

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

-----X
[REDACTED],

Plaintiff,

Case No.: [REDACTED]

vs.

ANDREW SAUL, Commissioner of the
Social Security Administration,

Defendant.

-----X

PLAINTIFF'S BRIEF

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INTRODUCTION

A. Ms. [REDACTED]'s Daunting 10-Year Fight for Disability Benefits.

Ms. [REDACTED] has been fighting for her disability benefits for nearly 10-years. Despite many obstacles and challenges throughout this journey, she has persisted in her efforts. The difficulties have been many, and this task of trying to obtain disability benefits has been daunting, as demonstrated by the very extensive history of administrative proceedings in this case. From January 5, 2012, through April 9, 2019, Ms. [REDACTED]'s claim for disability benefits went through extensive proceedings, including:

- 4 hearings (June 10, 2013; April 10, 2014; September 13, 2016; and April 24, 2019);
- 3 unfavorable decisions by an ALJ (May 29, 2014; December 5, 2016; and May 22, 2019);
- The 3 unfavorable decisions resulted in 3 appeals filed with Appeals Council (November 6, 2015; April 17, 2018; and July 2, 2019); and
- 2 Appeals Council remands due to errors committed by the ALJ (January 12, 2016 and April 17, 2018).

In this case, there have been numerous legal errors committed by the Commissioner in evaluating this claim, which resulted in two remands by Appeals Council. Now, nearly 10-years after Ms. [REDACTED] first filed her claim for benefits, she brings this action in Federal District Court asking for yet another remand on the basis that the Commissioner committed additional errors. As a result of these additional errors, the unfavorable decision should be vacated and the case be remanded back to an Administrative Law Judge for further consideration.

B. Ms. [REDACTED]'s Medical Conditions.

On the date that the application for disability benefits was filed, Ms. [REDACTED] was 18 years old. Tr. 35. Today, she is almost 28 years old and continues to suffer from severe conditions that preclude her from working.

Ms. [REDACTED] has a Full-Scale IQ that falls between a 65 to 68, which places her overall functioning in the Mild range of Mental Retardation. Tr. 763. Her cognitive functioning is described to be in the “extremely low range”. Tr. 817. In addition, she suffers from other mental health conditions, including: bipolar disorder, depression, possibly schizophrenia, hallucinations, anger, paranoia, anxiety, difficulties in social and adaptive functioning, and agoraphobia. See Para 11 to 52, below. She has an explosive personality and experiences “anger outbursts” that cause her to fly into sudden rages. When she is angry, she blacks out. She also gets mad easily because of her paranoia; she cannot go outside because she thinks people are looking at her and she gets mad and will black out. She thinks about harming others, although she claims she would never do it. However, she has had instances of fighting random strangers and even running her car into people when she gets angry. Her doctors recommended that she stop driving because she has a tendency to black out while she is driving.

Ms. [REDACTED] has a history of family conflicts, chaotic relationships, self-injurious behavior including cutting herself to the point of leaving scars and hitting walls to cause herself pain. She has a history of “pseudo-suicide” attempts. She self-isolates due to her anxiety, and she has been diagnosed with Agoraphobia. See Para. 19-37.

Ms. [REDACTED] reports experiencing hallucinations. She reports hearing noises and senses things that she cannot see. She hears people talking in her head and they keep her awake at night.

She describes a “male voice” that “won’t shut up” and “yells at me and keeps me up.” She also hears a female voice “who isn’t nice and tells me I won’t get better.” See Para. 40-44.

While Ms. [REDACTED]’s doctors have not diagnosed her with Schizophrenia, and have diagnosed her with a variety of other mental health conditions, two consultative examiners, Dr. Zlomke and Dr. Jackson, both diagnose Ms. [REDACTED] with Paranoid Schizophrenia. Tr. 735, 818.

Ms. [REDACTED]’s significant deficits in intellectual functioning, coupled with her other serious mental health conditions, have prevented her from working. However, her Agoraphobia also presents a serious hurdle to her obtaining a job, and holding a job if she were to find one. Dr. Zlomke notes that “[g]iven the longstanding nature of her symptoms and her difficulty leaving the house, it may prove difficult for her to attend treatment.” See Para 37. It only stands to reason that if Ms. [REDACTED] would have difficulty attending treatment due to her agoraphobia, she would, likewise, have difficulty leaving her home to attend work.

