LIST OF AVAILABLE MATERIAL

JANUARY – DECEMBER 2021

ITEM NUMBERS – 2250-2274

Attorneys' Fees

2264. After an ALJ issued an unfavorable decision, the claimant's representative withdrew and waived fees. The claimant obtained new representation, who assisted her with the Appeals Council request for review, federal district court case, an ALJ remand hearing, written exceptions to the Appeals Council after the second ALJ denial, and a second remand hearing before a different ALJ. At that point the claimant received a fully favorable decision and over $96,000 in retroactive benefits. The representative filed a fee petition for 25% of back benefits. The Regional Chief ALJ, Sherry Thompson, reviewed the petition, as is SSA policy for fees of $10,000 or more. Judge Thompson provided detailed analysis of each of the factors the RCALJ considered: purposes of the program, the extent and type of services the representative performed, the complexity of the case, the level of skill and competence required of the representative, the amount of time the representative spent on the case, the result the representative achieved, the level of review to which the claimant was taken and the level of the review a which the claimant became the representative and the amount of the fee requested. Ultimately, Judge Thompson determined that the requested fee of over $24,000 was appropriate. The representative was Nicholas Coleman of Cave Springs, Arkansas.

Order of the Regional Chief Judge Authorization to Charge and Collect a Fee (July 19, 2021)

Back Impairments

2262. The claimant's physical impairments included fibromyalgia and arthritis of the cervical spine, and she used a cane and a wheeled walker at various points in her treatment history. There were doctors' orders for each assistive device. The ALJ found that the claimant could perform a limited range of light work. The court addressed the ALJ's finding that a cane was not medically necessary. Although this case took place with the musculoskeletal listings in effect before April 2, 2021, the discussion about assistive devices might be especially useful now that the listings focus on "documented medical need for an assistive device" rather than "inability to ambulate effectively." The Sixth Circuit has held that to be considered a restriction or limitation, the record must reflect "more than just a subjective desire on the part of the plaintiff as to the use of a cane"; the cane must be medically necessary. Generally, it is error to find that a claimant's use of a cane is not medically necessary if one was prescribed, and here the claimant's doctors ordered her a cane and rollator, and her physical therapist showed her how to use them and advised her to do so at all times. Four out of five of the records the ALJ cited in support of a finding that the claimant's gait improved when she did not know she was being observed did not actually say that but demonstrated she had gait problems; the fifth does say that her gait improved, but did not describe the gait itself. The ALJ's reliance on strength, range of motion, and sensation tests (without citing to evidence) ignores the numerous citations about the claimant's balance problems, pain, and frequent falls. The ALJ also misstated the vocational witness' testimony. While it is true that the VE said using a cane or walker when walking would not reduce the number of jobs, the VE said that the use of these devices to stand or balance would. Therefore, the ALJ's finding about the claimant's need for an assistive device was not harmless error. The claim was remanded for additional proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Lindsey v. Commissioner, Case No. 1:18CV2158 (N.D. Ohio, E. Div. October 4, 2019) – Memorandum Opinion & Order and Judgment Entry

Epilepsy/Seizures

2250. The ALJ rejected the observations of the claimant's mother, contained in an affidavit, as to the claimant's seizure disorder. The ALJ held that the accuracy of the mother's conclusions was questionable, because she was not medically trained "to make exacting observations as to dates, frequencies, types and degrees of medical signs and symptoms, or of the frequency or intensity of unusual moods or mannerisms. Moreover, by virtue of the relationship with the claimant [his mother] cannot be considered a disinterested third party witness whose reports of restriction in functioning would not tend to be discolored by affection for the claimant and a natural tendency to agree with the symptoms and limitations the claimant alleges." In addition, the claimant's mother submitted a seizure log, which would establish that the claimant's seizures occur with a degree of frequency to satisfy the requirements of Section 11.02 of the Listing of Impairments. Yet, the ALJ dismissed the contention that the claimant's seizure disorder meets the requirements of the Listing in one sentence, without further explanation. At the District Court, the Plaintiff argued that Section 11.02A of Appendix 1 does not require that the observer be medically trained. There is no requirement that an individual attempt to hold off his seizure until he is in the presence of medically trained personnel, just so the ALJ can have a description from a physician or nurse as to the individual's seizure episode. And while section 11.00 H2 of Appendix 1 indicates that a description of a seizure from a medical professional who has observed at least one of the typical seizures is preferable, it is not required. Further, individuals who are in the throes of a seizure do not generally drag themselves into the street in front of strangers who, as disinterested third parties, would then observe the seizure episode and immediately record their observations for later use as evidence in a claim for Social Security benefits. The Commissioner's position essentially negates the possibility of establishing that an individual satisfies the requirements for presumptive disability, as no observer of a seizure who records their observations will be deemed to be disinterested, reliable or credible. The Court found that the mother's seizure log establishes the frequency of episodes required by the Listing. "Considering this evidence and the lack of a more detailed discussion of the listing claim in the ALJ's decision, [I] cannot find that the decision is supported by substantial evidence.' *K.M.L. v. Comm'r of Soc. Sec.*, No. 18-CV-1047, 2019 WL 2339449, at *5 (W.D. La. May 31, 2019). Thus, I find that the correct course is to reverse the Commissioner's decision and remand for further proceedings." The claimant was represented by Ronald Honig of Dallas, Texas.

