period. Although the claimant had stopped working due to her health before the hearing, her employment lasted longer than would qualify for an Unsuccessful Work Attempt and she was furloughed rather than no longer employed, facts the ALJ used to limit benefits to a closed period. The claimant was represented by John Horn of Tinley Park, Illinois.

Partially Favorable ALJ Decision [by ALJ Gregory Smith at the Orland Park (IL) OHO] (June 26, 2020)

Manual Dexterity

2226. The claimant's impairments included diabetes, high blood pressure, high cholesterol, coronary artery disease, and hand tremors. At some medical visits, the hand tremors were observed to be moderate to severe; at others, they were not observed or minimal. At the ALJ hearing, the claimant testified that the tremors depended on his hand position and that gaps in treatment were caused first by a lack of insurance and then by difficulty finding a neurologist who would accept the insurance. At the hearing, the VE opined that the claimant's past relevant work required frequent bilateral handling and fingering. After the claimant submitted a post-hearing statement from the claimant's new neurologist, which noted the claimant had "mild to moderate postural tremors which become severe when he tries to hold anything in his hands," as well as "mild intention[al] tremor," the ALJ decided that the claimant was disabled for a closed period, but then applied the 8-step process and found medical improvement had occurred. The Appeals Council and federal district courts upheld the decision. The circuit court, however, found that "evidence does not support the ALJ's view of the medical record." The tests performed on the claimant during the time period the ALJ found medical improvement were not "the ones noted to produce the tremors. Accordingly, it is an overstatement of the medical record to conclude it definitively shows that" the claimant's tremors had disappeared. The doctors who examined the claimant after the closed period also did not perform the tests that historically produced the tremors, and there was only a six-month period where the claimant has no records of complaining about the tremors. The court held that a "lack of tremor complaints during this sliver of time—six months—does not support a conclusion that tremors were absent during this time period" especially when the claimant lost and then changed insurance. "The ALJ did not cite medical evidence to support her inference of an 'on and off again' diagnosis of tremors, or tremors that 'could improve or worsen.'" For these reasons, the case was vacated and

remanded for additional proceedings. The claimant was represented by John Horn of Tinley Park, Illinois.

Brown v. Saul, No. 17 C 2631 (7th Cir.) (January 10, 2020) – Order

Mental Impairments

2245. The Fourth Circuit considered whether the ALJ properly weighed a Medicaid eligibility determination when denying the claimant. The state used the same five-step sequential evaluation process for Medicaid eligibility as SSA does, and it found that the claimant equaled listing 12.05(c). The ALJ's denial gave the Medicaid decision "minimal weight" and said it was "not binding" on SSA. The Appeals Council upheld and the district court held that the ALJ provided "persuasive, specific, and valid reasons" for the weight given to the Medicaid determination. But the circuit court notes precedent that the default weight for another agency's decision is "substantial weight" and that the North Carolina Medicaid decision is entitled to this weight because its programs have the same purposes and standards as SSA's programs. ALJs have to provide "persuasive, specific, valid reasons for" affording these decisions less weight, and those reasons must be "supported by the record." Here, the court held that the ALJ did not meet that standard because the only listing considered was 12.02, not 12.05. The decision also includes a footnote (5) pointing out that SSA changed listing 12.05 significantly, and announced in the Federal Register that it would apply the new version of the listing to court remands. The court states that this "may generate retroactivity concerns," but it does "not reach that issue here, as it would be premature to do so." The claimant was represented by George Piemonte of Charlotte, North Carolina.

Kiser v. Saul, No. 19-1511 (4th Cir. 2020) – Opinion and Judgment

Past Relevant Work

2229. The Appeals Council remanded the claim because the ALJ erred at step 4 of the sequential evaluation process. The ALJ decision found that the claimant could perform past relevant work as an operations manager and information processing engineer. However, the ALJ acknowledged that the claimant did these jobs for less than the time usually required to learn these positions. The ALJ improperly relied on vocational expert testimony that the claimant performed these jobs long enough to learn them by combining them with the skills she learned in a different job she performed more than 15 years before the decision, and jobs performed so long ago should not be considered when determining past relevant work (20 CFR 404.1565). The Appeals Council also noted that "transferable skills are only relevant at step five of the sequential evaluation process and should not factor in when determining whether a claimant can perform [her] past relevant work." Finally, the Appeals Council found that the ALJ had misinterpreted SSR 82-62. The claimant was represented by John Horn of Tinley Park, Illinois.

