UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

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Plaintiff,

vs.

Case No.:

ANDREW SAUL, Commissioner of the Social Security Administration,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Attorney(s) for the Plaintiff

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INTRODUCTION

Pursuant to 42 U.S.C. § 405(g), Plaintiff, [redacted], seeks judicial review of the final administrative decision of the Commissioner of Social Security ("Commissioner"). The Plaintiff asserts that the Commissioner's decision is not based on substantial evidence as required by 42 U.S.C. §405(g). The Plaintiff also specifically contends that the Commissioner erred as a matter of law in denying her claim for Social Security Disability ("SSDI") benefits for the reasons set forth below.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Elements.

This Court's review of the Commissioner's decision is limited to determining whether the Commissioner's decision, as a whole, is supported by substantial evidence and whether the Commissioner has employed the correct legal standards. 42 U.S.C. § 405(g). Substantial evidence is "more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971), *quoting* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938).

This court must determine whether the Commissioner's conclusions "are supported by substantial evidence in the record as a whole or are based on an erroneous legal standard." Beauvoir v. Chater, 104 F.3d 1432, 1433 (2d Cir. 1997) (internal quotation marks and citation omitted). The Court can set aside the ALJ's decision where it is based on legal error or is not supported by substantial evidence." Balsamo v. Chater, 142 F.3d 75, 79 (2d Cir. 1998).

Undisputed Material Facts.

Summary and Course of the Administrative Proceedings.

1. Ms. ██████ applied for disability benefits on September 6, 2016 alleging disability commencing on September 24, 2014. Her claim was denied initially on January 4, 2017. Her reconsideration was denied on June 16, 2017. Ms. ██████ filed a written request for a hearing on July 14, 2017, which subsequently was held on June 6, 2019. The ALJ denied the claim on July 1, 2019. Tr. 19-37.

2. Ms. ██████ filed a request for review with the Appeals Council on August 12, 2019. Tr. 6. Through her attorney, she submitted additional medical evidence to the Appeals Council. Tr. 2,8/ The additional evidence was a Physical Residual Functional Capacity form that addressed her restrictions since her 50th birthday. Tr. 8. The Appeals Council seemingly ignored that additional evidence, and did not remand the case for further consideration of this additional medical opinion, stating, "we find this evidence does not show a reasonable probability that it would change the outcome of the decision." Tr. 2. As a result, the evidence was not exhibited. The Appeals Council denied the Request for Review on June 3, 2020. Tr. 1. Accordingly, the ALJ's decision became the Commissioner's final decision.

Statement of Facts.

Plaintiff's age, education, and work experience.

3. Ms. ██████ was born on March 24, 1968. Tr. 31. Her date of last insured for Social Security Disability benefits (SSDI) was March 31, 2018. Tr. 21. She turned 50-years old on March 24, 2018, which was 7 days before the date of last insured. Tr. 31.

4. Ms. ██████ has at least a high school education. Tr. 31. While Ms. ██████ handled

a number of different jobs in the past, only one amounted to past relevant work. That job was for Marketing Technologies, where she was responsible for handling robocalls for a telemarketing company. Tr. 46-49.

Relevant Medical Evidence.

Mental Health Conditions.

5. In December of 2014, Ms. [redacted] was taken into the Emergency Room for a psychotic episode, including hallucinations, in her manic phase. Tr. 439,441. She was diagnosed with unspecified schizophrenia and other psychotic disorder by her treating doctor. Tr. 455. She was hospitalized for three days and discharged with diagnoses of psychotic disorder, psychosis to delirium, and major depressive disorder. Tr. 467.

6. In February of 2015 she had a manic episode with psychosis complicated by delirium from sleep deprivation, dehydration, pre-renal azotemia, and hypercalcemia. Tr. 540. She was diagnosed with bipolar I disorder, more manic with psychosis, by her treating doctor. Tr. 539.

7. In April of 2015, she was diagnosed with bipolar affective disorder. Tr. 534.

8. In October of 2015, she was diagnosed with bipolar I disorder and Generalized Anxiety Disorder ("GAD"). Tr. 511.

9. In May of 2016, she had been feeling bored and more depressed. She was concerned about her medical conditions that seemed to be getting worse. She was not sure she could work at that time. Tr. 633.

10. In June of 2016 she had been a major "low dip" that scared her. Overall, she had been more active and felt more positive about herself than she had for a while. Tr. 632.

11. In October of 2016 she was feeling better and felt better in every way. Tr. 664.

12. In February of 2017, she was manic and had not slept in three days. Tr. 836. She was

concerned because she had gained 12 pounds in one month on her "head meds". Tr. 630. Her doctor reported, "there is no doubt that she is disabled with bipolar which is only fairly well controlled on her current medications that she has extreme anxiety and agitation associated with this for which she is on her present list of medications which have an impairing effect of their own." Tr. 651.

13. In March of 2017, she was cycling very rapidly. She was "high" one week (manic) and then was crashing down. When she was crashing down it felt like she was free falling. She felt more anxiety and depression. She felt very foggy. Tr. 628. During her "low", things happened around her that she had no recollection. She had memory loss and inability to stay "within" when she was in her low. Her bipolar symptoms and psychosis were on the "difficult to manage" scale and her symptoms were quite severe. Tr. 629.

14. In April of 2017, she was on a high and wasn't sleeping and was feeling grouchy. Tr. 644.

15. In May of 2017, she slept through tow of her son's graduation parties because she was overwhelmed and medicated. Tr. 838.

16. In June of 2017, she was having lots of paranoia and "went off" on a social worker at the hospital. She had been seeing things and hearing things that were not there. She was irritable and agitated and talking "gibberish" one day. Tr. 839. She was angry, agitated and isolating. Tr. 840.

17. In August of 2017, her bipolar I disorder was only in fair control. She had recently had a low, but was doing fairly well. Tr. 771.

18. In October 2017, she was having a lot of anxiety. Tr. 848. She had many ups and downs and it was difficult to manage her bipolar. Tr. 849.

19. In November of 2017, her memory loss was affecting her. Her hands were shaking more, and she was not able to focus as much as normal. Her therapist reported that she is going to need long-term support. Tr. 850. Ms. [redacted] was concerned about how bad her memory was. Tr. 851. However, she was stable on her medications and life was going better for her, generally. Tr. 786.

20. In January of 2018 she had pressured speech, tangential thinking, incomplete sentence structure, and anxiety. She was difficult to manage in her therapy session. Tr. 852.

21. In February of 2018 she was super depressed and tearful. She was feeling worthless. She had been depressed for some time and it was not subsiding. She was the "worst depressed mood I have seen." Tr. 696.

22. In March of 2018, she was coming out of depression. Tr. 854.

23. In November of 2018 she was very depressed and not handling life well. She was taking a lot of medication and seemed lethargic. Tr. 859.

24. In December of 2018, she was crying and not functioning well. She was having a lot of anxiety. Tr. 866,867.

25. Mental Health Residual Functional Capacity Statements prepared by Diana Robbins, LCSW, also address Ms. [redacted]'s restrictions, and are incorporated herein by reference. Tr. 610-620 and 860-864.

GAF Scores.

26. On February 1, 2017, Diana Robbins, LCSW, notes that the plaintiff's GAF was 30, and that plaintiff's highest GAF over the course of the prior year was 32. Tr. 614. Approximately 1 year and 9 months later, on November 14, 2018, Diana Robbins, LCSW, assigned a "GAF" score of 40 and stated that the highest GAF over the past year was 44. Tr. 863.

Physical Conditions.

27. In October of 2011, a cervical MRI shows that she had "endplate marrow edema at C3-C4 suggestive of stress response from degenerative change versus osseous contusions." She also had, "multilevel degenerative changes . . . most pronounced at C5-C6 and C6-C7 where there is mild central canal stenosis especially at C5-C6 with moderate right lateral recess stenosis at C5-C6. Moderate bilateral neural foraminal narrowing at a lumber of levels including C5-C6 and C6-C7 as well as C3-C4." There was also "mild left lateral recess stenosis C3-C4." Tr. 347.

28. Ms. ██████ has a history of degenerative arthritis in her bilateral knees, with crepitance (crackling) and pain. Tr. 578. As of 2012, Ms. ██████ reported that she had 3 knee surgeries. Tr. 326. On January 27, 2014, she was evaluated for knee surgery. In May of 2017, Ms. ██████ had her right knee replaced. Tr. 762.

29. Ms. ██████ also has serious back conditions. As of January 27, 2014, at the time she was evaluated for knee surgery, the medical records reflect that she also had a history of back surgery. Tr. 424.

30. In January of 2018, a lumbar MRI showed that she had "moderate central canal stenosis at L3-4 measuring 7mm. This appears perhaps slightly progressed since prior exam." She also had, "Moderate central canal stenosis at L4-5 measuring 7mm . . .", "significant multilevel degenerative disc disease with discogenic endplate edema at L3-4", "mild left L2-3 neural foraminal narrowing . . .", "mild to moderate bilateral L4-5 neural foraminal narrowing . . .", and moderate to severe right and moderate left L5-S1 neural foraminal narrowing . . .." Tr. 690.