Aden v. Saul, No. 3:20CV00022, 2020 WL 6562128, at *1 (S.D. Tex. Nov. 9, 2020) – Plaintiff's Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, Plaintiff's Reply to Brief of Defendant, Memorandum and Recommendation, Order Adopting Magistrate Judge's Memorandum and recommendation, and Final Judgment

Headaches

2267. The court held that the ALJ did not adequately assess the claimant's migraine headaches and related sensitivity to light: despite hundreds of pages of evidence about the headaches and their treatment, the ALJ only mentioned migraines once, in a summary of the hearing testimony. It was therefore not possible for the court to determine whether the ALJ's decision was supported by substantial evidence. The case was remanded for further proceedings. The claimant was represented by Agnes Wladyka of Mountainside, New Jersey.

Doreen G. v. Acting Commissioner, Civil Action No. 18-14609 (MAS) (D.N.J., May 31, 2021) – Memorandum Opinion

2274. The claimant's impairments included migraines, cluster headaches and other trigeminal autonomic cephalgias. Her treating neurologist opined that she would miss about four days of work a month because of her headaches. In her federal court appeal, the claimant argued that the ALJ failed to consider whether her headaches met or equaled epilepsy listings (at the time, 11.02 or 11.03; now 11.02B and 11.02D). The Court held that substantial evidence supported the ALJ's finding that the claimant did not meet these listings, but "the ALJ was required to consider whether Plaintiff's combined impairments medically equaled this listing, as there was evidence that Plaintiff's impairments may have met the criteria set forth in SSR 19-4p. Thus, remand is required on this issue." The claimant was represented by John Horn of Tinley Park, Illinois.

Lauriann C. v. Kijakazi, Civil No. 2:19cv317 (N.D.Ind., December 9, 2021) – Opinion and Order

Intellectual Disability

2254. Claimant, who was in his 30s when he filed his claim in 2009, had some severe physical impairments. After an Appeals Council remand, he presented the ALJ with childhood IQ testing that was at Listing levels. The ALJ refused to order a consultative examination (CE) for a current score and denied the case. A District Court appeal followed, resulting in an October 2015 order directing the ALJ to obtain CE testing. In late 2016, a different ALJ at first refused to obtain CE testing. Only after she held a hearing with medical expert (ME) testimony did she order IQ testing, which revealed not only an IQ that would meet the intellectual disability listing but other significant mental health impairments and limitations. A supplemental hearing, again with ME testimony, was held after the mental listings changed on January 17, 2017. The ALJ then denied the claim after applying the new listings. The case was appealed again to District Court, and the court held that the pre-2017 listings must be applied. The court cited the 1988 Supreme Court case of *Bowen v. Georgetown Univ. Hosp.*, which stated "[r]etroactivity is not favored in the law… and administrative rules will not be construed to have retroactive effect unless their language requires this result." The court also noted that the case had been remanded in 2015 and the listings were not changed until 2017, so SSA "clearly did not intend that [the] claim be reviewed under the earlier version, because the remand wasn't 'after the effective date of these final rules.' The ALJ should have analyzed [the] claim under the old listing" (citations omitted). The court disregarded SSA's argument that this was harmless error because the claimant is not disabled according to either listing, stating that the ALJ committed legal error and remand was the appropriate outcome. As a postscript to the District Court decision, on remand the ALJ obtained a medical consultant opinion that said that none of the IQ scores were valid because the client was "born in Mexico." However, the claimant submitted evidence that he came to the US as a baby, all his education was in English, and he was sufficiently proficient in English that the IQ tests were valid. After the claimant's third ALJ hearing, he was found disabled at step 5 of the sequential evaluation process and will receive benefits retroactive to 2009. The claimant was represented by Ann Atkinson of Parker, Colorado.

Bencomo-Perez v. Saul, Civil Action No. 18-cv-02609-DDD (D. Colo., March 30, 2020) – Order Vacating Determination of ALJ and Remanding Case

2260. The ALJ decided that the claimant did not meet or equal listing 12.05 despite a consultative examiner finding that the claimant had a full scale intelligence quotient score of 51, with a verbal IQ of 66 and a perceptual reasoning IQ of 56. The ALJ gave limited weight to the examination's findings, noting that the claimant's work history and other medical records seemed inconsistent. However, as the Appeals Council explained, "12.00H specifies that only qualified specialists, Federal and State agency medical and psychological consultants, and other contracted medical and psychological experts may conclude that an obtained IQ score is not an accurate reflection of a claimant's general intellectual functioning." In this case, the consultative examiner reported that the claimant graduated from a specialized residential school for people with emotional, behavior and learning problems, and opined that she had performed an evaluation that provided a reliable estimate of the claimant's functioning. The CE report also indicated that the claimant could care for himself in some regards, but still needed assistance with some activities of daily living and had a case manager that helped him with independent living. Therefore, the Appeals Council remanded the case for further consideration of whether the claimant's intellectual disorder satisfies the requirements of Listing 12.05. The claimant was reported by Edward Damien Leone of Scranton, Pennsylvania.