As for her physical conditions, Ms. [REDACTED] suffers from Reynaud’s Phenomenon, which is a physical condition that is exacerbated by environmental factors and emotional stress, as well as asthma and migrane headaches. See Para 50-52. She also has a past history of back pain. Tr. 36.

A fair reading of the medical evidence in this case reveals that Ms. [REDACTED] is a tortured young woman who constantly struggles with her cognitive limitations and her mental health conditions. It is hard to imagine a scenario where Ms. [REDACTED] could hold a job for a prolonged period of time, assuming she could even find a job.

C. Ms. [REDACTED]’s Request for Relief.

Pursuant to 42 U.S.C. § 405(g), Ms. [REDACTED] seeks judicial review of the final administrative decision of the Commissioner of Social Security (“Commissioner”). Ms. [REDACTED] asserts that the Commissioner’s decision is not based on substantial evidence as required by 42 U.S.C. §405(g).

Ms. [REDACTED] also specifically contends that the Commissioner erred as a matter of law in denying her claim for disability 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. [REDACTED] applied for disability benefits on January 5, 2012, alleging disability commencing on that same date. Tr. 19. Two hearings were held; one on June 10, 2013, and another on April 10, 2014. An unfavorable decision was issued on May 29, 2014. Tr. 153-171.
2. Thereafter, on November 6, 2015, the Appeals Council denied the request to review

the May 29, 2014, unfavorable decision. Tr. 176. However, on January 12, 2016, the Appeals Council issued a new Order vacating the hearing decision and remanding the case to an Administrative Law Judge for further consideration. Tr. 183-186.

3. A hearing was held on September 13, 2016. Tr. 196. In a decision dated December 5, 2016, the claim was again denied. Tr. 196-218.

4. On April 17, 2018, the Appeals Council issued a second Order vacating the hearing decision and remanding the case to an Administrative Law Judge for further consideration. Tr. 225-229.

5. A hearing was held on April 24, 2019. Tr. 19. An unfavorable decision was issued on May 22, 2019. Tr. 36.

6. On July 2, 2019, a request for review of the unfavorable decision was filed with the Appeals Council. Tr. 4. The Appeals Council denied the Request for Review on April 9, 2020. Tr. 1. Accordingly, the ALJ's decision became the Commissioner's final decision.

7. From January 5, 2012, through April 9, 2019, Ms. [REDACTED]'s claim for disability benefits went through extensive proceedings, including: 4 hearings (June 10, 2013; April 10, 2014; September 13, 2016; and April 24, 2019), 3 unfavorable decisions by an ALJ (May 29, 2014; December 5, 2016; and May 22, 2019), 3 Appeals Council appeals (November 6, 2015; April 17, 2018; and July 2, 2019), and 2 Appeals Council remands (January 12, 2016 and April 17, 2018). As of the date this brief is being filed, the proceedings in this case have been pending for 9 ½ years.

8. Ms. [REDACTED] has brought this action in Federal District Court on the basis that there are still additional errors requiring correction.

Statement of Relevant Facts.

Ms. [REDACTED]'s age, education, and work experience.

9. Ms. [REDACTED] was born on July 15, 1993. Tr.35. On the date the application for disability benefits was filed she was 18 years old. Tr. 35. As of May 22, 2019, the date of the third ALJ decision denying benefits, she was 25 years old. As of today, the date this brief is filed, she is 27 years old and will be 28 years old when the decision on this appeal is issued.

10. Ms. [REDACTED] has no past relevant work. Tr. 35.

Relevant Medical Evidence.

11. The ALJ found that the Plaintiff has the following severe impairments: attention deficit hyperactivity disorder (ADHD); intellectual disorder; mood disorder; learning disorder; depressive disorder; bipolar disorder; anxiety disorder; personality disorder; abdominal disorder; back disorder; migraines; Reynaud's phenomenon; and asthma. Tr. 21.