Notice of Appeals Council Action (February 18, 2020)

Remand v. Reversal

2246. Previously, the U.S. Court of Appeals for the Seventh Circuit reversed and remanded this case because ALJ Studzinski's decision was not supported by substantial evidence and disregarded the claimant's reports of fatigue (allegedly a side effect of hypertension medication) and difficulty walking. On remand, the same ALJ again failed to credit the claimant's testimony about fatigue and gave no weight to evidence that the claimant had experienced fatigue when prescribed a given medication before the alleged onset date, even though the claimant was taking that same medication again during the period in question. The ALJ also found that the claimant had no limitations on walking despite the Seventh Circuit's conclusion that there was some limitation and the ALJ needed to determine the precise level. The ALJ also relied heavily on state agency medical determinations that were over six years old despite a large amount of newer medical evidence. The District Court reversed the second ALJ decision. The Court did not agree to a remand solely for the award of benefits because there were outstanding factual issues for the agency to resolve. However, the Court directed SSA to remand the case to a different ALJ and expedite the hearing because the claim has

been pending for over eight years. The claimant was represented by John Horn of Tinley Park, Illinois.

Robert M.W. v. Saul, Case No. 19 C 3165, N.D.Ill., E.Div. (November 19, 2020) – Memorandum Opinion and Order

Residual Functional Capacity

2237. The ALJ found that the claimant did not meet a listing, having only moderate limitations in concentration, persistence, and pace. He found she could perform a limited range of sedentary work, providing a significant number of possible jobs. The claimant alleged that the ALJ failed to perform the function-by-function analysis required for RFC assessment by SSR 96-8p. The Court held that "the ALJ's hypothetical to the VE and corresponding RFC assessment found that Plaintiff was 'capable of performing simple, routine tasks not at a production pace.' This limitation does not account for Plaintiff's moderate limitation in concentrating, persisting, or maintaining pace" (citations omitted). A restriction to being unable to work at a production pace is not enough information for the Court to determine whether the ALJ's RFC assessment was supported by substantial evidence. Adding in a restriction to being off task 10% of the day did not build an accurate and logical bridge to the ALJ's findings, especially given that he did not address absenteeism in his RFC assessment. Citing the *Mascio* and *Thomas* Fourth Circuit cases, the Court remanded for additional proceedings. The claimant was represented by Andrew Sindler of Columbia, Maryland.

Alisa S. v. Saul, Civil No. TMD 19-1109, D.Md. (May 1, 2020) – Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings and Memorandum Opinion Granting Plaintiff's Alternative Motion for Remand

2243. The ALJ issued a fully favorable decision, finding that the claimant would have an average of five unscheduled absences a month and there was no work that would tolerate this. The Appeals Council reviewed the award on its own motion. The Appeals Council found that although the claimant has severe neck and back impairments and was restricted to sedentary work, there was no narrative discussion explaining the medical evidence supporting to support a finding that she would have five unscheduled absences a month. As a result, the case was remanded to the ALJ. Although NOSSCR's collection of Available Materials usually includes cases that were favorable to the claimant, the representative believes this decision may be useful to NOSSCR members considering how SSA applies SSR 96-8p and how the Appeals Council handles own motion reviews. The claimant was represented by Randolph Baltz of Little Rock, Arkansas.

Order of Appeals Council Remanding Case to Administrative Law Judge (April 10, 2020)