Order of Appeals Council Remanding Case to Administrative Law Judge (January 8, 2021)

Lay Witness Testimony

2250. The ALJ rejected the observations of the claimant's mother, contained in an affidavit, as to the claimant's seizure disorder. The ALJ held that the accuracy of the mother's conclusions was questionable, because she was not medically trained "to make exacting observations as to dates, frequencies, types and degrees of medical signs and symptoms, or of the frequency or intensity of unusual moods or mannerisms. Moreover, by virtue of the relationship with the claimant [his mother] cannot be considered a disinterested third party witness whose reports of restriction in functioning would not tend to be discolored by affection for the claimant and a natural tendency to agree with the symptoms and limitations the claimant alleges." In addition, the claimant's mother submitted a seizure log, which would establish that the claimant's seizures occur with a degree of frequency to satisfy the requirements of Section 11.02 of the Listing of Impairments. Yet, the ALJ dismissed the contention that the claimant's seizure disorder meets the requirements of the Listing in one sentence, without further explanation. At the District Court, the Plaintiff argued that Section 11.02A of Appendix 1 does not require that the observer be medically trained. There is no requirement that an individual attempt to hold off his seizure until he is in the presence of medically trained personnel, just so the ALJ can have a description from a physician or nurse as to the individual's seizure episode. And while section 11.00 H2 of Appendix 1 indicates that a description of a seizure from a medical professional who has observed at least one of the typical seizures is preferable, it is not required. Further, individuals who are in the throes of a seizure do not generally drag themselves into the street in front of strangers who, as disinterested third parties, would then observe the seizure episode and immediately record their observations for later use as evidence in a claim for Social Security benefits. The Commissioner's position essentially negates the possibility of establishing that an individual satisfies the requirements for presumptive disability, as no observer of a seizure who records their observations will be deemed to be disinterested, reliable or credible. The Court found that the mother's seizure log establishes the frequency of episodes required by the Listing. "Considering this evidence and the lack of a more detailed discussion of the listing claim in the ALJ's decision, [I] cannot find that the decision is supported by substantial evidence.' *K.M.L. v. Comm'r of Soc. Sec.*, No. 18-CV-1047, 2019 WL 2339449, at *5 (W.D. La. May 31, 2019). Thus, I find that the correct course is to reverse the Commissioner's decision and remand for further proceedings." The claimant was represented by Ronald Honig of Dallas, Texas.

Aden v. Saul, No. 3:20CV00022, 2020 WL 6562128, at *1 (S.D. Tex. Nov. 9, 2020) – Plaintiff's Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, Plaintiff's Reply to Brief of Defendant, Memorandum and Recommendation, Order Adopting Magistrate Judge's Memorandum and recommendation, and Final Judgment

Medications

2263. The claimant testified that he used an emotional support dog to help with symptoms of depression, anxiety, and PTSD. He also took medication, which had side effects including sleepiness so he took several naps a day. The court held that the ALJ had erred in rejecting the claimant's testimony about a need for the dog (which a vocational witness testified would require an accommodation by an employer): the ALJ relied on one sentence of one treatment note to determine that the claimant's panic attacks were under control, when there were many contradictory findings in the record. The court found this to be impermissible "cherry-picking." Additionally, the court held that the ALJ erred when she found "Xanax causes no serious side effects, it relaxes [the claimant] and causes sleepiness." The sleepiness itself was a serious side effect, with uncontradicted evidence that the claimant napped frequently and the vocational witness' testimony that the claimant's amount of napping would preclude work. Finally, the court held that the ALJ's decision to find the treating provider's opinion of "minimal persuasiveness" was in error. The ALJ did not explain which treatment notes she found incongruent with the provider's opinion. There was no logical bridge from the evidence to the ALJ's decision, and many treatment notes did support the opinion. Therefore, the case was remanded for additional proceedings. The claimant was represented by John Horn of Tinley Park, Illinois.

Mark B. v. Saul, Case No. 20 CV 50164 (N.D.Ill., W.Div. June 11, 2021) – Memorandum Opinion and Order

Mental Impairments

2253. The claimant has anxiety, depression, and chronic organic brain dysfunction. He was found to meet listing 12.06 because he had more than the required number of symptoms under the A criteria and had marked limitations in interacting with others and in maintaining concentration, persistence, and pace. Evidence supporting this finding came from psychotherapy and psychiatry records, a statement from the claimant's fiancée, and an MRI showing white matter signal abnormality. 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] (September 17, 2020)

2255. The ALJ found several severe musculoskeletal impairments, but determined that COPD, affective disorder, and anxiety disorder were not severe. Although the ALJ made some mention of problems with concentration and other non-exertional limitations in the residual functional capacity assessment, the claimant argued that the ALJ did not fully take into account the findings of the psychological consultative examiner, "cherrypicking" the statements that demonstrated the claimant's strengths and not addressing areas where the claimant struggled. Furthermore, the ALJ did not state what weight was given to the examiner's opinion. The court held that although finding an impairment to be non-severe could be harmless error, especially in cases where the non-severe impairment was still considered in the RFC analysis, here it was legal error because the ALJ never mentioned the impairments again after step 2 of the sequential evaluation process, and therefore the ALJ's decision was not supported by substantial evidence. The case was remanded for additional proceedings. The claimant was represented by Agnes Wladyka of Mountainside, New Jersey.

Williams v. Saul, Civil Action No. 2:18-cv-13145 (D.N.J., March 18, 2021) – Order and Opinion and Order

2258. The Appeals Council remanded the case back to the ALJ, noting that although the claimant appeared to use various substances and had gaps in treatment, Administrative Message 12048 (not public, but available at https://empirejustice.org/wp-content/uploads/2020/07/AM-12048-Schizophrenia.pdf) indicates that these are common situations for people with schizophrenia and not preclusive of a finding of disability. The Appeals Council found that more development is needed, especially given that the claimant previously received SSI because of schizophrenia. An additional hearing with better development of the claimant's mental impairments and residual functional capacity is necessary, with medical and vocational witnesses as needed. The claimant was represented by Randolph Baltz of Little Rock, Arkansas.