12. The medical conditions and symptoms that are of particular relevance to this appeal are set forth below.

Mental Health Conditions and Symptoms.

Intellectual disorder.

13. Ms. [REDACTED] was in special education classes when she was in school. Tr. 919

14. The last grade she completed was the 8th grade. Tr. 760.

15. In a report completed after a consultative examination on February 28, 2012, Dr. Jennifer Jackson stated that "it is estimated that Ms. [REDACTED] functions in the Mildly Retarded range of intelligence". Tr. 735.

16. In a consultative examination report prepared by Dr. Davis after an examination on

September 9, 2013, Ms. [REDACTED] obtained a Full-Scale IQ of 68, which placed her overall functioning in the Mild range of Mental Retardation. Tr. 763

17. Dr. Davis noted that “the claimant shows symptoms of mental retardation including significantly subaverage intellectual functions with deficits in adaptive behavior.” Tr. 764.

18. After a consultative examination and cognitive testing conducted by Dr. Zlomke, it was determined that Ms. [REDACTED] obtained a Full-Scale IQ of 65, which ranks in the “extremely low range”. Tr. 817.

Anger, Paranoia and Difficulties in Social Functioning.

19. Ms. [REDACTED] has “anger outbursts.” Tr. 725.

20. Her usual mood is, “always upset and angry, but I don’t know why”. Tr. 734.

21. It does not take much to make her irritable. Tr. 853.

22. She flies into sudden rages. Tr. 856.

23. Ms. [REDACTED] reports that, “I am still very angry, I get so angry I black out.” Tr. 802.

24. Ms. [REDACTED] blacks out and she does not remember what she has done. She cannot go outside because if somebody walks by her she gets mad because she thinks they are looking at her and she gets mad and will black out. Tr. 732, 754.

25. Ms. [REDACTED] is anxious, paranoid, and angry. She gets angry a lot and has thoughts of harming others, but says she would never do it. However, she says if she did not have her children, she may be in jail. She has a lot of rage and feels like she will explode. She cannot go anywhere. Tr. 806.

26. She feels in her gut like everybody is talking about her. Tr. 732, 908. She is also paranoid about death. She will not let her mom out of her sight because she thinks if she stays with her mother she can prevent her death. Tr. 732.

27. Ms. [REDACTED] becomes aggressive toward her mother and sister when she becomes angry. Tr. 919.

28. Ms. [REDACTED] is afraid of people. She states, “I feel like they’re all talking about me. I’m afraid they’re going to hurt me. I think they’re all planning bad stuff against me”. She “can’t stand” being around others. “They talk about me. I don’t want to be around people.” She added, “Nobody wants to be around me, either.” Tr. 736, 755.

29. Ms. [REDACTED] has had instances of fighting random strangers, running her car into people when she is angry, getting into fights with her siblings, and cutting herself. Tr. 754.

30. She was advised not to drive because she suffers from blackouts when driving. The blackouts are caused by anxiety. Tr. 806, 882.

31. She has a history of family conflict and chaotic relationships. Tr. 856.

32. She has small scars on her left arm from cutting herself. Tr. 750, 757. She would cut herself as a teenager. Moreover, since her father committed suicide in November of 2016, she began “digging into her skin and picking at it”. Tr. 881, 882, 908.

33. She will punch a wall when she is angry to harm herself. Tr. 908.

34. Ms. [REDACTED] has many pseudo-suicide attempts. Tr. 881.

35. Ms. [REDACTED] self-isolates due to her anxiety. Tr. 856, 908.

Agoraphobia.

36. Ms. [REDACTED] was diagnosed with Agoraphobia. Tr. 859, 908, 910.

37. Dr. Zlomke notes that “[g]iven the longstanding nature of her symptoms and her difficulty with leaving the house, it may prove difficult for her to attend treatment.” Tr. 818.

Difficulties in adaptive functioning.

