LIST OF AVAILABLE MATERIAL

JANUARY – MAY 2022

ITEM NUMBERS – 2275-2282

Absenteeism

2281. The Court agreed with the claimant that it was legal error for the ALJ to consider only what the claimant could do in a single eight-hour workday rather than "on a regular and continuing basis" when making the RFC determination. The ALJ's RFC assessment did not consider the claimant's argument that although she could at times complete an eight-hour day at her past work, her impairment would lead her to be absent from it—or from other jobs—too often to sustain employment. The Court agreed that SSR 96-8p required a broader RFC assessment than the ALJ performed. Therefore, the Court overturned the part of the Magistrate Judge's Report and Recommendation about the RFC determination, upheld the portion finding that the ALJ failed to accurately assess the claimant's allegations of pain, and remanded the case for additional proceedings. The plaintiff was represented by Bruce Billman of Fredericksburg, Virginia.

Megan S. v. Kijakazi, CA No. 3:20-cv-54 (W.D. Va. Charlottesville Div., March 31, 2022) – Memorandum Opinion and Order

Alcoholism/Substance Abuse

2276. The ALJ issued a fully favorable decision on the record, finding that the claimant's liver disease met Listing 5.05A. The ALJ found that the liver disease "would not improve to the point of non-disability in the absence of the alcohol use disorder." The substance use is not material because "despite ongoing reports of abuse, laboratory studies consistently noted an undetectable level of alcohol when he was admitted for his episodes of bleeding requiring the transfusions. Further, no acceptable medical source ever opined that the impact of the claimant's chronic liver disease would improve by any discernible degree if alcohol use stopped. As such, cessation of alcohol consumption would not materially impact the determination of disability." The claimant was represented by John Horn of Tinley Park, Illinois.

Fully Favorable ALJ Decision [by ALJ Karen Sayon] (January 14, 2022)

Illiteracy

2277. The plaintiff left school in his homeland of Italy in the third grade. Once he arrived in the United States, he learned his trade of tile setting from an Italian speaker. He can speak English with a strong accent, but he cannot read beyond identifying some letters or write more than his name; an evaluation revealed learning disabilities and that he was at or below the kindergarten level in reading and writing. Knee injuries leave him unable to perform his past work. DDS found that he could perform a limited range of medium work; the ALJ said he could perform a limited range of light work and had a marginal education, finding that there were a significant number of jobs he could perform. The Appeals Council remanded so the ALJ could consider the effects of the claimant's mental limitations and the need for a sit-stand option, and the ALJ denied the case again. The Appeals Council remanded for a third ALJ hearing that resulted in a denial (this time with an RFC for medium work), and the Appeals Council and federal district court upheld it. However, the circuit court determined that substantial evidence did not support SSA's conclusions. The claimant doesn't have marginal education, even though that is generally defined as a sixth grade education or less, because, as the regulations note, "the numerical grade level that [the claimant] completed in school may not represent [his] actual educational abilities," so the agency will only use numerical grade level to determine educational abilities "if there is no other evidence to contradict it." Here the evaluation showed the claimant's true level of function. SSA's post-hoc rationalizations that the ALJ could safely assume marginal education because the claimant speaks English and can set tile would be insufficient even if they accurately reflected the ALJ's decision-making process. The claimant is illiterate. The ALJ also cherrypicked evidence in support of a medium RFC. An illiterate claimant

aged 50-54 (as the plaintiff was at his alleged onset date) who is limited to light work would be found disabled on the grids, and the case was remanded solely for the award of benefits. The plaintiff was represented in federal court by George Piemonte of Charlotte, North Carolina.