Order of Appeals Council Remanding Case to Administrative Law Judge (June 26, 2019)

2263. The claimant testified that he used an emotional support dog to help with symptoms of depression, anxiety, and PTSD. He also took medication, which had side effects including sleepiness so he took several naps a day. The court held that the ALJ had erred in rejecting the claimant's testimony about a need for the dog (which a vocational witness testified would require an accommodation by an employer): the ALJ relied on one sentence of one treatment note to determine that the claimant's panic attacks were under control, when there were many contradictory findings in the record. The court found this to be impermissible "cherry-picking." Additionally, the court held that the ALJ erred when she found "Xanax causes no serious side effects, it relaxes [the claimant] and causes sleepiness." The sleepiness itself was a serious side effect, with uncontradicted evidence that the claimant napped frequently and the vocational witness' testimony that the claimant's amount of napping would preclude work. Finally, the court held that the ALJ's decision to find the treating provider's opinion of "minimal persuasiveness" was in error. The ALJ did not explain which treatment notes she found incongruent with the provider's opinion. There was no logical bridge from the evidence to the ALJ's decision, and many treatment notes did support the opinion. Therefore, the

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

Mark B. v. Saul, Case No. 20 CV 50164 (N.D.Ill., W.Div. June 11, 2021) – Memorandum Opinion and Order

Pain

2262. The claimant's physical impairments included fibromyalgia and arthritis of the cervical spine, and she used a cane and a wheeled walker at various points in her treatment history. There were doctors' orders for each assistive device. The ALJ found that the claimant could perform a limited range of light work. The court addressed the ALJ's finding that a cane was not medically necessary. Although this case took place with the musculoskeletal listings in effect before April 2, 2021, the discussion about assistive devices might be especially useful now that the listings focus on "documented medical need for an assistive device" rather than "inability to ambulate effectively." The Sixth Circuit has held that to be considered a restriction or limitation, the record must reflect "more than just a subjective desire on the part of the plaintiff as to the use of a cane"; the cane must be medically necessary. Generally, it is error to find that a claimant's use of a cane is not medically necessary if one was prescribed, and here the claimant's doctors ordered her a cane and rollator, and her physical therapist showed her how to use them and advised her to do so at all times. Four out of five of the records the ALJ cited in support of a finding that the claimant's gait improved when she did not know she was being observed did not actually say that but demonstrated she had gait problems; the fifth does say that her gait improved, but did not describe the gait itself. The ALJ's reliance on strength, range of motion, and sensation tests (without citing to evidence) ignores the numerous citations about the claimant's balance problems, pain, and frequent falls. The ALJ also misstated the vocational witness' testimony. While it is true that the VE said using a cane or walker when walking would not reduce the number of jobs, the VE said that the use of these devices to stand or balance would. Therefore, the ALJ's finding about the claimant's need for an assistive device was not harmless error. The claim was remanded for additional proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Lindsey v. Commissioner, Case No. 1:18CV2158 (N.D. Ohio, E. Div. October 4, 2019) – Memorandum Opinion & Order and Judgment Entry

Remand: "Good Cause"

2261. The Ninth Circuit remanded under sentence six, finding that the Magistrate abused his discretion by finding that Veterans Administration compensation and pension ("C&P") examinations and a rating submitted to the court, but not to the Appeals Council, did not have good cause for when they were presented and did not have a reasonable possibility of changing the outcome of the case. The VA evidence arose in the course of ordinary administrative processes, just after the Appeals Council declined review. Plaintiff submitted the evidence immediately to the court with the merits brief, making a sentence six argument in the alternative. The evidence could not have been submitted sooner. The VA evidence clarified the diagnosis of PTSD and tended to affect the ALJ's assessment of Plaintiff's subjective claims and other medical opinions. The Magistrate might have ordered supplemental briefing on sentence six given the unusual evidentiary circumstances and OGC's failure to respond to the sentence six argument. Instead, the Magistrate manufactured a complete sentence six argument on behalf of OGC, starting with, "While the Commissioner doesn't respond directly..." The Circuit Court didn't touch the problem of a Magistrate arguing on behalf of one of the litigants, but instead looked to the merits of the sentence six argument. Of note, the court cited an old case, *Ward v. Schweiker*, 686 F.2d 762, 764 (9th Cir. 1982), which holds: "Where, as here, the new evidence could not have been presented to the ALJ because it did not exist at the time of the ALJ's decision, there is good cause for failing to present the evidence sooner." The court also expressed interest in the VA rating itself despite the regulatory change ruling it irrelevant, 20 CFR § 404.1504. In the Ninth Circuit, a VA rating might remain probative under *McCartey*, because *McCartey* holds that the rules and programmatic structures of the VA and SSA are so similar that one rating or decision should inform the other, undermining the rationale of the new regulation.

McCartey v. Massanari, 298 F.3d 1072, 1076 (9th Cir. 2002). That question may be resolved on remand. The claimant was represented by Jeffrey Baird of Seattle, Washington.

Short v. Saul, 19-35273 (9th Cir. March 8, 2021) – Plaintiff-Appellant Opening Brief and Memorandum Opinion; reported at 839 Fed. Appx. 159 (9th Cir. 2021)

Remand: Lost Tape

2270. The case was remanded by the Appeals Council due to the "inappropriate" and "unprofessional" comments made by the hearing reporter that were audible on the recording of the hearing. Although it was not clear whether the comments could be heard during the hearing, the Appeals Council vacated the decision and allowed the client a new hearing. The claimant was represented by Laura Siguad of Morgan Weisbrod of Dallas, Texas.