31. In February of 2018, a lumbar X-Ray showed, "Osteopenia without evidence of acute compression fracture or traumatic malalignment", "Dextroscoliosis of the lumbar spine centered at L2 with a Cobb angle approximating 20-degrees", "Straightening of the normal lumbar lordosis.

No dynamic instability on flexion or extension views", "severe degenerative disc disease extending from L2 through S1 with prominent facet arthropathy in the mid to lover lumbar spine." Tr. 919.

32. Also, in February of 2018, a CT scan of the lumbar spine revealed "marked multilevel lumbar degenerative disc and joint disease from L2 through S1". Tr. 696.

33. In May of 2018, a CT scan of the lumbar spine confirmed, "severe multilevel degenerative disc disease". Tr. 704.

34. In August of 2018, Ms. [redacted] underwent surgery of her lumbar spine at the L4-L5 and L5-S1 levels. The pre-operative indications noted that she had, "degenerative lumbar spondylosis", "flat back syndrome" and "spinal stenosis with right L3 radiculopathy". This was the first of two surgeries. The first surgery was aborted due to a vein rupture. Tr. 1114-1120. The second surgery to complete the spinal fusion took place on February 28, 2019. Tr. 1484.

35. A Residual Functional Capacity Form was prepared by Dr. Thompson and submitted to the Appeals Council for review. This report addressed Ms. [redacted]'s restrictions since she turned 50 years of age on March 24, 2018. According to the report, she can sit 2 hours, stand for 1 hour, walk for 1 hour, but must rest or lie down for 4 hours, during a normal 8-hour work day. But she can only stand or walk up to 15-minutes at a time, and can only sit for up to 1-hour at a time. Moreover, she can lift and carry 10-pounds occasionally, but she can never carry 20-pounds or more. The report further notes that there are other limitations with "bending/stooping, stair climbing, rapid/repetitive movements", but does not elaborate. Tr. 8.

Medication Side Effects and Memory Difficulties.

36. In the RFC prepared by Dr. Thompson on February 9, 2017, her limitations are due, in part, from the "effects of medication." Tr. 617. The side effects noted by Dr. Thompson are "fatigue". Tr. 616. Diana Robbins, LCSW, lists the side-effects as, "drowsiness, dry mouth,

fatigue, forgetfulness, problems with balance and coordination, social awkwardness, paranoia, depression and anxiety (extreme)." Tr. 860.

37. At the hearing, Ms. [redacted] testified that she shakes form taking Lithium and that she shakes really bad at times. Tr. 51-52, 295. As a result, she cannot type anymore. Tr. 51-52.

38. She also testified that her medications are pretty strong, so she doesn't drive. Tr. 65. According to her Function Report, her brain feels sedated, she suffers from memory problems, and she experiences drowsiness, as a result of her medications. Tr. 295.

39. In March of 2017 she had memory loss and inability to stay "within" when she was in her low. Tr. 629. Her Social Worker reported that "her memory is lacking and frustrating her." Tr. 623. "Her memory has been affected and she feels "foggy" so her activities are limited." Tr. 624. Her treating Social Worker reported that Ms. [redacted] had memory loss and required reminder texts to remember to keep her appointments. Tr. 905. Ms. [redacted] was very slow to process new information and was slow in completing tasks. She had difficulty focusing on and completing tasks. Tr. 906. In November of 2018 her therapist reported that for 15% or more of an eight-hour workday she would be precluded from virtually all employment functions because of her memory loss, fogginess, lethargy, and distractibility. Tr. 862. Moreover, her memory loss is reported as significant, which has impairs her thinking and rationalizing. Tr. 863-864. In December of 2018, her treating doctor reported that, with regard to understanding and memory, she would be precluded form understanding and remembering very short and simple instructions for 10% of an eight-hour workday. And, for 15% or more of an eight-hour work day, she would be precluded from understanding and remembering detailed instructions due to high doses of medications needed to manage her bipolar disorder with panic and psychotic features as well as chronic pain requiring narcotic medication. Tr. 829.

Summary of Testimonial Evidence.

Medical Conditions: Mental Health.

Poor Memory.

40. Ms. ████ testified that she has memory problems. She forgets everything and has to leave notes around to remember. She also explained to the ALJ that upon arriving at the hearing office she did not remember her address. Tr. 50, 52-53.

Mania / Hallucinations / Delusions.

41. Ms. ████ explained that her mania interferes with her ability to work. Her manic state feels like she's going a hundred miles an hour inside. She's describes it as "pounding" and states "it's like a tornado". She explained that she loses sleep, has delusions, and experiences hallucinations. Each time she goes into a manic state it lasts a few days. Afterwards, she experiences depression where she closes herself off and doesn't talk to anybody. The depression usually lasts a couple weeks. She explained that her mental health conditions would impact her reliability, focus, concentration, and productivity, and would interfere with her ability to work. Tr. 56-58.

Medical Conditions: Physical.

42. Ms. ████ testified that she recently had back surgery. Tr. 63.

43. She also testified that she needs to move after 45 minutes because of her blood clots, Tr. 64, that she can sit for 2 hours without getting up, Tr. 65, but she could not speculate on how long she could stand and work. Tr. 65. She also stated that she would have problems going from sitting to standing. Tr. 65.

Medical Conditions: Medication Side Effects.

44. Addressed above under the Relevant Medical Evidence section; "Medication Side-

Effects and Memory", paragraphs 36-39, and not be reiterated here.

Work Experience.

45. Ms. [redacted] testified that she worked at Marketing Technologies handling robocalls. She managed conversations on three different computers and was required to engage in a lot of multi-tasking. Tr. 46-49. She also worked for 5-months taking political surveys and worked as tech support for Comcast. Tr. 45, 49.

Vocational Expert.

46. The vocational expert was provided the following hypothetical:

> "Now, then if I have an individual as described by claimant as well as described by her attorney in opening statement as well as in some of her testimony that we've heard today who has diagnosable condition, primarily bipolar or manic depressive disorder, which is going to result in this person having what might be described as a psychotic episode on a periodic basis. It's going to be intermittent, unexpected. It's probably going to happen about once every six weeks on average where the person is actually going to end up having a period of time of days where they're not going to be able to function. They're not going to be to attend work. It may be three or four days in a row whether they can't go into work. If the person is presenting in a pattern like that over time, but it's consistent, would they be able to maintain these jobs?" Tr. 70.

47. The vocational expert answered: No. Tr. 70.

48. In one hypothetical question, the VE was asked to consider that the plaintiff had "no communication limits". Tr. 68.

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ISSUES PRESENTED

I. Whether the Commissioner erred as a matter of law in failing to evaluate whether the Plaintiff's physical conditions, which resulted in multiple surgeries, met or equaled a listing?

II. Whether the Commissioner erred as a matter of law in finding that the plaintiff's physical conditions are not as limiting as alleged when he relied on evidence created two or three years prior to the worsening of the Plaintiff's conditions?

III. Whether the Commissioner erred as a matter of law in failing to properly evaluate additional evidence submitted to the Appeals Council?

IV. Whether the Commissioner erred as a matter of law in failing to consider the cumulative effects of all the plaintiff's medications?

V. Whether the Commissioner erred as a matter of law in failing to order a consultative examination to evaluate the plaintiff's documented memory difficulties as well as her severe and worsening physical conditions?

VI. Whether the Commissioner erred as a matter of law by failing to consider whether the Plaintiff's memory difficulties amounted to a "severe" medical condition?

VII. Whether the Commissioner erred as a matter of law by not considering the plaintiff's "GAF" scores, which were consistently 44 and under, and as low as 30, which suggested severe and marked impairments and a complete inability to work?

VIII. Whether the Commissioner erred as a matter of law by not evaluating the plaintiff was disabled under the GRID Rules?

IX. Whether the Commissioner erred as a matter of law by improperly classifying the Plaintiff's age as a "younger person age 18-49" when, in fact, the plaintiff turned 50 prior to the Date of Last Insured?

X. Whether the Commissioner erred as a matter of law by failing to propose a complete hypothetical question to the Vocational Expert, which failed to take into consideration all of the plaintiff's limitations?

XI. Whether the Commissioner erred as a mater of law by failing to consider the episodic nature of bipolar disorder and by simply cherry-picking evidence demonstrating the times when the plaintiff appeared to be doing somewhat better?

XII. Whether the Commissioner erred as a matter of law by improperly evaluating the opinions of the plaintiff's medical providers?

STATUTORY AND REGULATORY FRAMEWORK

The Social Security Act, 42 U.S.C. §423(d)(1)(A), defines disability as the:

> . . . inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; . . . (A)n individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . .

Section 423(d)(3) of the Act defines a "physical or mental impairment" as:

> . . . an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical or laboratory diagnostic techniques.