38. Dr. Zlomke states that “Starla is significantly impaired in her ability to understand,

carry out, and remember instructions. She is severely impaired in her ability to respond appropriately to supervision, coworkers, and work pressures within a work setting.” Tr. 818. She is “markedly impaired” in “the ability to make judgments on simple work-related decisions.” Tr. 820.

39. Dr. Davis states “The claimant shows symptoms of mental retardation including significantly subaverage intellectual functions with deficits in adaptive behavior. The claimant shows symptoms of depression such as loss of interest in activities, sleep disorder, decreased energy, feelings of guilt or worthlessness, and difficulty concentrating or thinking. The claimant also shows manic symptoms such as hyperactivity, flight of ideas, easy distractibility, and involvement in activities that have a high probability of painful consequences which are not recognized. The claimant also shows symptoms of anxiety, including excessive worrying.” Tr. 764.

Hallucinations.

40. She does not feel her medication is working. She hears things and hears something answering her when she asks herself questions. She is not sure if this is her own conscience or not. She attends to this and will hear noises and senses things that she cannot see. Tr. 806.

41. Ms. [REDACTED] hears people talking in her head and they keep her awake at night. She cannot sleep because she hears people talking in her head and they keep her up. She describes a “male voice” that “won’t shut up. He yells at me and keeps me up”. Tr. 732.

42. Ms. [REDACTED] hears voices in her head and outside her head. She states that she is going “crazy” and that she knows other people know she’s crazy. Tr. 725.

43. She reported, “hearing a voice (a female) who isn’t nice and tells me I won’t get better.” Tr. 908.

44. She has auditory hallucinations of vague things. She hears her name being called or horns. She has visual hallucinations of shadows and lights. Tr. 853, 856, 859, 898.

Schizophrenia.

45. Dr. Zlomke diagnosed Ms. [REDACTED] with Schizophrenia and a Moderate Intellectual Disability. Tr. 818. The consultative examiner, Dr. Jackson, also diagnosed Ms. [REDACTED] with Schizophrenia, Paranoid type. Tr. 735.

Judgment and Insight.

46. As a result of the February 28, 2012, consultative examination, Dr. Jackson reported that, “Ms. [REDACTED]’s judgment seemed poor. She appeared to have little insight into herself and her condition.” Tr. 735.

47. As a result of the September 23, 2013, consultative examination, Dr. Davis opined, “the claimant cannot manage any benefits that are forthcoming due to immaturity and poor judgment.” Tr. 765.

48. As a result of the April 19, 2016, consultative examination, Dr. Zlemke stated that Ms. [REDACTED]’s “judgment and insight appeared to be fair. She was able to discuss her family composition, health concerns, and mood with decent understanding.” However, Dr. Zlemke also stated, “Starla cannot manage her own money and does not have a bank account. Her partner pays all of the bills.” Tr. 816.

49. On July 22, 2016, medical records prepared by Dr. Saitz, a treating doctor, indicate that she has limited insight into the exacerbation of her symptoms. Tr. 856.

Reynaud's Phenomenon.

50. Ms. [REDACTED] was diagnosed with Reynaud's Phenomenon. This condition, "causes some parts of the body particularly fingers and toes to be affected causing them to be numb and cold in response to cold temperatures or stress. The smaller arteries that provide blood to your skin get narrow and limit blood flow to those affected areas. Women are more likely than men to have this. Lifestyle changes can help avoid things that may trigger Raynaud's like cold temperatures, emotional stress. Protecting self from cold temperatures can help. Will monitor for now. Patient is asymptomatic today. If lifestyle changes are attempted and symptoms worsen will consider medication. RTC as needed." Tr. 829, 860.

Asthma.

51. Ms. [REDACTED] was diagnosed with asthma. At one time, Ms. [REDACTED] was prescribed an inhaler. Tr. 797, 34.

Headaches.

52. Ms. [REDACTED] was diagnosed with headache syndrome. Tr. 797, 34.

Relevant Testimony.