Order of Appeals Council Remanding Case to Administrative Law Judge (October 27, 2020)

Residual Functional Capacity

2259. The court found that it was reversible error for the ALJ not to have considered whether the claimant's plaque psoriasis and obsessive-compulsive disorder were severe impairments. If these were the claimant's only two alleged impairments and neither were found to be severe, denial would be appropriate. But here, the ALJ found that the claimant had several other severe impairments. Therefore, the ALJ was required to consider the effects of both the severe and non-severe impairments at the subsequent steps of the process, including the determination of residual functional capacity. If the ALJ did not discuss the severity of the impairments in the step 2 analysis but incorporated their limitations into the RFC, the step two error could have been harmless. But here, the impairments were not discussed when determining the RFC either. Although SSA contended that Plaintiff did not meet her burden to identify work-related limitations caused by these impairments, that argument was unsuccessful. While the court cited previous case law stating that the "burden of producing evidence sufficient to establish the existence of an impairment and its resulting functional limitations rests on the claimant," it held that the issue in this case "is not whether the Plaintiff presented sufficient evidence of an impairment. Rather, the issue is the ALJ's failure to acknowledge the existence of Plaintiffs' plaque psoriasis and obsessive-compulsive disorder, regardless of severity, and incorporate those impairments into Plaintiff's RFC determination. This is particularly so where the Plaintiff presented evidence of these impairments during Plaintiff's hearing before the ALJ, i.e., in her Disability Report and outpatient medical treatment records." Therefore, remand is necessary. The claimant was represented by Andrew Sindler of Severna Park, Maryland.

Tamika v. Saul, Civil No. GLS 19-3345, Report and Recommendation of Magistrate Judge (D.Md.,S.Div., March 12, 2021) – Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings and Opinion and Order from Magistrate Judge Remanding Case for Further Proceedings

Retroactivity

2254. Claimant, who was in his 30s when he filed his claim in 2009, had some severe physical impairments. After an Appeals Council remand, he presented the ALJ with childhood IQ testing that was at Listing levels. The ALJ refused to order a consultative examination (CE) for a current score and denied the case. A District Court appeal followed, resulting in an October 2015 order directing the ALJ to obtain CE testing. In late 2016, a different ALJ at first refused to obtain CE testing. Only after she held a hearing with medical expert (ME) testimony did she order IQ testing, which revealed not only an IQ that would meet the intellectual disability listing but other significant mental health impairments and limitations. A supplemental hearing, again with ME testimony, was held after the mental listings changed on January 17, 2017. The ALJ then denied the claim after applying the new listings. The case was appealed again to District Court, and the court held that the pre-2017 listings must be applied. The court cited the 1988 Supreme Court case of *Bowen v. Georgetown Univ. Hosp.*, which stated "[r]etroactivity is not favored in the law… and administrative rules will not be construed to have retroactive effect unless their language requires this result." The court also noted

that the case had been remanded in 2015 and the listings were not changed until 2017, so SSA "clearly did not intend that [the] claim be reviewed under the earlier version, because the remand wasn't 'after the effective date of these final rules.' The ALJ should have analyzed [the] claim under the old listing" (citations omitted). The court disregarded SSA's argument that this was harmless error because the claimant is not disabled according to either listing, stating that the ALJ committed legal error and remand was the appropriate outcome. As a postscript to the District Court decision, on remand the ALJ obtained a medical consultant opinion that said that none of the IQ scores were valid because the client was "born in Mexico." However, the claimant submitted evidence that he came to the US as a baby, all his education was in English, and he was sufficiently proficient in English that the IQ tests were valid. After the claimant's third ALJ hearing, he was found disabled at step 5 of the sequential evaluation process and will receive benefits retroactive to 2009. The claimant was represented by Ann Atkinson of Parker, Colorado.

Bencomo-Perez v. Saul, Civil Action No. 18-cv-02609-DDD (D. Colo., March 30, 2020) – Order Vacating Determination of ALJ and Remanding Case

2257. In October 2014, the ALJ issued an unfavorable decision. In March 2017, the District Court remanded the case with specific instructions to consider Listing 12.05(C). However, at an ALJ hearing in April 2018, the ALJ refused to consider 12.05(C) because the listings had since changed. The Appeals Council rejected the *Bowen* argument when exceptions were filed and the case returned to District Court. The District Court gave detailed explanation as to why this retroactive rulemaking was not permitted and again directed the case to be considered under 12.05(C), as directed by *Bowen* and numerous other cases. The court stated that "the retroactive application of the revised Listing version was particularly inappropriate because this Court had remanded the case expressly because the prior ALJ had failed to consider Listing 12.05(C), as the ALJ was obligated to do. (AR 530-35). Having been reversed by this Court, the Commissioner cannot then evade that obligation by retroactively applying new requirements, without express Congressional authority to do so." The Appeals Council issued a fully favorable decision after this second federal court remand, noting that it was following the District Court order to consider the old Listing and finding that the claimant met Listing 12.05(C). The claimant was represented by Janna Lowenstein of Valencia, California.

Tania A. v. Saul, Civil Action No. 2:20-cv-00722-PSG-JC (C.D. Cal., October 9, 2020) – Report and Recommendation of United States Magistrate Judge

Severity

2259. The court found that it was reversible error for the ALJ not to have considered whether the claimant's plaque psoriasis and obsessive-compulsive disorder were severe impairments. If these were the claimant's only two alleged impairments and neither were found to be severe, denial would be appropriate. But here, the ALJ found that the claimant had several other severe impairments. Therefore, the ALJ was required to consider the effects of both the severe and non-severe impairments at the subsequent steps of the process, including the determination of residual functional capacity. If the ALJ did not discuss the severity of the impairments in the step 2 analysis but incorporated their limitations into the RFC, the step two error could have been harmless. But here, the impairments were not discussed when determining the RFC either. Although SSA contended that Plaintiff did not meet her burden to identify work-related limitations caused by these impairments, that argument was unsuccessful. While the court cited previous case law stating that the "burden of producing evidence sufficient to establish the existence of an impairment and its resulting functional limitations rests on the claimant," it held that the issue in this case "is not whether the Plaintiff presented sufficient evidence of an impairment. Rather, the issue is the ALJ's failure to acknowledge the existence of Plaintiffs' plaque psoriasis and obsessive-compulsive disorder, regardless of severity, and incorporate those impairments into Plaintiff's RFC determination. This is particularly so where the Plaintiff presented evidence of these impairments during Plaintiff's hearing before the ALJ, i.e., in her Disability Report and outpatient medical treatment records." Therefore, remand is necessary. The claimant was represented by Andrew Sindler of Severna Park, Maryland.