The Social Security regulations set forth a sequential method of evaluating disability claims. See 20 C.F.R. § 404.1520(b). The first step is to determine whether the claimant is engaging in substantial gainful activity. If so, the claim is denied. If not, the second step is to determine whether the claimant has a severe impairment, i.e., an impairment which significantly limits ability to do basic work activities. See 20 C.F.R. § 404.1520(c). If not, the claim is denied. Id.

If a severe impairment is present, the third step is to determine whether it meets or equals one of the impairments listed in 20 C.F.R. Part 404, Subpart P, App. 1. See 20 C.F.R. § 404.1520(d). If it does, a finding of disability is directed. Id. If not, the fourth step is to determine whether the claimant has an impairment which precludes the performance of past relevant work. 20 C.F.R. § 404.1520(e). If not, the claim is denied. Id. If so, the fifth step is to determine whether

the claimant's impairments prevent the performance of any other work, considering residual functional capacity, age, education and work experience. See 20 C.F.R. § 404.1520(f).

STANDARD OF REVIEW

See the Statement of Elements and Undisputed Facts, above. The standard of review in Federal Disability Appeals is set forth in that section.

ARGUMENT

I.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO EVALUATE WHETHER THE PLAINTIFF'S PHYSICAL CONDITIONS, WHICH RESULTED IN MULTIPLE SURGERIES, MET OR EQUALED A LISTING.

Applicable law:

The Tenth Circuit held in Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996) that the ALJ is required to discuss the evidence and explain the reasons why the impairment did not meet or equal a listing. In so holding, the court stated:

> In this case, the ALJ did not discuss the evidence or his reasons for determining that appellant was not disabled at step three, or even identify the relevant Listing or Listings; he merely stated a summary conclusion that appellant's impairments did not meet or equal any Listed Impairment. Appellant's App. at 18-19. Such a bare conclusion is beyond meaningful judicial review. Under the Social Security Act, 42 U.S.C. 405(b)(1). Under this statute, the ALJ was required to discuss the evidence and explain why he found that appellant was not disabled at step three. Cook v. Heckler, 783 F.2d 1168, 1172-73 (4th Cir.1986); *see also* Brown v. Bowen, 794 F.2d 703, 708 (D.C.Cir.1986) (relying upon 20 C.F.R. 404.953 and 5 U.S.C. 557(c)[(3)(A)] to hold that an ALJ must explain his adverse decisions).

Id.

A Kansas district court held that the ALJ must specifically discuss the relevant evidence he relied upon or rejected in finding that a claimant's impairment does not meet or equal a listed impairment. Neinhaus v. Massanari, 153 F. Supp.2d 1274, 1279 (D. Kan. 2001), *citing* Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). A district court in New Mexico agreed that an ALJ's summary conclusion – that the claimant's severe obesity did not equal an impairment found in the listings – was improper and required remand so the ALJ could properly determine whether the claimant's obesity equaled a listed impairment. Roberts v. Callahan, 971 F. Supp. 498, 501 (D.N.M. 1997).

The 9th Circuit held that an ALJ Must assess the relevant evidence before deciding that a claimant's impairments do not meet or equal a listed impairment, but "[a] boilerplate finding is insufficient to support a conclusion that a claimant's impairment does not do so." Leis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001), *citing* Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990). A Washington district court held that the ALJ had to actually consider medical equivalency, and that "simply making a finding that plaintiff's impairments do not meet or equal a listing is insufficient." James v. Apfel, 174 F. Supp.2d 1130 (W.D. Wash. 2001), *citing* Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990).

Argument:

In this case, Ms. ██████ had multiple severe physical conditions, including her neck, bilateral knees, and back, requiring multiple surgeries. Yet, the ALJ failed to consider whether Ms. ██████'s physical conditions met or equaled a listing.

Physical conditions:

Neck:

In October of 2011, a cervical MRI shows that she had "endplate marrow edema at C3-C4 suggestive of stress response from degenerative change versus osseous contusions." She also had, "multilevel degenerative changes . . . most pronounced at C5-C6 and C6-C7 where there is mild central canal stenosis especially at C5-C6 with moderate right lateral recess stenosis at C5-C6. Moderate bilateral neural foraminal narrowing at a lumber of levels including C5-C6 and C6-C7 as well as C3-C4." There was also "mild left lateral recess stenosis C3-C4." Tr 347.

Bilateral Knees:

Ms. ███ has a history of degenerative arthritis in her bilateral knees, with crepitance (crackling) and pain. Tr. 578. As of 2012, Ms. ███ reported that she had **3 knee surgeries.** Tr. 326. On January 27, 2014, she was evaluated for knee surgery. In May of 2017, **Ms. ███ had her right knee replaced**. Tr. 762.

Back:

Ms. ███ also has serious back conditions. As of January 27, 2014, at the time she was evaluated for knee surgery, the medical records reflect that she also had a history of back surgery. Tr. 424.

In January of 2018, a lumbar MRI showed that she had "moderate central canal stenosis at L3-4 measuring 7mm. This appears perhaps slightly progressed since prior exam." She also had, "Moderate central canal stenosis at L4-5 measuring 7mm . . .", "**significant multilevel degenerative disc disease** with discogenic endplate edema at L3-4", "mild left L2-3 neural foraminal narrowing . . .", "mild to moderate bilateral L4-5 neural foraminal narrowing . . .", and **moderate to severe** right and moderate left L5-S1 neural foraminal narrowing . . .." Tr. 690.

In February of 2018, a lumbar X-Ray showed, "Osteopenia without evidence of acute compression fracture or traumatic malalignment", "Dextroscoliosis of the lumbar spine centered at L2 with a Cobb angle approximating 20-degrees", "Straightening of the normal lumbar lordosis. No dynamic instability on flexion or extension views", "**severe degenerative disc disease** extending from L2 through S1 with prominent facet arthropathy in the mid to lover lumbar spine." Tr. 919.

Also in February of 2018, a CT scan of the lumbar spine revealed "**marked multilevel lumbar degenerative disc and joint disease from L2 through S1**". Tr. 696.

In May of 2018, a CT scan of the lumbar spine confirmed, "**severe multilevel degenerative disc disease**". Tr. 704.

In August of 2018[1], Ms. [redacted] underwent **surgery of her lumbar spine** at the L4-L5 and L5-S1 levels. The pre-operative indications noted that she had, "degenerative lumbar spondylosis", "flat back syndrome" and "spinal stenosis **with right L3 radiculopathy**". This was the first of two surgeries. The first surgery was aborted due to a vein rupture. Tr. 1114-1120. The **second surgery** to complete the spinal fusion took place on February 28, 2019. Tr. 1484.

Conclusion:

Based on the fact that the Plaintiff suffered from numerous severe physical conditions, the Commissioner was required to consider whether the conditions meet or equal a listing. However, the decision completely fails to discuss, or even mention, whether any of the claimant's physical

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[1] The May 2018 CT scan and August 2018 surgery and February 2019 surgery all occurred after the date of last insured ("DLI"). However, these procedures, and the findings related to these procedures, are still relevant to the overall assessment of the Plaintiff's conditions. As indicated from the testing and results that occurred prior to the date of last insured, the procedures and findings that occurred after the DLI clearly existed prior to the DLI. Thus, these post DLI procedures must be considered by the ALJ. See Hargis v. Sullivan, 945 F.2d 1482, 1493 (10th Cir. 1991)(*holding* that "post-DLI diagnosis was not a valid reason for discounting the effects [of plaintiff's medical condition], but "the proffered evidence [must] relate to the time period for which the benefits were denied.").

conditions meet or equal a listing. The decision is completely devoid of any such discussion. See Tr. 21-23. For this reason, the case must be remanded for further consideration.

II.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FINDING THAT THE CLAIMANT'S PHYSIAL CONDITIONS ARE NOT AS LIMITING AS ALLEGED WHEN HE RELIED ON EVIDENCE CREATED TWO OR THREE YEARS PRIOR TO THE WORSENING OF THE PLAINTIFF'S CONDITIONS.

Applicable law:

A Kansas district court held that the ALJ's credibility findings must be "linked" to substantial evidence of record and cannot be "just a conclusion in the guise of findings." Pierce v. Apfel, 21 F.Supp.2d 1274, 1279 (D. Kan 1998). It is reversible error where an ALJ makes a substantial number of illogical or erroneous statements – including an erroneous evaluation of the claimant's testimony – that materially impacted on her conclusion that the claimant is not disabled. Sarchet v. Chater, 78 F.3d 305, 307 (7th Cir. 1996).

Argument:

The ALJ writes that:

> "[a]s to physical impairments, she testified to experiencing back pain. She said she is unable to sit very long without having to stand and stretch. She says she can sit maybe forty-five minutes at a time. She says she can walk a half a mile. However, she says she has no problems standing." Tr. 24.

Notably, the ALJ's representation of the plaintiff's statements are inaccurate. Ms. [redacted] did not state that she has no problems standing. Her testimony was that she could not speculate

on how long she could stand and work. Tr. 65. She also stated that she would have problems going from sitting to standing. Tr. 65.