53. The Vocational Expert Testimony was as follows (Tr. 72-73):

Q: I want you to assume a hypothetical individual of the claimant's age and education and the past work you have described. Further assume they can do a range of light work, except their ability to understand, remember and apply information would be limited to performing simple and routine tasks. She can read and understand short and simple information. Her ability to use judgment is limited to performing simple work-related decisions. She can interact with supervisors and coworkers occasionally. She could work around the public but should avoid direct interaction with them. She could deal with occasional changes in the routine work setting. Could that hypothetical individual perform any of the past – any work in the national economy?

A Yes, Your Honor. I'll identify – excuse me – a poultry eviscerator. The DOT 525.687-074. Light and unskilled with an SVP of 2. In the United States approximately 154,000 jobs. I would identify silver wrapper. The DOT is 318.687-018. Light with an SVP of 1. In the United States approximately 106,200 jobs. And I would identify a maid in the industry. The DOT is 323.687-014. Light and unskilled with an SVP of 2. In the United States, an excess of 500,000.

Q Is that testimony consistent with the DOT?

A It is, Your Honor.

Q If they were unable to interact with supervisors would there be any national work they could do?

A Oh, no. Actually, no.

Q If they missed two or more days of work a month that were unexcused would there be any national work they could do?

A No, Your Honor.

Q If they were unable to do simple, routine and repetitive tasks would there be any national work they could do?

A No.

ISSUES PRESENTED

- I. Whether the Commissioner erred as a matter of law in holding that the claimant did not meet the requirements of Listing 12.05B?
- II. Whether the Commissioner erred as a matter of law in failing to consider the Plaintiff's Agoraphobia?
- III. Whether the Commissioner erred as a matter of law by failing to formulate an RFC that takes into account restrictions related to all severe medical conditions?
- IV. Whether the Commissioner erred as a matter of law by failing to propose a complete hypothetical question to the Vocational Expert, taking into consideration the Plaintiff's limitations in Concentration, Persistence, and Pace?

**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.

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ARGUMENT

I.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN HOLDING THAT THE CLAIMANT DID NOT MEET THE REQUIREMENTS OF LISTING 12.05B.

Applicable law:

Listing 12.05 relates to an intellectual disorder. In this case, the Listing may be satisfied by proving the following:

B. Satisfied by 1, 2, and 3 (see 12.00H):

1. Significantly subaverage general intellectual functioning evidenced by a or b:
 - a. A full scale (or comparable) IQ score of 70 or below on an individually administered standardized test of general intelligence; or
 - b. A full scale (or comparable) IQ score of 71-75 accompanied by a verbal or performance IQ score (or comparable part score) of 70 or below on an individually administered standardized test of general intelligence; and
2. Significant deficits in adaptive functioning currently manifested by extreme limitation of one, or marked limitation of two, of the following areas of mental functioning:
 - a. Understand, remember, or apply information (see 12.00E1); or
 - b. Interact with others (see 12.00E2); or
 - c. Concentrate, persist, or maintain pace (see 12.00E3); or
 - d. Adapt or manage oneself (see 12.00E4); and
3. The evidence about your current intellectual and adaptive functioning and about the history of your disorder demonstrates or supports the conclusion that the disorder began prior to your attainment of age 22.

In this case, each of the requirements have been met. As discussed below, the ALJ erred in finding that the requirements were not met.

Argument:

The ALJ states, “in this case, the requirements are not met because although the claimant has a full-scale IQ below 70, she does not have significant deficits in adaptive functioning as required to meet listing 12.05.¹ As discussed above, the undersigned finds that the claimant has moderate limitations in the areas of mental functioning, i.e., understanding, remembering, or applying information, interacting with others, concentrating, persisting, or maintaining pace, and adapting or managing oneself. While the claimant has some low IQ scores in the 60’s, no examining, non-examining, or treating source has found that the claimant has marked or extreme limitations in the applicable “paragraph B” criteria to support a finding that the requirements of listing 12.05 are met.” Tr. 26 (emphasis added).