SSI: Disabled Children

2234. The claimant's application for SSI benefits was made in December 2010, when he was a child. He was denied at a 2013 ALJ hearing and the denial was upheld by the Appeals Council, but remanded by federal district court in 2014. The case was reassigned to a different ALJ. By the time the second hearing was held in 2017, the claimant was an adult. Again, the ALJ denied the claim, finding that the claimant did not meet the child or adult disability standards for the relevant periods, and the Appeals Council upheld the denial. On another appeal to the district court, the court began its analysis by stating "It is difficult to know where to begin in this case. Lillard raises specific challenges to the ALJ's decision, and all of his challenges have merit. But there are many other issues with the decision that cause me great concern. While Lillard is entitled to relief on the basis of his specific claims, the overall egregiousness of the ALJ's errors is so substantial that additional discussion is warranted." The court held that the ALJ relied too heavily on a 2010 report by the claimant's teacher and a 2011 evaluation from a state agency doctor, even as hundreds more pages of evidence, mostly more recent, were available. The ALJ failed to acknowledge evidence that the claimant had a brain injury or to consider how that injury interacted with the claimant's mental health diagnoses. The ALJ noted the claimant's good grades in school and ability to graduate early,

but not the highly structured setting in which the claimant attended class or the Ds and Fs he received in general education classes. Similarly, the ALJ did not consider the high structure or significant supports the claimant received in his life after high school. The court held that the "overwhelming" evidence in the record indicated that the claimant has been disabled since his alleged onset date. "There is no reason to further prolong this case… with the Commissioner committing several egregious, reversible errors on both [ALJ hearings and Appeals Council reviews]. I will not remand the matter for the Commissioner to make a third attempt at getting it right. The case was remanded solely for the award of benefits. The claimant was represented by Courtney Hilts and Vicki Dempsey of Hannibal, Missouri.

Lillard v. Berryhill, 376 F.Supp.3d 963 (E.D. Mo. 2019) – Memorandum, Brief in Support of Complaint, Brief in Support of the Answer, Defendant's Response to Plaintiff's Statement of Uncontroverted Material Facts, Defendant's Statement of Additional Facts, Plaintiff's Reply Brief to Defendant's Answer, and Memorandum and Order

Subjective Symptom Evaluation

2241. The ALJ found that the claimant's severe impairments were multiple sclerosis and obesity, but that he did not meet a listing and could perform a significant number of jobs. The claimant alleged that the ALJ did not properly consider whether the claimant met listing 11.09 and erred in evaluating the treating physician's opinion. The claimant also alleged that the ALJ's subjective symptom evaluation was flawed. The ALJ found that "the claimant's medically determinable impairments could reasonably be expected to produce the above alleged symptoms, however the claimant's statements about the intensity, persistence, and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record for the reasons explained in this decision. Accordingly, these statements have been found to affect the claimant's ability to work only to the extent they can reasonably be accepted as consistent with the objective medical and other evidence." However, it was not clear to which symptoms the ALJ was referring; the decision does not explain what part of the claimant's testimony was inconsistent with what other evidence. The ALJ did ask the claimant about head and hand tremors, noting that these were not visible to the ALJ during the hearing. He also questioned the claimant about difficulty with buttons and how he managed a button-down shirt; the claimant testified that his father helped him button it. The court held that it did could not find that the ALJ's decision was supported by substantial evidence and remanded for further proceedings. The claimant was represented by Gregg M. Hobbie of Eatontown, New Jersey.

Nicholas F.G. v. Commissioner of Social Security, 3:19-cv-10880-MAS, D.N.J. (May 31, 2020) – Memorandum Opinion

Subsequent Application

2238. In January 2019, the district court ordered the claimant's case to be reversed and remanded for payment of benefits dating back to January 2016. Shortly thereafter, his attorney moved for EAJA fees, which the court granted. But in May 2020, the claimant filed an application for a writ of assistance, noting that he had not received any benefits despite his and his lawyer's repeated contact with the SSA field office, the Office of the USA Attorney, and his Senator. SSA's response to the claimant's application for a writ of assistance noted that the claimant had been awarded benefits beginning in May 2018 based on a subsequent application. In February 2020, SSA informed the claimant they had decided to reopen in light of the court's decision, and in March 2020 the agency asked the payment center to process the additional back benefits. Within weeks of the writ being filed, SSA deposited more than $26,000 in the claimant's account, but the claimant says "neither he nor his counsel had received any document explaining how that amount was calculated, if the amount included dependents' benefits, or whether attorney fees were withheld from the amount." The magistrate judge's order says "Defendant makes no attempt to explain its delay of more than one year in awarding Hurst benefits as directed by this court." The order gives SSA six weeks to provide the claimant with an accounting of the benefits disbursed. The claimant's request to hold SSA in contempt and for SSA to pay him interest on the delayed benefits were denied. The

claimant's request for additional attorney's fees for his work in obtaining the benefits ordered to be paid to his client was denied without prejudice because he did not provide an hourly rate for time expended. The claimant was represented by Gary Ficek of Fargo, North Dakota.