Ms. ██████'s severe physical conditions, including her numerous surgeries, are set forth above under Point I, and are incorporated herein by reference. The ALJ recognizes all of these conditions, but states "despite this, the severity of her back impairment during the period at issue supports the above RFC", which was light work. Tr. 25.

The ALJ erroneously and illogically rationalizes the decision, stating:

> "[d]espite her back and knee impairments, evidence suggests she is not as limited as alleged. At the consultative exam in December 2016, she asserted disability secondary to spinal stenosis and arthritis (Ex. B4F). Of note, she reported that her claim for disability rested solely on mental health. On exam with the consultative examiner, she had an unremarkable gait. She did not use an assistive device or brace. She was able to change positions with relative ease. She had normal strength and neurological exam of all four extremities. She could perform all higher-level ambulatory activities except for declining to hop on either foot. She had very good lumbar range of motion in all planes. Her lumbar spine range of motion was very good, approximately one hundred ten degrees flexion (normal is ninety degrees) and approximately sixty degrees extension (normal is thirty-five degrees). A few months before her alleged onset date in May 2014, she had a normal gait (Ex. B1F/100). She also had normal gait in January, March 2016 (Ex. B1F/141 and B2F/16), as well as in February and June 2017 (Ex. B8F/21 and B10F/8).
>
> The RFC also has support in her activities, as self-reported and reported by her husband. She states she is able to do the laundry, care for her personal needs and grocery shop without problems. Her husband states she does yoga and feeds and grooms her dogs (Ex. B4E). He states she is able to feed and cook for herself without issue. He also states she likes to go fishing once or twice per month. **<u>For these reasons</u>**, the claimant is reasonably limited to light level exertion as stated in the above RFC." Tr. 25-26 (emphasis added).

The ALJ specifically states that it is "for these reasons" that he finds she is reasonably limited to light level exertion. Tr 26. However, this is erroneous and illogical rationale. Almost all of these statements relate to examinations and a third-party function report prepared by her husband, which were created between the years 2014 through 2016.

The reason the ALJ's reliance on these statements to support a light RFC is erroneous is because the plaintiff's condition clearly worsened since 2016. In May of 2017 she underwent knee replacement surgery. This was at least her fourth such surgery.[2] Between January of 2018 and May of 2018, she had numerous tests that demonstrated a worsening of her back conditions that included, but was not limited to, "significant multilevel degenerative disc disease", "moderate to severe right and moderate left L5-S1 neural foraminal narrowing", Tr. 690, "severe degenerative disc disease extending from L2 through S1 with prominent facet arthropathy in the mid to lover lumbar spine", Tr. 919, "marked multilevel lumbar degenerative disc and joint disease from L2 through S1", Tr. 696, "severe multilevel degenerative disc disease", Tr. 704. In August of 2018[3], Ms. ██████ underwent surgery of her lumbar spine at the L4-L5 and L5-S1 levels. The pre-operative indications noted that she had, "degenerative lumbar spondylosis", "flat back syndrome" and "spinal stenosis with right L3 radiculopathy". This was the first of two surgeries. The first surgery was aborted due to a vein rupture. Tr. 1114-1120. The second surgery to complete the spinal fusion took place on February 28, 2019. Tr. 1484.

[2] The Decision and Order states this was her fifth knee surgery. See Tr. 25.

[3] See Fn 1, above.

Conclusion:

The records clearly and unquestionably demonstrate that Ms. ████'s physical conditions worsened over time. Thus, it was an improper evaluation of the evidence for the ALJ to rely on evidence from the year 2014 through 2016 to undermine the severity of the conditions as they worsened from 2016 through 2019. This credibility determination was clear error and was not based on substantial evidence.

Moreover, if the ALJ had question about the severity of Ms. ████'s back conditions as of the date of the decision, he could have ordered a new consultative examination. See Argument under Point V. He did not. Instead, he relied on old and outdated information to support a light RFC. Had the ALJ properly performed a credibility determination, and properly recognized the worsening of Ms. ████'s conditions, it is asserted that he would have had to find that she was limited to sedentary work, or no work. Even a finding of sedentary level work would have resulted in a finding that Ms. ████ was disabled once she turned 50-years of age, which was before the date of last insured. See Argument under Point VIII.

For the foregoing reasons, this case must be remanded for further consideration.

III.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY EVALUATE ADDITIONAL EVIDENCE SUBMITTED TO THE APPEALS COUNCIL.

Applicable law:

A Colorado district court noted that the Commissioner's own regulations require the Appeals Council to consider any new evidence presented to it, provided it is new, material, and relates to the time period before the ALJ's decision. Tyson v. Apfel, 107 F.Supp.2d 1267, 1271 (D. Colo. 2000). However, the court in Tyson found error because the Appeals Council did not

consider the claimant's evidence. Id. A Kansas district court reversed and remanded for evaluation of new evidence submitted to the Appeals Council, finding that the new evidence related to the claimant's condition on or before the date of the ALJ's decision. Burkett v. Callahan, 978 F.Supp. 1428, 1431 (D. Kan. 1997).

The court pointed out that the new evidence did not exist until after the hearing, which alone provided an adequate excuse for the claimant's failure to submit those records for the ALJ's consideration at the hearing. Id., *citing* Goad v. Shalala, 7 F.3d 1397, 1398 (8th Cir. 1993).

Argument:

The Appeals Council order states, "[y]ou submitted a Physical Residual Functional Capacity Statement from Brooks Thompson, MD, dated October 30, 2019 (1 page). We find this evidence does not show a reasonable probability that it would change the outcome of the decision. We did not exhibit this evidence." Tr. 2.

The Appeals Council's nonchalant statement regarding the evidence in question is insufficient consideration under the regulations. However, even assuming, *arguendo*, that this honorable court finds that it is sufficient consideration of the additional evidence, then such evidence becomes part of the overall administrative record to be considered when evaluating the Commissioner's decision for substantial evidence. See O'Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994). Regardless of whether this amounts to insufficient consideration of the evidence, or sufficient consideration, this case must be remanded for further proceedings. If it is insufficient consideration the case must be remanded for failing to adhere to the regulations. If it is sufficient consideration then the case must be remanded because the additional record demonstrates that the decision is not supported by substantial evidence. Notably, the additional medical evidence demonstrates that Ms. [redacted] may be limited to sedentary work or less, and considering her age

and past work experience, she may be eligible for disability benefits under the GRID Rules. See Argument under VIII.

Finally, the submission of this new evidence did not exist before the ALJ decision. The ALJ decision was dated July 1, 2019. Tr. 32. The new evidence was signed and dated on August 30, 2019. Tr. 8. As such, this is an sufficient basis for the submission of evidence to the Appeals Council and not the ALJ. See Burkett v. Callahan, 978 F.Supp. 1428, 1431 (D. Kan. 1997) *citing* Goad v. Shalala, 7 F.3d 1397, 1398 (8th Cir. 1993).

Conclusion:

For these reasons, in addition to the reasons set forth under VIII, this case must be remanded for further consideration.

IV.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO CONSIDER THE CUMULATIVE EFFECTS OF ALL CLAIMANT'S MEDICATIONS.

Applicable law:

The ALJ is required to consider the cumulative effects of all claimant's ailments, and, if relevant, medications. Martin v. Apfel, 118 F.Supp.2d 9, 15 (D.D.C. 2000). Regarding medications, the regulations require consideration of the type, dosage, effectiveness and side effects of any medication taken to deal with a claimant's ailments. Id., *citing* 20 C.F.R. Sec. 404.1529(c)(3)(iv), 416.929(c)(3)(iv). It is not sufficient to list the impairments individually and to state that separately the are non-severe. Id. at 15 *citing* Cook v. Heckler, 783 F.2d 1168, 1174 (4th Cir. 1986). Instead, the ALJ must "make a particularized finding on the effect of combination of impairments and, if necessary, the medication that the claimant must take." Id. at 15-16, *citing* Hines v. Bowen, 872 F.2d 56, 59 (4th Cir. 1989). In Martin, the court held that the ALJ did not

properly consider or explain the effect of the combination of impairments or the consequences of the sleep-inducing medication the claimant takes to control her impairments, which made her sleep for three hours each morning. Id. at 16. "This failure on the part of the ALJ constitutes an obvious violation of his obligation to view the plaintiff's situation not atomistatically but synergistically but understanding the interrelated consequences to her of her physical and psychological problems and of the medication she had to take to secure relief from them" Id. Even in cases where the ALJ finds that the claimant was not receiving any significant pain regimen, the ALJ must assess the side effects of medication to properly evaluate the claimant's ability to perform substantial gainful activity. Simmonds v. Massanari, 160 F.Supp.2d 1235, 1244 (D. Kan. 2001).

The failure to discuss the medication side-effect of drowsiness is reversible error. Glenn v. Apfel, 102 F.Supp.2d 1252, 1258 (D. Kan. 2000), *citing* Dvorak v. Celebrezze, 345 F.2d 897 (10th Cir. 1965).

Argument:

Ms. ████ testified that she shakes form taking Lithium and that she shakes really bad at times. Tr. 51-52, 295. As a result, she cannot type anymore. Tr. 51-52.