First, it is important to note that the ALJ concedes that Section B1(a) of the Listing was met because the Plaintiff’s IQ scores are in the 60’s. In a consultative examination report prepared by Dr. Davis after an examination on September 9, 2013, Ms. ██████ obtained a Full-Scale IQ of 68, which placed her overall functioning in the Mild range of Mental Retardation. Tr. 763 Dr. Davis noted that “the claimant shows symptoms of mental retardation including significantly subaverage intellectual functions with deficits in adaptive behavior.” Tr. 764. After a consultative examination and cognitive testing conducted by Dr. Zlomke, it was determined that Ms. ██████ obtained a Full-Scale IQ of 65, which ranks in the “extremely low range”. Tr. 817. Based on the available cognitive testing and evaluations, Ms. ██████’s intellectual functioning is significantly

¹Adapt or manage oneself is defined as follows:

Adapt or manage oneself (paragraph B4). This area of mental functioning refers to the abilities to regulate emotions, control behavior, and maintain well-being in a work setting. Examples include: responding to demands; adapting to changes; managing your psychologically based symptoms; distinguishing between acceptable and unacceptable work performance; setting realistic goals; making plans for yourself independently of others; maintaining personal hygiene and attire appropriate to a work setting; and being aware of normal hazards and taking appropriate precautions. These examples illustrate the nature of this area of mental functioning. We do not require documentation of all of the examples.

below average and demonstrates that she has symptoms of mental retardation. Thus, this Section of the Listing has been met.

Second, with respect to Section B3, the ALJ does not address this section at all. However, to briefly touch upon this Section, it is also met. The Plaintiff has been alleging that she is suffering from her medical conditions, and intellectual limitations, since the inception of the case. At the time the claim was filed, 9 ½ years ago, the Plaintiff was 18 years old. Additionally, she only completed the 8th grade and she was in special education classes when she was enrolled in school. Thus, the Plaintiff's disorder began before she was 22 years old.

The issue of contention is whether the Plaintiff's condition satisfied the criteria in Section B2. Here, the ALJ states, "While the claimant has some low IQ scores in the 60's, no examining, non-examining, or treating source has found that the claimant has marked or extreme limitations in the applicable "paragraph B" criteria to support a finding that the requirements of listing 12.05 are met." Tr. 26. It is in this statement that the ALJ erred.

In this case, there are, in fact, findings of "marked limitations" sufficient to find that the Section B2 criteria was met. The ALJ is incorrect.

One of the consultative examiners (a non-treating source), Dr. Zlomke, states that "Starla is significantly impaired in her ability to understand, carry out, and remember instructions. She is severely impaired in her ability to respond appropriately to supervision, coworkers, and work pressures within a work setting." Tr. 818. She is "markedly impaired" in "the ability to make judgments on simple work-related decisions." Tr. 820.

Dr. Zlomke's opinion is supported by the medical records. Ms. [REDACTED]'s ability to interact with people in a work setting is clearly severely impaired. The facts set forth above in Paragraphs 11 to 52 are incorporated herein by reference. As set forth therein, Ms. [REDACTED] suffers from

significant and explosive anger outbursts, she fights with random people, she has paranoia issues, she has tried to run people down in her car, and she has engaged in self harm. This certainly demonstrates a severe impairment. Additionally, her marked impairment to make judgments on simple work-related decisions is highlighted by the fact that she has difficulty with insight and judgment related to her medical condition and also has the inability to manage her own finances at home. See Para 46-46.

Additionally, the ALJ decision is internally inconsistent. On the one hand, the decision states that no doctor finds any marked limitations. On the other hand, the ALJ recognizes that Dr. Zlomke notes there are marked limitations, but then goes on to give “little weight” to the opinion. The ALJ states, “Dr. Zlomke, “opined that the claimant’s ability to . . . make judgments on simple work-related decisions is markedly impaired. [. . .] Dr. Zlomke further opined that the claimant’s ability to carry out complex instructions and make judgments on complex work-related decisions is extremely limited.” The ALJ assigned “little weight” to these opinions “as they are not consistent with or supported by her own examination findings or the objective evidence of record. For instance, Dr. Zlomke’s opinion that the claimant’s ability to make judgments on simple work-related decisions is markedly impaired is not consistent with her finding that the claimant’s judgment and insight was fair. The undersigned gives partial weight to the remainder of Dr. Zloke’s opinion, as it is somewhat consistent with the other opinions.” Tr. 34.