Tamika v. Saul, Civil No. GLS 19-3345, Report and Recommendation of Magistrate Judge (D.Md.,S.Div., March 12, 2021) – Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings and Opinion and Order from Magistrate Judge Remanding Case for Further Proceedings

2268. An ALJ found the claimant had the following severe impairments: "vertigo, left-sided hearing loss, major depressive disorder, panic disorder with agoraphobia, and Graves' disease." However, the ALJ found that the claimant had the residual functional capacity to perform substantial gainful activity in a significant number of jobs. On appeal to federal court, the claimant argued that the ALJ erred by not finding her fractured foot injury, thyroid condition, lumbar degenerative disc disease, and cervical disc disorder with radiculopathy as severe impairments, and in failing to consider them when developing the RFC assessment. SSA said all impairments were considered when determining the claimant's RFC, including those that are not severe, and that the claimant didn't state anything that would have changed about the RFC. The court held that while "the ALJ considered severe and non-severe impairments generally at step two, the ALJ completely failed to address Plaintiff's degenerative disc disease both in step two of the analysis and in determining the RFC generally. The ALJ makes no mention of Plaintiff's doctors' notes and MRI results, nor does the ALJ's decision adequately explain Plaintiff's subjective description of back pain" (citations omitted). Therefore, remand is necessary. The representative was Andrew Sindler of Severna Park, Maryland.

Jennifer F. v. Saul, Commissioner, Social Security Administration, Civil No. 1:20-cv-01118-JMC (D.Md., September 28, 2021) – Order of the Court

2271. At an ALJ hearing, the claimant was found to have numerous medically determinable impairments, but the ALJ did not find that any were severe, either alone or in combination. Therefore, a step two denial was issued. The court did not agree with the claimant's arguments that the ALJ failed in her duty to develop the record or gave undue weight to the claimant's lack of treatment after the application date. However, the court did find persuasive the argument that the ALJ did not properly consider the claimant's subjective testimony about her symptoms. The decision reiterates precedent about the claimant's "mild" burden of proof at Step Two, which is merely a "threshold inquiry" en route to other steps of the sequential evaluation process. The court found that the claimant testified "extensively and specifically at the ALJ hearing regarding the intensity, persistence, and limiting effects of her pain" and that the ALJ "did not address it with any sort of specificity" which was reversible error. The case was remanded for additional proceedings. The claimant was represented by Micki Beth Stiller of Montgomery, Alabama.

Loretta Brown v. Kilolo Kijakazi, Civil No. 2:20-00428-N (S.D.Ala., N.Div., November 1, 2021) – Memorandum Opinion and Order

Veterans' Disability Benefits

2261. The Ninth Circuit remanded under sentence six, finding that the Magistrate abused his discretion by finding that Veterans Administration compensation and pension ("C&P") examinations and a rating submitted to the court, but not to the Appeals Council, did not have good cause for when they were presented and did not have a reasonable possibility of changing the outcome of the case. The VA evidence arose in the course of ordinary administrative processes, just after the Appeals Council declined review. Plaintiff submitted the evidence immediately to the court with the merits brief, making a sentence six argument in the alternative. The evidence could not have been submitted sooner. The VA evidence clarified the diagnosis of PTSD and tended to affect the ALJ's assessment of Plaintiff's subjective claims and other medical opinions. The Magistrate might have ordered supplemental briefing on sentence six given the unusual evidentiary circumstances and OGC's failure to respond to the sentence six argument. Instead, the Magistrate manufactured a complete sentence six argument on behalf of OGC, starting with, "While the Commissioner doesn't respond directly..." The Circuit Court didn't touch the problem of a Magistrate arguing on behalf of one of the litigants, but instead looked to the merits of the sentence six argument. Of note, the court cited an old case, *Ward v. Schweiker*, 686 F.2d 762, 764 (9th Cir. 1982), which holds: "Where, as here, the new evidence could not have been presented to the ALJ because it did not exist at the time of the

ALJ's decision, there is good cause for failing to present the evidence sooner." The court also expressed interest in the VA rating itself despite the regulatory change ruling it irrelevant, 20 CFR § 404.1504. In the Ninth Circuit, a VA rating might remain probative under *McCartey*, because *McCartey* holds that the rules and programmatic structures of the VA and SSA are so similar that one rating or decision should inform the other, undermining the rationale of the new regulation. *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). That question may be resolved on remand. The claimant was represented by Jeffrey Baird of Seattle, Washington.