In the RFC prepared by Dr. Thompson on February 9, 2017, her limitations are due, in part, from the "effects of medication." Tr. 617. The side effects noted by Dr. Thompson are "fatigue". Tr. 616. Diana Robbins, LCSW, lists the side-effects as, "drowsiness, dry mouth, fatigue, forgetfulness, problems with balance and coordination, social awkwardness, paranoia, depression and anxiety (extreme)." Tr. 860.

Her doctor reported, "there is no doubt that she is disabled with bipolar which is only fairly well controlled on her current medications that she has extreme anxiety and agitation associated

with this for which she is on her present list of medications which have an impairing effect of their own." Tr. 651.

At the hearing, she also testified that her medications are pretty strong, so she doesn't drive. Tr. 65. The ALJ did not ask any additional questions regarding the medication side effects or why she cannot drive due to her medications. However, according to her Function Report, her brain feels sedated, she suffers from memory problems, and she experiences drowsiness, as a result of her medications. Tr. 295.

The ALJ discusses only the side effect of hand tremors in the Decision. Tr. 27. The ALJ failed to discuss any other side-effects, including fatigue, anxiety, or any of the others. As noted above, the failure to discuss the side-effect of fatigue / drowsiness is reversible error. Glenn v. Apfel, 102 F.Supp.2d 1252, 1258 (D. Kan. 2000), *citing* Dvorak v. Celebrezze, 345 F.2d 897 (10th Cir. 1965).

Conclusion:

As per the case law cited above, the ALJ failed in properly evaluating the plaintiff's ability to engage in substantial gainful activity. Thus, the case must be remanded for further consideration.

V.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO ORDER A CONSULTATIVE EXAMINATION TO EVALUATE THE CLAIMANT'S DOCUMENTED MEMORY DIFFICULTIES AS WELL AS HER SEVERE AND WORSENING PHYSICAL CONDITIONS.

Applicable law:

The Tenth Circuit held that while the Commissioner has "broad latitude in order consultative examinations," where there is a direct conflict in the medical evidence which needs

resolution and where the medical evidence is inconclusive, a "consultative examination is often required for the proper resolution of a disability claim." Hawkins v. Chater, 113 F.3d 1162, 1165 (10th Cir. 1997)(*noting* that the use of consultative examinations is supported by 20 C.F.R. Sec. 404.1512(f). Similarly, where additional tests are needed to explain a diagnosis contained in the record, it may be necessary to order a consultative examination. Id.

In determining whether to order a consultative examination, "the starting place must be the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation." Id. at 1167. The ALJ's duty to develop the record includes ordering a consultative examination in cases where the medical records are incomplete. See Owen v. Chater, 913 F.Supp. 1413 (D. Kan. 1995 (*noting* that as the medical records regarding claimant's mental impairments were incomplete, the ALJ should request a consultative examination on remand); Crawford v. Chater, 997 F.Supp. 1387 1396 (D. Colo. 1998)(*stating* that once a claimant has met his burden showing reasonable probability of a severe impairment, it is the ALJ's duty to order a consultative examination if such an examination would be helpful or necessary in resolving the issue of disability); Underwood v. Shalala, 985 F.Supp. 970, 979, 980 (D. Colo 1997)(*finding* that the ALJ did not develop the record by failing to seriously consider or by not requesting further evidence of an SSA consulting physician and, as a result, substantial evidence did not support their conclusion that the claimant was capable of performing SGA); Birnell v. Apfel, 45 F.Supp.2d 826, 836-837 (D. Kan. 1999)(*holding* that the ALJ erred in not ordering a consultative examination to obtain a retrospective diagnosis of the claimant's mental impairments before the ALJ rendered her decision at the hearing level).

Argument:

A. Memory Difficulties:

The ALJ found that the plaintiff had only a "moderate limitation" in "understanding, remembering, or applying information." Tr. 22. In reaching this finding, it appears that the ALJ relies largely in medical evidence dating back to the year 2015 and 2016. Regarding the plaintiff's memory, the Decision and Order states:

> "At the consultative exam December 13, 2016, the examiner noted her memory was normal (Ex. B4F/4). Further, at multiple exams in 2015 and 2016, she was alert and oriented and her recent and remote memory were 'adequate' (Ex B3F/16/32/56/77). At exams throughout the record, including in April and August 2015 and March 2016, she was alert and oriented, with intact attention, and her insight was fair and fund of knowledge adequate (Ex. B2F/16/56/59). Moreover, at her consultative exam in December 2016, the examiner noted her concentration was normal (Ex. B4F/4). Finally, the claimant said she is able to pay bills, use a savings account and checkbook as well as count change (Ex. B3E). She is also able to read and watch television. Additionally, on several occasions, including February, April, August, October and December 2015 and Marh 2016, she presented as appropriately dressed and well groomed (Ex. B2F/16). Tr. 27. See also Tr. 250-258, 497, 537, 538, 637 (the referenced records).

However, in a Residual Functional Capacity ("RFC") statement prepared by Diana Robbins, LCSW, and dated February 1, 2017, it is noted that the "patient reports decreased capacity for memory and ability to learn and retain information". Ms. [redacted] was assessed as having a current GAF of 30, and that the highest GAF she had over the last year was 32. This GAF was determined by "client self report, therapy notes, family input, doctor report, and medication evaluations." Tr. 614.

In an RFC prepared by Dr. Brooks Thompson, and dated February 9, 2017, it is noted that Ms. [redacted] has "memory loss". Tr. 617.

In another RFC prepared by Diana Robbins, LCSW, dated November 14, 2018, it is noted that Ms. [redacted] has "memory lapses" and that her "memory loss is significant". Ms. [redacted] was assessed as having a current GAF of 40, and that the highest GAF she had over the last year was 44. This GAF was determined by "observation, self-report, and doctor input." Tr. 862-863.

In March of 2017 she had memory loss and inability to stay "within" when she was in her low. Tr. 629. Her Social Worker reported that "her memory is lacking and frustrating her." Tr. 623. "Her memory has been affected and she feels "foggy" so her activities are limited." Tr. 624. Her treating Social Worker reported that Ms. [redacted] had memory loss and required reminder texts to remember to keep her appointments. Tr. 905. Ms. [redacted] was very slow to process new information and was slow in completing tasks. She had difficulty focusing on and completing tasks. Tr. 906. In November of 2018 her therapist reported that for 15% or more of an eight-hour workday she would be precluded from virtually all employment functions because of her memory loss, fogginess, lethargy, and distractibility. Tr. 862. Moreover, her memory loss is reported as significant, which has impairs her thinking and rationalizing. Tr. 863-864. In December of 2018, her treating doctor reported that, with regard to understanding and memory, she would be precluded form understanding and remembering very short and simple instructions for 10% of an eight-hour workday. And, for 15% or more of an eight-hour work day, she would be precluded from understanding and remembering detailed instructions due to high doses of medications needed to manage her bipolar disorder with panic and psychotic features as well as chronic pain requiring narcotic medication. Tr. 829.

At the hearing, Ms. [redacted] testified that she has memory problems. She forgets everything and has to leave notes around to remember. She also explained to the ALJ that upon

arriving at the hearing office she did not remember her address. Tr. 50, 52-53. The ALJ did not further explore, through questioning, the plaintiff's reports of memory difficulties.

The ALJ also specifically acknowledges in the Decision and Order that "the claimant made **many** reports alleging difficulty with her memory (Ex B6F/2 and B11F/5/9/18/19)." Tr. 22. See also Tr. 617, 837, 841, 850, 851 (the referenced records). Yet, despite these many references to the plaintiff's memory problems, the ALJ discounts these references on the basis that "during the relevant period, there is little objective testing to confirm such reports". Tr. 22. The ALJ finds that the plaintiff's memory issues "appears to be a recitation of the claimant's own complaints, not resting on objective testing". Tr. 22. Thus, the ALJ assigns the plaintiff a "moderate limitation" to her memory as part of the analysis as to whether she meets a listing for mental limitations. Tr. 22. As part of the RFC, the ALJ limits the plaintiff to "work involving only simple, routine, and repetitive tasks of two or three steps on average." Tr. 23. Though, it is unclear if this RFC was reached because of perceived memory issues, concentration issues, or for some other reason.

The ALJ erred when he substituted his own medical opinion for the opinions of the numerous medical providers that recognized the plaintiff's difficulty with memory. It is error when an ALJ substitutes his own medical opinion for a medical expert's opinion. Eason v. Chater, 951 F.Supp. 1556, 1561 (D.N.M. 1996). Moreover, where an ALJ found that the doctor's conclusions were based solely on the claimant's statements, instead of medical tests, then the ALJ has two options under the circumstances: he could have sent the claimant for a consultative examination, or he could have used a medical advisor. Id.

In this case, the ALJ could have sent the plaintiff for a consultative examination for testing regarding her cognitive abilities and memory. It is not uncommon for claimants to be sent for IQ tests and other cognitive and memory testing.