Assuming, *arguendo*, that the ALJ was free to discount Dr. Zlomke’s opinions regarding Plaintiff’s ability to make judgments on simple work-related decisions, the ALJ still erred. That is because there are other portions of Dr. Zlomke’s opinion that demonstrates there are “marked impairments” in the Plaintiff’s ability to interact with others and adapt or manage herself. Dr. Zlomke states, Ms. [REDACTED] “is severely impaired in her ability to respond appropriately to

supervision, coworkers, and work pressures within a work setting.” Tr. 818. This relates to Section 2b and 2d. While Dr. Zlomke does not use the word “marked”, his description of the limitations as “severely impaired” and can be fairly interpreted as meaning “marked” in this context. And the severe impairment described relates to interacting with others, such as supervisors and co-workers (2b) and adapting and managing herself (2d). Certainly, her ability to interact with others is severely, or in other words markedly, impaired as demonstrated above (Para 11 to Para 52). Moreover, her severe impairment in her ability to adapt and manage herself is demonstrated by her difficulties in handling work pressures in a work setting. The facts support this, as she experiences hallucinations, anger, agoraphobia, anxiety, Raynaud’s Phenomenon (which may be caused by stress and pressure), and cannot manage her own money. (Para 11 - 52).

Here, the ALJ attempted to discount Dr. Zlomke’s findings that were found to be “marked impairments”, as set forth in a checkbox form (Tr. 820), but as to all remaining aspects of the opinion the ALJ specifically stated, “the undersigned gives partial weight to the remainder of Dr. Zlomke’s opinion, as it is somewhat consistent with the other opinions.” Tr. 34. Thus, a plain reading of this portion of the decision demonstrates that the ALJ effectively gave weight to the portion of the opinion that finds the claimant is “severely impaired”.

Thus, even assuming, *arguendo*, that the ALJ was free to assign “little weight” to one part of Dr. Zlomke’s opinion, the ALJ specifically then gave more weight to the remainder of the opinion. In doing so, the ALJ effectively credited the portion of the opinion finding that the claimant had “severe”, meaning “marked”, limitations “in her ability to respond appropriately to supervision, coworkers, and work pressures within a work setting”. Those limitations directly relate to the Section 2b and 2d criteria and, if properly considered by the ALJ, would have provided ample support for a determination that the Section 2b and 2d criteria were satisfied because there

is proof that both functional areas have marked limitations. If the ALJ properly evaluated the findings of the “severe”, meaning “marked”, limitations, Ms. [REDACTED] would have been found to meet Listing 12.05B and she would have been found eligible for disability benefits.

Conclusion.

The ALJ erred in finding that “no examining, non-examining, or treating source has found that the claimant has marked or extreme limitations in the applicable “paragraph B” criteria to support a finding that the requirements of listing 12.05 are met.” Tr. 26. This was incorrect. First, Dr. Zlomke specifically determined that there were “marked limitations”. Second, Dr. Zlomke also found numerous “severe limitations” to exist. In this case, the Doctor’s findings of “severe limitations” equated to “marked limitations”, which were not properly considered by the ALJ. Thus, the ALJ’s decision erred by (1) determining that no doctor found “marked limitations” in adaptive functioning when, in fact, Dr. Zlomke specifically found “marked limitations”; and (2) by effectively crediting the existence of the “severe limitations” when finding the majority of Dr. Zlomke’s opinion to be “partially persuasive”, but then by failing to consider whether these “severe limitations” satisfy the Section 2b and 2d criteria. Thus, the ALJ’s decision is not based on substantial evidence and must be reversed and remanded for further consideration.

II.

**THE COMMISSIONER ERRED AS A MATTER OF
LAW IN FAILING TO CONSIDER THE PLAINTIFF’S
AGORAPHOBIA.**

Applicable law.

The Commissioner is obligated to consider all "medically determinable impairments" and consider all medical evidence, opinions of medical sources and other evidence. 20 C.F.R. §

404.1545. When the Commissioner's decision fails to address relevant medical opinions and medical evidence in the record, the decision must be reversed and remanded.