Hurst v. Social Security Administration, Case No. 3:18-cv-54, D.N.D. (June 10, 2020) – Order, Affidavit of Gary A. Ficek, Plaintiff's Attorney, In Support of Status Report and Reply Brief, Plaintiff's Reply to Defendant's Response to Plaintiff's Application for Writ of Assistance, Defendant's Response to Plaintiff's Application for Writ of Assistance, and Plaintiff's Application for Writ of Assistance and for Order Finding Defendant in Contempt of Court

Veterans' Disability Benefits

2228. The Court sustained the claimant's objections to the magistrate judge's Report and Recommendation. The Court noted that while a claimant may be able to perform the physical demands of light work on some days, he may not be able to do so repeatedly or during periods of symptom exacerbation. This is especially true when the claimant's testimony repeatedly expresses difficulties with activities of daily living and the medical records repeatedly reflect a history of frequent, albeit intermittent, episodes of exacerbated pain. Additionally, the Court found that the ALJ erred in denying the claim in part because the claimant, "…has not had the level of treatment one would expect for a disabled individual." The claimant had rejected further back surgery because two previous surgeries had "mixed results" and did not use opioids because they "lead to problems I choose to avoid." The Court wrote, "The ALJ should not automatically penalize a claimant for electing conservative treatment because, 'there may be any number of reasons for a physician to prescribe a conservative course of treatment and it is for that reason that such treatment alone would not necessarily render a claimant ineligible for disability benefits,'" citing *Dunn v. Colvin*, 607 F.App'x 264, 275 (4th Cir. 2015). The Court concluded, "The ALJ should not construe the evidence against the claimant simply because he sought less than the most aggressive treatments and because he refused to risk the hazards of opiates or surgery". Finally, the Court found that the ALJ misstated the standard established by the Fourth Circuit in *Bird v. Commissioner of SSA*, 699 F.3d 337 (4th Cir. 2012) regarding the claimant's VA disability rating. The ALJ summarily concluded that the VA finding was "inconsistent with the medical record as a whole" in light of the claimant's activities of daily living, which the Court had already found the ALJ mischaracterized. The Court wrote that *Bird* requires "not merely good reasons for disregarding the disability rating, but evidence that *clearly demonstrates* the ALJ should deviate from the one-hundred percent disability rating…To demonstrate that it is appropriate to accord less than 'substantial weight' to a disability decision from [the VA] 'an ALJ must give persuasive, specific, valid reasons for doing so that are supported by the record (emphasis in original).'" The claimant was represented by Bruce Billman of Fredericksburg, Virginia.

Saunders v. Saul, Civil Action No. 3:18cv643, E.D.Va., Richmond Div. (January 8, 2020) – Memorandum Opinion

Wavier of Issues

2236. Several months after the claimant and SSA submitted cross-motions for summary judgment, the claimant submitted a new motion for summary judgment and dismissal of the ALJ's unfavorable decision on the grounds that the ALJ had not been properly appointed under the Appointments Clause, citing the *Lucia* Supreme Court decision and the *Cirko* Third Circuit decision. SSA's attorneys said that the claimant had waived or forfeited this argument. However, the Court held that the Commissioner's argument, which relied on appellate rules about waiver, was not applicable to a district court case. "No doubt it is better practice for parties before a district court to present all of their arguments in their first briefs, but this is a far cry from holding that they are later foreclosed from raising other arguments in the same proceeding." At most, the Court held, the claimant forfeited the issue, rather than waiving it. The Court has discretion to consider it and it would be more efficient to handle this purely legal issue now. The Appointments Clause is an important Constitutional safeguard. Therefore, the claim was remanded for a hearing with a different ALJ. The claimant was represented by E. David Harr of Greensburg, Pennsylvania.