In this case, it was necessary for the ALJ to send the plaintiff for a consultative examination to have her tested for memory and cognitive difficulties. In this case, the consultative examination was necessary because (1) the medical evidence regarding her memory issues were noted throughout the medical records, but appeared to still be inconclusive (Hawkins v. Chater, 113 F.3d 1162, 1165 (10th Cir. 1997)); (2) there is evidence in the record suggesting that there is the existence of memory problems that could have a material impact on the case (Id. at 1167); (3) the record shows that there is a reasonable probability that the plaintiff's memory problems amounted to a severe impairment, which required further development (Crawford v. Chater, 997 F.Supp. 1387 1396 (D. Colo. 1998)); (4) the ALJ specifically acknowledged that the records demonstrated there are **many** reports of memory difficulties; (5) the ALJ discounted the severity of the plaintiff's memory difficulties because such reports were based upon her own reports instead of medical testing (Eason v. Chater, 951 F.Supp. 1556, 1561 (D.N.M. 1996)).

B. Physical conditions:

As discussed above under Point II, the ALJ relied on old and outdated information to find that Ms. ███ was able to perform light work. For the reasons stated under Point II, the decision must be reversed and remanded. However, considering the fact that the consultative examinations were dating back to 2016, and were not current and did not address the worsening of Ms. ███'s physical conditions, it was necessary and appropriate for the ALJ to order a new consultative examination to have her physical conditions re-evaluated. A new physical examination would have been appropriate in order to evaluate Ms. ███'s current physical condition, to determine if she is restricted to sedentary work or no work (as opposed to light work), and to determine if her physical conditions meet or equal a listing. Based on the case law discussed

herein, it was error for the ALJ to not order a new consultative examination to fully evaluate plaintiff's physical conditions.

Conclusion:

For these aforementioned reasons, the ALJ erred by failing to order a consultative examination to perform objective testing, such as IQ and memory testing, in order to further develop the record regarding the many reports of memory and cognitive difficulties. Moreover, the ALJ erred by not ordering a new consultative examination to evaluate the plaintiff's physical conditions, which were clearly worsening and which required multiple surgeries. Thus, the case must be remanded for further proceedings.

VI.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER WHETHER THE PLAINTIFF'S MEMORY DIFFICULTIES AMOUNTED TO A "SEVERE" MEDICAL CONDITION.

Applicable law:

At step two of the five-step sequential inquiry, the Commissioner determines whether the claimant has a medically severe impairment or combination of impairments. See Smolen v. Chater, 80 F.3d 1273, 1290 (9 Cir. 1996). The step-two inquiry is a *de minimus* screening device to dispose of groundless claims. An impairment or combination of impairments can be found "not severe" only if the evidence establishes a slight abnormality that has "no more than a minimal effect on an individual's ability to work." Id. The purpose of step two of the sequential evaluation process is to identify medical impairments that "are so slight that it is unlikely theywould be found to be disabled even if their age, education, and experience were taken into account." Bowen v. Yuckert, 482 U.S. 137, 153 (1987). The ALJ should not apply a "more stringent legal standard than is

mandated by law." Edlund v. Massanari, 253 F.3d 1152, 1158 (9 Cir. 2001). Step two is intended to be "a *de minimus* screening device to dispose of groundless claims" Id. *quoting* Smolen v. Chater, 80 F.3d at 1290. As such, the ALJ must consider the claimant's subjective symptoms at step two, Smolen v. Chater, 80 F.3d at 1290.

Argument:

The factual recitation regarding the plaintiff's memory difficulties are addressed in Point V, above, as well as Paragraphs 36-39 in the Statement of Material Facts section, above, and incorporated herein by reference.

As discussed above, in this case, and as the ALJ acknowledged, the plaintiff's memory difficulties were mentioned **many** times throughout he record. Tr. 22. Moreover, she had described her subjective symptoms and complaints as well. See Paragraphs 36-39 in the Statement of Material Facts section, above.

Although the ALJ discusses the plaintiff's memory difficulties in the decision, he fails to determine if the memory and cognitive issues are "severe" or "not severe", which he should have done.

Conclusion:

The ALJ erred in failing to find that Ms. ██████'s memory difficulties were either "severe" or "not severe". Additionally, as discussed above in Point V, the ALJ failed to send Ms. ██████ for a consultative examination to help reach a conclusion regarding the severity of her memory and cognitive difficulties. Thus, the case must be remanded for further consideration.

VII.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY NOT CONSIDERING THE PLAINTIFF'S "GAF" SCORES, WHICH WERE CONSISTENTLY 44 AND UNDER, AND AS LOW AS 30, WHICH SUGGESTED SEVERE AND MARKED IMPAIRMENTS AND DEMONSTRATED A COMPLETE INABILITY TO WORK.

Applicable law:

Many courts, including the Tenth Circuit and other districts in the Tenth Circuit, indicate that failure to consider GAF scores at Step 2 are reversible error or that a Step 2 decision of non-severity when the record contains GAF scores of lower than 50 are not supported by substantial evidence. See Lee v. Barnhart, 117 Fed. App'x 674, 678 (10 Cir. 2004) ("A GAF score of fifty or less, however, does suggest an inability to keep a job. . . In a case like this one, decided at step two, the GAF score should not have been ignored."); Bronson v. Astrue, 530 F. Supp. 2d 1172 (D. Kan. 2008) (decision where ALJ considered GAF scores at Step 2, ultimately concluding that all of the medical evidence did not establish requisite severity); see also, e.g., Magwood v. Commissioner of Social Sec., 2008 WL 4145443 at *2 (3 Cir. 2008) (medical evidence that claimant was "receiving psychiatric services on a regular basis, was engaged in therapeutic counseling on a weekly basis, was taking antidepressants, was assessed as functioning with a GAF of 55-60, and had an opinion from a treating psychiatrist that she was unable to work on a sustained basis . . . was more than sufficient to satisfy step two's *de minimis* threshold," thus, Step 2 decision held "not supported substantial evidence"); McPherson v. Astrue, 2009 WL 529221 at *12 (S.D.W.Va. 2009) ("Plaintiff's GAF score may be relevant in a more generalized assessment of the severity of mental impairment at step two"); Jackson v. Astrue, 2009 WL 248491, 8 (D. Kan. 2009) ("The step two requirement is generally considered a *de minimis* screening device to dispose

of groundless claims; thus, reasonable doubts on severity are to be resolved in favor of the claimant. . . . Mr. Garrett's RFC assessment and GAF scores provide evidence which would support a finding that plaintiff had severe mental impairments, i.e., that plaintiff's mental impairment would have more than a minimal effect on his or her ability to do basic work activities. The ALJ improperly ignored the GAF score of 50 by Darlys Miller, another treating source. Such a score suggests an inability to keep a job, and thus would clearly suggest that plaintiff has a severe mental impairment. Thus, contrary to the findings of the ALJ, Mr. Garrett's assessment has some support in the record from another treating source which should be considered when this case is remanded."); Miller v. Astrue, 2008 WL 5129874 at **1-2 (W.D. Wash. 2008) ("Here, the ALJ erred when he did not consider Plaintiff's depression a severe impairment at step-two. Ms. Miller has a long history of treatment for depression. DDS, staff psychologists, Dr. van Dam and Dr. Clifford, opined Ms. Miller suffered from depressive disorder, recurrent, moderate; and dependent personality traits . . . The doctors opined that Ms. Miller is moderately limited in her ability to understand and remember detailed instructions; moderately limited in her ability to carry out detailed instructions; and moderately limited in her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods . . . Treatment records in evidence show she was being treated at the Center for Behavioral Solutions (CBS) from July 2003 through the time of hearing, for major depressive disorder . . . Her treatment records show GAF scores in the 40's and 50's, with suicidal ideation, poor hygiene, pressured speech, agitated mood, anxious and tearful affect, inability to act to preserve state assisted support, and scattered thoughts and need of multiple re-directions"); Salazar v. Astrue, 2008 WL 5046403 at *7 (W.D. Okla. 2008) ("GAF score reflects serious impairment in social, occupational, or school

functioning, such as inability to keep a job" but ALJ did not discuss it or other evidence and it "'is improper for the ALJ to pick and choose among medical reports, using portions of evidence favorable to his position while ignoring other evidence)'; Hardman v. Barnhart, 362 F.3d 676, 681 (10 Cir. 2004) . . . the ALJ's step two finding is flawed."); Stewart v. Astrue, 2008 WL 4829926 at *4 (C.D. Cal. 2008) (though evidence not sufficient to establish a disability, fact that Plaintiff worked with a mental impairment did not establish non-severity as diagnosis of depression was confirmed by consultative psychiatrist; Plaintiff given GAF of 58 yet "ALJ did not address any of plaintiff's GAF scores," and holding that in "light of this evidence, plaintiff has proven that she suffered from more than a slight mental impairment.").