Short v. Saul, 19-35273 (9th Cir. March 8, 2021) – Plaintiff-Appellant Opening Brief and Memorandum Opinion; reported at 839 Fed. Appx. 159 (9th Cir. 2021)

Vocational Expert Testimony

2256. The judge remanded the case back to SSA for further proceedings because the ALJ did not ask questions to clarify a conflict between the DOT and the vocational witness's testimony. The ALJ's final residual functional capacity determination included a limitation of occasional overhead reaching. The vocational witness stated that the claimant can perform her past work as a Flagger and another job as a School Crossing Guard. But according to the DOT and O*Net, each of these jobs required frequent reaching. The magistrate judge found that the ALJ should have reconciled the conflict. The claimant was represented by Antonio Serrano Valdez, Jr. of Auburn, California.

John v. Saul, Civil Action No. 2:19-cv-02008 CKD (SS) (E.D. Cal., March 23, 2021) – Order

2265. The claimant alleged that the ALJ erred in the evaluation of medical evidence and vocational expert testimony, and misapplied SSA law, regulations, and Social Security Rulings on severe impairments, listings, residual functional capacity, and medical-vocational rules. The ALJ failed to include the claimant's rotator cuff injury as a severe impairment because it was only diagnosed six months before the hearing, but medical records showed the claimant sought treatment for shoulder pain and showed a limited range of motion well before the cause of the pain was diagnosed. The claimant also alleged that the ALJ cherrypicked evidence about her mental health, improperly weighed medical evidence from treating sources, and failed to perform a function-by-function analysis as required by the Fourth Circuit in *Mascio* when assessing her RFC. The claimant also alleged that the ALJ asked the vocational witness a hypothetical that was flawed because it was based on the erroneous RFC, and neglected the witness' testimony that no occupations existed for someone with an RFC that was supported by the claimant's evidence. Furthermore, the occupations the witness provided in response to the ALJ's hypothetical were not consistent with the DOT: the ALJ asked about occupations with "simple, short instructions" so jobs with an reasoning level of 2 or 3 should not have been provided. The claimant's brief led SSA to request a voluntary remand under Sentence 4. The claimant was represented by Andrew Sindler of Severna Park, Maryland.

Lu C. v. Saul, Civil Action No. 1:20-cv-01039-DLB (D.Md. June 25, 2021) – Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings and Order

Weight of Medical Evidence

2251. The claimant alleged that ALJ Matula erred in her evaluation of the medical and vocational opinion evidence, vocational witness testimony, the claimant's credibility and limitations, and whether the claimant met a listing. The ALJ found that several of the claimant's impairments were nonsevere, but made cursory statements rather than specific findings; when she did refer to evidence her citations were often inaccurate or indicated a highly selective reading of medical records. In finding that the claimant did not meet or equal a listing for depression, the claimant alleged that ALJ relied heavily on boilerplate "normal" findings reproduced on electronic medical records rather than the treating provider's more detailed notes. The ALJ found that the claimant had no limitations in understanding, remembering, and applying information, but based this on findings such as that the claimant "used to enjoy reading," is "learning to crochet," attends medical appointments and school functions for her child, and purportedly shows no problems understanding in her ongoing mental health treatment. While these findings are not even completely accurate (the claimant testified she has been unsuccessful in learning to crochet and needs reminders about appointments

and medication) they would not indicate a lack of limitations even if they were true. The claimant also alleged the ALJ held that EMG and nerve conduction studies were normal when they were not, failed to give controlling weight to a treating source's opinion, did not credit the claimant's testimony about side effects of her medication, and failed to incorporate the vocational witness' testimony about the vocational impact of time off task, among many other errors. After the plaintiff's motion for summary judgment, SSA moved for voluntary remand. The plaintiff consented and the magistrate judge ordered remand under Sentence 4. The claimant was represented by Andrew Sindler of Severna Park, Maryland.

Anglin v. Saul, No. DLB-19-2566 (D.Md. July 21, 2020) – Plaintiff's Memorandum in Support of Motion for Judgment on the Pleadings and Order

2252. The claimant had diabetes with neuropathy, knee and back pain, and several mental impairments. He was in his late 40s during the period at issue, had an 11th grade education, and no past relevant work, and could communicate in English. The ALJ found that he was not disabled because he could perform a limited but still significant number of light unskilled jobs. The vocational witness did state that if the claimant were limited to occasional handling, fingering, or feeling, or if he were absent twice monthly, that there would be no jobs, but the ALJ did not make an RFC assessment that included those limitations. The court held that "the ALJ failed to meaningfully address the medical evidence regarding Mobley's neuropathy. Although the ALJ discussed some of the medical evidence, the ALJ failed to address the majority of Mobley's treatment records, she failed to acknowledge or address the abnormal objective findings documented by his physicians, and she misstated the evidence in several respects." For example, a set of medical records that showed some normal results as well as descriptions of the claimant's pain and wasting were described only as "normal findings." Similarly, the ALJ did not explain how the consultative examiner's opinion that the claimant would have "some limitations" in walking and standing squared with an RFC determination for light work, which requires "a good deal" of these activities: approximately six hours of an eight-hour work day. The ALJ cherry-picked evidence and made unfounded assumptions, such as that the claimant could lift a certain amount because his young child was at the consultative examination and likely needed to be carried, neglecting to mention that the claimant's wife was also at the examination and not citing to evidence that the child was carried or how much he weighed. The ALJ simply did not build a logical bridge between the evidence and her decision and therefore the case must be remanded for additional proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Mobley v. Saul, No. 1:19-CV-02777 (N.D. Ohio, E.Div. July 24, 2020) – Memorandum of Opinion and Order and Judgment Entry