Bilotta v. Saul, No. 19-2277 (4th Cir., March 10, 2021) – Unpublished Opinion

Mental Impairments

2279. The Court found that the ALJ erred in making findings on the B criteria in the mental health listings when the ALJ noted that the claimant declined to go to behavioral health treatment and underwent the "conservative" treatment of medication and occasional counseling. The ALJ did not take testimony about the claimant's reasons for not undergoing additional treatment (such as a lack of insurance and transportation) and did not follow SSR 16-3p. The ALJ did not define what she meant by "conservative treatment" and used "her own subjective notions" to reach her decision. The ALJ also did not fully consider the claimant's neuropathy, intellectual disability (including a full scale IQ of 62), hearing impairment, and panic attacks and did not provide a "logical bridge" between her recitation of the claimant's medical records and her decision to discount them. Therefore, remand for additional proceedings is necessary. The plaintiff was represented by John Horn of Tinley Park, Illinois.

Grubich v. Kijakazi, No. 2:20-CV-375 JEM (N.D. Ind., Hammond Div.) – Opinion and Order

2282. The ALJ decision twice noted that the claimant had been diagnosed with PTSD (including by a doctor who described it as "chronic" and "severe") but did not otherwise mention or assess that impairment. The Court found that this was legal error, citing precedent that merely mentioning an impairment when determining RFC is insufficient: ALJs must "actually consider" impairments. The Court rejected the defendant's argument that doctors upon whose opinions the ALJ relied considered the PTSD and therefore the ALJ had properly considered the impairment. The ALJ, not a doctor or someone else, must "actually consider" the impairment in making the RFC determination. For this reason, the case is remanded for additional proceedings, with instructions to the Commissioner to also properly assess and analyze several other issues as well. The claimant was represented by John Horn of Tinley Park, Illinois.

Steven M. v. Kijakazi, Case No. 20 c 4003 (N.D. Ill., E.Div., February 9, 2022) – Memorandum Opinion and Order

Remand v. Reversal

2275. The plaintiff had been receiving disability benefits before she had a Continuing Disability Review that found medical improvement. She appealed and the ALJ upheld the termination, as did the Appeals Council. However, when the case was brought to federal court, attorneys for SSA did not oppose any of the plaintiff's arguments and agreed she should receive summary judgment. The only question remaining for the court was whether to remand for additional proceedings or solely for the award of benefits. It took SSA six months to file its answer and certified administrative record for the case, and after that was done and the plaintiff motioned for summary judgment, SSA requested and was given four extensions to respond to it. The court stated on granting the fourth extension that no more would be granted. SSA did not respond by the new deadline, and the plaintiff eventually moved for default judgment. At this point, SSA filed a motion agreeing with the plaintiff's arguments but requesting summary judgment with a remand for additional proceedings rather than default judgment be granted. Plaintiff did not oppose summary judgment, but "maintains her position that the remedy to which she is entitled is remand for an award of benefit." The Court agreed with the plaintiff. Given that SSA conceded to all the plaintiff's arguments, the latter two of the Garrison factors for award are met: "the ALJ has failed to provide legally sufficient reasons for rejecting evidence, [and] if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand." The first Garrison factor, if the record has "been fully developed and further administrative proceedings would serve no useful purpose," is also satisfied. Although SSA stated that the record was not fully developed, it did not say what evidence

was missing or what point additional proceedings would serve. Finally, the Court noted that "the government fails to account for its own inequitable conduct, unnecessarily delaying resolution of this case for years when, in the end, the government concedes that the ALJ erred on at least five grounds and that Plaintiff is entitled to summary judgment. In light of the government's concessions of the ALJ's errors, the government could have agreed to settle this case at any time and spared Plaintiff the hardship and consequence of unnecessary delay. The government did not do so. Instead, Plaintiff has now waited for nearly four years for a correction to the ALJ's errant termination of her benefits. The government's inequitable conduct further strengthens Plaintiff's case for an award of benefits." The plaintiff was represented by Steven Weiss of Bay Area Legal Services, Oakland, California.