Argument:

In the Decision and Order, the ALJ omitted pertinent discussion. "GAF" scores are acceptable tests for consideration of whether a claimant is disabled and unable to work. In this case, the Record demonstrates that the plaintiff's GAF scores were well under 50. On February 1, 2017, Diana Robbins, LCSW, notes that the plaintiff's GAF was 30, and that plaintiff's highest GAF over the course of the prior year was 32. Tr. 614. Approximately 1 year and 9 months later, on November 14, 2018, Diana Robbins, LCSW, assigned a "GAF" score of 40 and stated that the highest GAF over the past year was 44.[4] Tr. 863. Yet, nowhere in the Decision does the ALJ discuss this evidence. Many courts, including the Tenth Circuit and other districts in the Tenth

[4] The GAF is a subjective determination based on a scale of 100 to 1 of "the clinician's judgment of the individual's overall level of functioning." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (Text Revision 4th ed.2000) at 32. A GAF score of 51-60 indicates "moderate symptoms," such as a flat affect, or "moderate difficulty in social or occupational functioning." *Id.* at 34. A GAF score of 41-50 indicates " [s]erious symptoms ... [or] serious impairment in social, occupational, or school functioning," such as inability to keep a job. *Id.* A GAF score pf 31-40 indicates " major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood", such as avoiding friends, neglecting family, and inability to keep a job. *Id.*

Circuit, indicate that failure to consider GAF scores at Step 2 are reversible error or that a Step 2 decision of non-severity when the record contains GAF scores of lower than 50 are not supported by substantial evidence. In this case, the plaintiff's GAF score was as low as 30, but no higher than 44, between roughly the dates of February 1, 2016 thorough November 14, 2018, as reflected in the Residual Functional Capacity Reports prepared by Diana Robbins. Presumably, Ms. ████'s GAF remained very low even after November of 2018, through her Date of Last Insured, which was in March of 2018.

Despite the fact that the plaintiff's GAF scores were consistently well under 50, and as low as 30, the ALJ failed to discuss whether this impacted the plaintiff's memory rendering her memory difficulties a severe medical condition (see Point VI, above, discussing the fact that the ALJ failed to consider whether the plaintiff's memory difficulties were severe or non-severe). Moreover, the ALJ failed to consider the GAF scores when analyzing whether Ms. ████ met a listing for mental health conditions. Throughout the analysis of whether she met a listing, the ALJ found that Ms. ████ had either "mild" or "moderate limitations" in the broad areas of functioning analyzed. However, the ALJ completely failed to consider the impact of the GAF scores. The GAF scores, which were consistently under 50, and as low as 30, are suggestive of the fact that Ms. ████'s mental limitations may have been, at times, "marked". Had the ALJ properly considered the GAF scores, he should have found that Ms. ████ met a listing for her mental health conditions. Thus, Ms. ████ should have been awarded benefits.

It should be noted that the ALJ did discuss the Residual Functional Capacity assessments submitted by Diana Robbins, LCSW. The ALJ assigned the overall assessment "limited weight" stating that the opinions are "inconsistent with the overall record". Tr. 28. However, this does not obviate the need for the ALJ to have discussed the GAF score contained in those reports. That is

because the ALJ fails to discuss what information in the medical evidence undermines Ms. Robbins' assessments. Clearly, some of the information in the RFC assessments is correct and undisputed, such as the fact that Ms. ██████ suffers from shaking hands, as just one example. Clearly, the ALJ cannot be fully discounting and discrediting all information in Ms. Robbins' RFC assessments. Yet, it is impossible to tell which parts of the report are being credited, versus not credited, based on how the Decision and Order is drafted. Since the GAF is not discussed anywhere in the Decision and Order, and since the ALJ fails to assigning the GAF score any weight at all, the ALJ erred as a matter of law. See Salazar v. Astrue, 2008 WL 5046403 at *7 (W.D. Okla. 2008) ("GAF score reflects serious impairment in social, occupational, or school functioning, such as inability to keep a job" but ALJ did not discuss it or other evidence and it "'is improper for the ALJ to pick and choose among medical reports, using portions of evidence favorable to his position while ignoring other evidence)'.

Conclusion:

Because the Commissioner failed to consider the GAF scores, the case must be reversed and remanded for further consideration.

VIII.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY NOT CONSIDERING WHETHER THE PLAINTIFF DISABLED UNDER THE GRID RULES.

Applicable law:

At Step Five, ALJs use the Medical Vocational Guidelines, which contain a number of rules in a grid-like matrix. See 20 C.F.R. pt. 404, subpt. P, app. 2 § 200.00(a). To figure out which rule applies, the ALJ enters into the matrix the applicant's residual functional capacity, age category, education level, and previous work experience. The matrix, in turn, identifies the

applicable rule, and that rule directs a disability finding. Changing any one of these inputs can change what the matrix requires. For instance, if you change the age category and leave the other inputs unchanged, that will sometimes direct a different answer regarding whether the applicant is disabled. This matrix is often referred to as the GRID rules.

Argument:

As discussed above, under Point I and II, the ALJ erred by improperly evaluating the plaintiff's physical conditions. Had the plaintiff's physical conditions been properly evaluated, the ALJ would have had to find that she was limited to sedentary or no work. Moreover, a Residual Functional Capacity Form was prepared by Dr. Thompson and submitted to the Appeals Council for review. This report addressed Ms. [redacted]'s restrictions since she turned 50 years of age on March 24, 2018. According to the report, she can sit 2 hours, stand for 1 hour, walk for 1 hour, but must rest or lie down for 4 hours, during a normal 8-hour work day. But she can only stand or walk up to 15-minutes at a time, and can only sit for up to 1-hour at a time. Moreover, she can lift and carry 10-pounds occasionally, but she can never carry 20-pounds or more. The report further notes that there are other limitations with "bending/stooping, stair climbing, rapid/repetitive movements", but does not elaborate. Tr. 8.

The supplemental report is important because, if credited, it would place the plaintiff into sedentary work or less, or possibly no work at all. See 20 C.F.R. Sec. 404.1567. If Ms. [redacted] was found to be able to perform sedentary work, as opposed to light level work, she would be disabled under the GRID rules once she turned 50-years of age.

Conclusion:

The Commissioner erred by not evaluating whether the claimant was disabled under the GRID Rules. Thus, the case must be remanded for further consideration.

IX.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY IMPROPERLY CLASSIFYING THE PLAINTIFF'S AGE.

In order to properly apply the GRID rules, the Commissioner must determine if the claimant is a younger individual (age 18-49), a person closely approaching advanced age (age 50-54), or a person who is of advanced age (age 55 and older). See 20 C.F.R. pt. 404, subpt. P, app. 2 § 200.00(a).

In this case, the claimant was born on March 24, 1968 and was 50 years old on the date of last insured. Thus, the plaintiff was a person closely approaching advanced age.

However, in this case, as part of the ALJ decision and order, the Commissioner improperly classified the plaintiff as a "younger individual, age 18-49, on the date of last insured." Tr. 31. This was incorrect.

Since the Commissioner erred in finding that the plaintiff was a "younger individual" when, in fact, she was not, there was inherently an improper evaluation and consideration as to whether the GRID Rules apply to this case. For this reason, the case must be remanded for further consideration.

X.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO PROPOSE A COMPLETE HYPOTHETICAL QUESTION TO THE VOCATIONAL EXPERT, TAKING INTO CONSIDERATION ALL OF THE PLAINTIFF'S LIMITATIONS.

Applicable law:

The hypothetical question posed by the ALJ to the Vocational Expert "must relate all of claimant's impairments with precision." Taylor v. Callahan, 969 F.Supp. 664, 669 (D. Kan. 1997)

citing Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991). In Taylor, the court held that the ALJ's hypothetical question did not duplicate the claimant's condition as precisely as possible because the ALJ failed to refer to the claimant's numerous other impairments besides his diabetes and cardiac arrhythmia. Id. A Colorado district court held that the ALJ posed a flawed hypothetical to the VE when he failed to accurately include all the claimant's established limitations, mental impairments, as well as the claimant's pain. Ricketts v. Apfel, 16 F.Supp.2d 1280, 1293-1295 (D. Colo 1998), *citing* Williams v. Bowen, 844 F.2d 748, 752 (10th Cir. 1988). See also Underwood v. Shalala, 985 F.Supp. 970, 979 (D. Colo. 1997)(*finding* error in the ALJ's failure to include in his hypothetical the claimant's limitations of finger dexterity, abstract reasoning, special perception, verbal reasoning, and writing, as well as all the restrictions set forth by the treating physician).

Argument:

In this case, the ALJ's hypothetical questions were insufficient for the following reasons:

(1) The hypothetical specifically states that the claimant will have "no communication limits". Tr. 68. The VE answered the hypothetical question based on there being "no communication limits". However, this hypothetical is inconsistent with the ALJ's findings in the Decision. The ALJ found in the Decision that the claimant did have "communication limitations". The decision states, "there has been mention that she has difficulty finding words when speaking (Ex. B12F/8). However, this does not appear to demonstrate more than a moderate limitation." Tr. 22. The ALJ found that the plaintiff had "moderate limits" in communicating, yet he asked the VE to consider that the plaintiff had no such limits. This was inconsistent and clear error.