2263. The claimant testified that he used an emotional support dog to help with symptoms of depression, anxiety, and PTSD. He also took medication, which had side effects including sleepiness so he took several naps a day. The court held that the ALJ had erred in rejecting the claimant's testimony about a need for the dog (which a vocational witness testified would require an accommodation by an employer): the ALJ relied on one sentence of one treatment note to determine that the claimant's panic attacks were under control, when there were many contradictory findings in the record. The court found this to be impermissible "cherry-picking." Additionally, the court held that the ALJ erred when she found "Xanax causes no serious side effects, it relaxes [the claimant] and causes sleepiness." The sleepiness itself was a serious side effect, with uncontradicted evidence that the claimant napped frequently and the vocational witness' testimony that the claimant's amount of napping would preclude work. Finally, the court held that the ALJ's decision to find the treating provider's opinion of "minimal persuasiveness" was in error. The ALJ did not explain which treatment notes she found incongruent with the provider's opinion. There was no logical bridge from the evidence to the ALJ's decision, and many treatment notes did support the opinion. Therefore, the case was remanded for additional proceedings. The claimant was represented by John Horn of Tinley Park, Illinois.

Mark B. v. Saul, Case No. 20 CV 50164 (N.D.Ill., W.Div. June 11, 2021) – Memorandum Opinion and Order

2266. The ALJ denied the claimant's case at Step 5. The claimant appealed, arguing that the ALJ gave inappropriate "limited" weight to two of her treating sources' opinions, "little" weight to two more, "partial weight" to two consultative examiners (for example, in a mental CE, "great weight" to the opinion that the plaintiff could perform simple directions and tasks, but "less weight" to the opinions about the plaintiff's moderate to marked limitations) and "great weight" to the opinion of a state agency doctor who never met or examined the claimant. The court held that remand was appropriate because at least some of the treating sources' opinions were consistent with each other and with treatment records, the ALJ failed to provide "good reasons" for the wait that was assigned, and the ALJ should have attempted to clarify a treating source's opinion rather than disregarding it for being insufficiently specific. The representative was Max Leifer of New York, New York.

Laura J. v. Commissioner of Social Security, Civil Action 19-CV-5367 (AMD) (E.D.N.Y., March 30, 2021) – Memorandum Decision and Order

2269. The claim for disability benefits was filed March 3, 2017, just more than three weeks before SSA implemented new regulations on how medical evidence is to be weighed. When denying the claim, the ALJ gave "great weight" to state agency consultants who had not seen later evidence about diagnosis and treatment of the claimant's back pain. The court held that it was "misleading" of the Commissioner to say that the ALJ considered all of the relevant objective evidence and found that it was consistent with the medical consultants 'opinions. "The ALJ did make conclusory, boilerplate statements that the state agency opinions were 'consistent with the evidence as a whole' and 'there is no objective evidence contradicting these findings,' but he gave no explanatory details to support the conclusions. Specifically, after detailing multiple clinical findings of pain that were supported by objective evidence, all after July 2018, the ALJ failed to explain how it is that he could conclude that there was 'no objective evidence' to contradict state agency opinions dating back more than a year" that the claimant had the residual functional capacity to stand or walk for six hours in a workday. The court notes "the point here is not that the state agency opinions could never be reconciled with the post-July 2018 medical evidence, but that the ALJ made no attempt to do so on the record in a manner that makes his reasoning – not simply his conclusion – apparent to the claimant and reviewable by the court." Therefore, the case was remanded for further proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Maldonado. v. Commissioner, Social Security Administration, Civil Action No. 1:20-CV01460 (N.D.Ohio, E.Div., September 30, 2021) – Memorandum Opinion and Order

2272. The claim for disability benefits was filed in November 2013 and had been remanded twice by federal courts for new ALJ hearings by the time this decision was issued. Once again the District Court found that the decision did not adequately consider the opinions of claimant's psychiatrist and neurosurgeon. For example, the ALJ discredited the treating doctor's opinions regarding the claimant's inability to stand for more than an hour and sit for two hours because the doctor's records show the claimant had a normal gait and minimally limited range of motion. As the court stated, "a 'logical bridge' must connect the evidence and the ALJ's conclusion. It is not logical to conclude that because one can walk normally in and out of a doctor's office, then one can stand for more than an hour or sit for more than two hours. On remand, the ALJ should consider obtaining the opinion of a medical expert on Plaintiff's ability to stand and sit post lumbar fusion surgery. The prior consultative exams were performed before Plaintiff's surgery." Furthermore, the ALJ did not adequately assess claimant's testimony about his medication side effects and need to elevate his legs. Therefore, the case was remanded for a third time. The claimant was represented by John Horn of Tinley Park, Illinois.

Danniel W. B. v. Comm'r of Soc. Sec., Case No. 20-cv-145-RJD (S.D.Ill., September 21, 2021) – Memorandum and Order

2273. This claim for benefits was filed after March 27, 2017, so the newer regulations on weight of medical evidence apply. The Court found that the ALJ erred in finding the treating source's opinion "unpersuasive"; although the ALJ said that it was mostly based on the claimant's subjective complaints, the provider actually performed several tests and physical examinations that supported her opinion. Additionally, the ALJ remarked on a lack of "objective" findings but the Court cited its own precedent to explain that the claimant's records were typical of people with fibromyalgia, which does not appear on imaging or tests of muscle strength. As the Court stated, "Although the new standards are less stringent in their requirements for the treatment of medical opinions, they still require that the ALJ provide a coherent explanation of his reasoning. Here, the ALJ failed to build an accurate and logical bridge from the evidence to his conclusions." The case was remanded for additional proceedings. The claimant was represented by Margolius, Margolius and Associates of Cleveland, Ohio.

Felix v. Commissioner of Social Security, Civil No. 1:20-cv-01550-JG (N.D.Ohio, E.Div., August 3, 2021) – Report & Recommendation