Campbell v. Saul, 2:19-CV-00378, W.D. Pa. (May 18, 2020) – Memorandum Opinion and Order

Weight of Medical Evidence

2227. The claimant's treating physician issued two opinions, one on a check-box form and one that included narratives. The ALJ assigned partial weight to these opinions. Sixth Circuit precedent indicates that an ALJ must first determine whether a treating physician's opinion deserves controlling weight. If it doesn't, there is a rebuttable presumption that it deserves great deference, unless certain factors exist. The two analyses cannot be collapsed into one unless the ALJ states "good reason" for the weight assigned. As the court here noted, ALJs "cannot avoid reversal by merely citing exhibits in the record that support her findings without discussing the content of those exhibits and explaining how that content provides support. Nor can counsel for the Commissioner save a decision from reversal by citing to evidence in the record not cited and adequately discussed by the ALJ." In this case, the ALJ merely said the treating source opinions were not consistent with the record as a whole but didn't cite to or discuss specific inconsistencies. The ALJ noted that the claimant can perform daily activities, but the court noted that "it is well-settled that the ability to perform 'minimal daily functions' does not mean a person can perform 'typical work activities' for eight hours a day." The case is therefore remanded for proper consideration of the doctor's opinions. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Remick v. Commissioner of Social Security Administration, Case No. 1:18 CV 1028 (N.D.Ohio., E.Div.) (August 9, 2019) – Memorandum Opinion & Order and Judgment

2233. The claimant's treating physician submitted an opinion about her physical and mental limitations, stemming from anxiety, depression, and recurrent blood clots. Another treating physician provided two medical source statements regarding the claimant's mental status. Since the claim was filed before March 27, 2017, the ALJ was obligated to give controlling weight to these opinions unless the decision articulated good reasons for giving a different weight to the opinions. The District Court held that the ALJ provided good reasons for giving less weight to the treating physician's opinion about the claimant's physical limitations, having discussed inconsistencies with other evidence in the file, but that the ALJ "entirely overlooked" the mental capacity assessment provided by the other doctor. The Appeals Council attempted to cure this mistake by reviewing the assessment and assigning it little weight, but it was supported by and consistent with other evidence in the file and the Appeals Council failed to articulate the other factors it would have needed to analyze to give the opinion less than controlling weight. Therefore, the case must be remanded for further proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Leibold v. Commissioner of Social Security, Case No. 1:19-cv-1078, N.D.Ohio, E.Div. (April 6, 2020) – Memorandum Opinion and Order and Judgment Entry

2240. The claimant alleged that the ALJ erred in her evaluation of the medical and vocational opinion evidence, her assessment of medical impairment listings, her assessment of Residual Functional Capacity, her assessment of the claimant's credibility and exertional and non-exertional limitations, and her evaluation of the Vocational Expert opinion evidence, and did not meaningfully consider the favorable and relevant medical and vocational evidence. SSA sought a voluntary remand and it was granted under sentence four of Section 205(g) of the Social Security Act. The claimant was represented by Andrew Sindler of Columbia, Maryland.

Heather A. v. Saul, Civil Action No. DLB-19-2566, D.Md. (July 22, 2020) – Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings and Order

2249. The claimant had multiple musculoskeletal and other impairments. The ALJ found that the claimant could perform a limited range of sedentary work, and although he could not go back to past work, he had a high school degree and was a younger individual, so would be able to do other jobs. Since this claim was filed March 8. 2016, the rules in 20 CFR 404.1527 apply. The court found that

SSA had not followed those rules in the weight the ALJ gave to the claimant's treating physician, Dr. Keppler. The doctor had treated the claimant for approximately two years, including performing surgery on him, when he provided an opinion on the claimant's limitations. The ALJ gave "great" rather than "controlling" weight to parts of this opinion, "little weight" to other parts, and did not address other parts of the opinion at all. The court held that a consultative examiner's finding that a claimant walked "normally with a rolling walker" was different than a finding that the claimant could walk normally and was not good reason to reduce the weight given to the doctor's opinion that the claimant had limitations in walking. The decision provides an explanation of Sixth Circuit jurisprudence on the "treating physician" rule and of SSA's policies about needing to sit and stand at will. The case was reversed and remanded for additional proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Hines v. Saul, Case No. 1:19 CV 0289, N.D.Ohio, E.Div., (March 13, 2020) – Memorandum Order and Opinion and Judgment Entry