Ramsey v. Saul, Case No. 20-cv-05956-EMC (N.D.Cal., January 4, 2022) – Order Granting Plaintiff's Motion for Summary Judgment and Denying Plaintiff's Motion for Default Judgment

Residual Functional Capacity

2280. The claimant appealed her denial to federal court and shortly thereafter, filed a new claim. The medical consultant at the initial level adopted the ALJ's RFC from the first claim, applying Acquiescence Ruling (AR) 98-4(6) (*Drummond*). However, the medical consultant at the reconsideration level determined that the ALJ's RFC should not be adopted because that claim was still pending in federal district court. She instead issued RFC findings including that the claimant was able to lift 10 pounds occasionally and frequently, could stand and/or walk for two hours of a work day, and could sit for six hours of a work day. The claimant was 60 at her ALJ hearing on the new claim. The ALJ adopted the prior ALJ's RFC and denied the claim. The ALJ said she was applying *Drummond*. However, *Drummond* had already been clarified by *Earley*, which requires a "fresh look" at the evidence, when the ALJ issued her decision. The Commissioner argued that the ALJ did provide the "fresh look" even though she cited *Drummond* and not *Earley* and there was at most harmless error. However, the ALJ used the identical RFC of the first ALJ and stated that she was "bound" by *Drummond* to follow the first ALJ's decision. The Court did not find this error harmless, and remanded the case for additional proceedings. The claimant was represented by Margolius, Margolius & Associates of Cleveland and Columbus, Ohio.

Barnard v. Commissioner of Social Security, Case No. 1:20-CV-01711-JDG (N.D. Ohio, E.Div., September 2, 2021) – Memorandum of Opinion and Order

SSI: Disabled Children

2278. This claim was filed on behalf of J.B., an adolescent whose SSI claim was denied on the grounds that her severe mental and visual impairments did not meet listings and did not cause marked impairments in any domains of functioning. The ALJ gave more weight to the opinion of J.B.'s school case manager and state agency examiners, and less weight to her teacher, therapist, and consultative psychological examiner. The ALJ disregarded two IQ tests that would have met listing 112.05: one from when J.B. was in third grade because it was administered before the period at issue, and one from sixth grade because there were indications of low effort and because J.B. participated in activities like choir. The Court held that since the ALJ properly found that J.B. had borderline intellectual functioning and not significantly subaverage intellectual functioning, she would not have met listing 112.05 even had the IQ test scores been properly credited. However, the Court found that the ALJ mis-weighed opinion evidence: the teacher and therapist provided opinions after the state agency reviewer evaluated the case, and the ALJ did not explain why the earlier opinions deserved more weight despite this deficiency in the record the state agency reviewed. The ALJ's decision about what weight to give the various opinions is not supported by substantial evidence, and as that determination is "inextricably bound up with the ALJ's findings as to the limitations of the various functional domains," those findings are also not supported by substantial evidence. The case was remanded for additional proceedings. The claimant was represented by Margolius, Margolius & Associates of Cleveland and Columbus, Ohio.

Crutchfield v. Commissioner of Social Security, Case No. 1:20-CV-00572 (N.D. Ohio, E.Div., September 30, 2021) – Memorandum Opinion and Order

Weight of Medical Evidence

2279. The Court found that the ALJ erred in making findings on the B criteria in the mental health listings when the ALJ noted that the claimant declined to go to behavioral health treatment and underwent the "conservative" treatment of medication and occasional counseling. The ALJ did not take testimony about the claimant's reasons for not undergoing additional treatment (such as a lack of insurance and transportation) and did not follow SSR 16-3p. The ALJ did not define what she meant by "conservative treatment" and used "her own subjective notions" to reach her decision. The ALJ also did not fully consider the claimant's neuropathy, intellectual disability (including a full scale IQ of 62), hearing impairment, and panic attacks and did not provide a "logical bridge" between her recitation of the claimant's medical records and her decision to discount them. Therefore, remand for additional proceedings is necessary. The plaintiff was represented by John Horn of Tinley Park, Illinois.

Grubich v. Kijakazi, No. 2:20-CV-375 JEM (N.D. Ind., Hammond Div.) – Opinion and Order