(2) The hypothetical questions do not seem to take into consideration the plaintiff's reduced functioning as demonstrated by her GAF scores. See also Point VII.

(3) The hypothetical questions do not take into consideration the worsening of the plaintiff's physical conditions starting as of the year 2016. See also Point II.

(4) The hypothetical questions do not take into consideration all possible side effects of the plaintiff's medications. Although the VE testified regarding time off task, the testimony was clearly in relation to periodic and unexpected psychotic episodes in the preceding hypothetical. This discussion was not taking into consideration possible memory issues, or fatigue, related to the side-effects of medication. Tr. 70. See also Point IV.

Conclusion:

For the foregoing reasons, the ALJ erred by failing to propose a complete and proper hypothetical to the VE. Thus, the case must be remanded for further consideration.

XI.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER THE EPISODIC NATURE OF BIPOLAR DISORDER AND BY SIMPLY CHERRY PICKING EVIDENCE DEMONSTRATING THE TIMES WHEN THE PLAINTIFF APPEARED TO BE DOING SOMEWHAT BETTER.

Applicable law:

It is "inherent in psychotic illness that periods of remission occur, " and that such remission does not mean that the disability has ceased." Andler v. Chater, 100 F.d 1389, 1393 (8th Cir. 1996), *quoting* Miller v. Heckler, 756 F.2d 679, 681 n.2 (8th Cir. 1985). One aspect of bipolar disorder, is that symptoms may wax and wane. For this reason, it is not a contradiction to find that a claimant

has a severe and disabling mental illness and yet "was behaving pretty normally during her office visits." Kangail v. Barnhart, 454 F.3d at 629 (7th Cir. 2006). This is because "bipolar is episodic." Id.

The ALJ cannot extrapolate from days where Plaintiff seems to be doing better to conclude that he has improved his condition. See Punzio v. Astrue, 630 F.3d 704 at 710 (7th Cir. 2011)("But by cherry-picking [the treating psychiatrist's] file to locate a single treatment note that purportedly undermines her overall assessment of [the claimant's] functional limitations, the ALJ demonstrated a fundamental, but regrettably all-too-common, misunderstanding of mental illness. As we have explained before, a person who suffers from a mental illness will have better days and worse days, so a snapshot of any single moment says little about her overall condition."); Bauer v. Astrue, 532 F.3d 606 at 609 (7th Cir. 2008)("A person who has a chronic disease, whether physical or psychiatric, and is under continuous treatment for it with heavy drugs, is likely to have better days and worse days; that is true of the plaintiff in this case. Suppose that half the time she is well enough that she could work, and half the time she is not. Then she could not hold down a full-time job.").

It is error where an ALJ's opinion does not fully consider the waxing and waning nature of bipolar disorder when weight is placed on the fact that plaintiff had no remarkable findings during several mental status examinations. In this case, the ALJ failed to consider the waxing and waning of the plaintiff's bipolar disorder.

Argument:

In this case, the ALJ discounts the episodic nature of her bipolar disorder by noting that "she has presented well when around treatment providers" and when she "presented as cooperative on several occasions of record". Tr. 22. The ALJ's decision seems to almost document the

episodic nature of the condition by noting that "[i]n July 2017, her social worker reported that, when depressed, she struggles with hygiene and looks as if she is "out of it".' Tr. 22. The ALJ discounts this report stating that this does not appear consistently in the record and that on several occasions, including in February, April, August, October, and December 2015 and March 2016, the claimant presented as appropriately dressed and with good grooming. Tr. 23. The ALJ further discounts the episodic nature of Ms. ███'s disorder by stating "she stated that she is able to pay bills, use a savings account and a checkbook as well as count change" and that "she is able to read and watch television". Tr. 23.

The ALJ also cherry picks certain entries in the medical records, such as a note in "September of 2016 where Ms. ███ "reported that she believed her medication was helping", and on December 2, 2016, where her physician said "her bipolar was 'presently well controlled on current medications for which the [claimant] was happy and grateful'." "A few days later, at an exam, her doctor noted no obvious delusions, anxiety or depression evident." Tr. 26.

The ALJ cherry picks a notation from August of 2017, where it says Ms. ███'s bipolar disorder was "fairly controlled", and where "it was reported that she had recently had a low but was doing fairly well." Moreover, the ALJ notes that in November of 2017, Ms. ███ "joined a support group for bipolar disorder, and was learning a lot", and that "in addition to having successful treatment through her therapy and medications, [her] instances of delusions and hallucinations have seemed to have improved." Tr. 27. The ALJ further notes that Ms. ███ has not been hospitalized for her bipolar disorder since December of 2014. Tr. 27.

The ALJ further notes that the plaintiff can perform simple routine work tasks because she is able to go grocery shopping with her husband, she is able to feed and cook for herself without issue, and she can do laundry and care for her personal needs. She can also use her phone and

enjoys reading as well as listening to her e-book reading device. She also attends church, social groups, and stores regularly. She gets along with authority figures without problems and relates well with people. Tr. 27-28. Thus, the ALJ concludes, "these activities indicate she is not as limited as alleged, and are consistent with the functional abilities in the above RFC." Tr. 28.

It is unclear how the ALJ is reaching the conclusion that doing very simple routine daily activities, such as answering the phone, or feeding herself, demonstrates she has sufficient mental capacity to work. Moreover, the Decision seems to cherry pick this evidence as support for the finding that the plaintiff does not meet a listing for her mental health conditions and can work. The ALJ fails to address the records that consistently demonstrate the plaintiff is often struggling with her mental health conditions. The medical records demonstrate a waxing and waning of the conditions; some days she is struggling badly and others she reports feeling much better. Due to the extensive recitation of medical evidence, paragraphs 27-35 of the undisputed material facts section are incorporated herein by reference, and which demonstrate the consistent documentation of the episodic, and yet often very deteriorated, mental illness.

In this case, the ALJ clearly failed to fully consider the episodic nature of the plaintiff's bipolar condition. There is no discussion whatsoever in the Decision that demonstrates that the ALJ considered the episodic nature of the condition and still determined that the plaintiff was able to work.

Additionally, the ALJ also failed to consider the GAF scores, which demonstrated a consistent and rather severe diminished mental functioning. The GAF score further demonstrates the consistent difficulties that the plaintiff was suffering from. See also Point VII.

Conclusion:

A Decision cannot overlook the episodic nature of bipolar illness. In this case, it is clear that the ALJ did not consider, or discuss, the episodic nature of the plaintiff's bipolar disorder, despite the fact that the record clearly has ample evidence that the plaintiff's condition would often wax and wane. Thus, the ALJ did not properly evaluate whether the plaintiff met a listing for her mental health condition, and also did not properly evaluate her overall Residual Functional Capacity to work. For this reason, the case must be remanded for further consideration.

XII.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY IMPROPERLY EVALUATING THE OPINIONS OF THE PLAINTIFF'S MEDICAL PROVIDERS.

Applicable law:

The Tenth Circuit held that the ALJ failed to consider certain specific factors prior to rejecting the treating physician's opinions. Drapeau v. Massanari, 255 F.3d 1211, 1213 (10th Cir. 2001). These factors are: (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistent between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support to contract a the opinion. Id., *citing* Goatcher v. United States Dep't of Health Human Servs., 52 F.3d 288, 290 (10th Cir. 1995). See also White v. Massanari, 271 F.3d 1256, 1259 (10th Cir. 2001)(*noting* that the regulations at 20 CFR Sec. 404.1527(d)(2) include several factors to consider when examining

a treating physician's opinion, and agreeing with the district court that the ALJ set forth specific and legitimate reasons for discontinuing the treating doctor's opinion.

Argument:

In this case, the plaintiff's social worker, Diana Robbins, and treating physician, Dr. Brooks Thompson, both submitted multiple Residual Functional Assessment forms, in addition to the supporting medical records. With respect to Diana Robbins, the ALJ simply stated, "these opinions receive only limited weight as they are inconsistent with the overall record". Tr. 28. There is no further explanation. Moreover, with respect to Dr. Thompson, the Decision states, "such statements receive minimal weight. The medical opinion is without substantial support for objective evidence provided by Dr. Thompson, which renders it less persuasive." Tr. 29.

The ALJ completely failed to analyze any of these medical opinions in accordance with the factors set forth in 20 CFR Sec. 404.1527(d)(2). Notably, as discussed in the numerous points above, the medical opinions are very consistent with the overall record when analyzed properly. The plaintiff suffers form both physical and mental conditions that are severe and disabling.

Conclusion:

The ALJ failed to properly evaluate the credibility of the plaintiff's medical providers in accordance with 20 CFR Sec. 404.1527(d)(2). Thus, the decision must be remanded for further consideration.

CONCLUSION

For the reasons stated above, the plaintiff asks that the denial of benefits be vacated and that the claim be remanded for further proceedings.

Dated: Salt Lake City, UT
March 3, 2021

Yours, etc.,

Attorney(s) for the Plaintiff

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