In the case of Woodbury v. Colvin, 2011 WL 5101531, at *4 (Dist. SC, 2011), the ALJ failed to address at Step Two a diagnosis of Panic Disorder with Agoraphobia. Thus, the ALJ did not reach any determination as to whether this condition was severe or non-severe. In the decision, the ALJ only made a passing mention at Step Four of the diagnosis of panic disorder, but failed to refer to the diagnosis of Agoraphobia and its potential impact on Plaintiff's ability to perform work. The ALJ's failure to address in the decision the medical diagnosis of Panic Disorder with Agoraphobia, and assess this impairment's impact on the Plaintiff's RFC, was found to constitute error mandating reversal and remand. 20 C.F.R. §§ 404.1520(a)(4)(ii) and (c), 1527(b), 1545. The Court in Woodbury further held that if the ALJ assessed and determined Plaintiff's Panic Disorder with Agoraphobia was a severe impairment, it would have then been necessary to assess the impact of that finding at each subsequent step of the disability evaluation process.

Argument.

Agoraphobia is defined as, an “abnormal fear of being helpless in a situation from which escape may be difficult or embarrassing that is characterized initially often by panic or anticipatory anxiety and finally by the avoidance of open or public places.” See <https://www.merriam-webster.com/dictionary/agoraphobia>.

In this case, Ms. [REDACTED] was diagnosed with Agoraphobia. Tr. 859, 908. Moreover, Dr. Zlomke recognizes the Plaintiff's history of Agoraphobia and notes that she may have difficulty leaving her home to seek proper medical treatment. He states, “[g]iven the longstanding nature of her symptoms and her difficulty with leaving the house, it may prove difficult for her to attend treatment.” Tr. 818. As discussed above under Point I, the ALJ gave Dr. Zlomke's opinion “partial

weight” (the only portion given “little weight” related to a specific finding of “marked” and “extreme limitations” in simple work-related decisions or following complex instructions; but the ALJ specifically gave “partial weight” to the remainder of the doctor’s opinion). Thus, the ALJ inherently credited Dr. Zlomke’s opinion that the Plaintiff will have difficulty leaving her home to attend treatment. Yet, despite the diagnosis of Agoraphobia that appears in the medical records, and Dr. Zlomke’s opinion that the Ms. [REDACTED] will have difficulty leaving her home to seek proper medical treatment, the ALJ failed to discuss the diagnosis of Agoraphobia, Dr. Zlomke’s opinion related to Agoraphobia, or the impact that this condition would have on the Plaintiff’s ability to leave her home and attend work on a full-time basis. Certainly, if she would have difficulty leaving her home to obtain medical treatment, she would have difficulty leaving her home for work.

The ALJ briefly notes that “the claimant has reported that she self-isolates and that she does not like to be around others due to anxiety . . .” Tr. 23. However, this was only a passing reference of her anxiety and her disdain for being around other people. This is similar to Woodbury, *supra*, where the ALJ only made a passing mention at Step Four of the diagnosis of panic disorder, but failed to refer to the diagnosis of Agoraphobia and its potential impact on Plaintiff’s ability to perform work. In this case, ALJ made a passing reference to the Plaintiff’s anxiety, and the Plaintiff’s reported self-isolation because she does not like to be around others, but failed to refer to the diagnosis of Agoraphobia and failed to discuss the potential impact that Agoraphobia has on Ms. [REDACTED]’s ability to perform work. Thus, ALJ’s failure to address in the decision the medical diagnosis of Agoraphobia, and assess this impairment’s impact on the Plaintiff’s RFC, is error mandating reversal and remand.

In addition, the ALJ notes that “the claimant has sought only sporadic treatment for her allegedly disabling mental impairments.” Tr. 30. The ALJ references her sporadic treatment and

notes she was discharged from her mental health treatment in 2013 due to no contact for 90 days.

Tr. 30. The ALJ also notes that she was discharged from her mental health treatment again in January of 2017 due to no contact for 90 days, and states “she had not been seen since July 2016”.

Tr. 31. Based on the context of these references by the ALJ, such as the Plaintiff’s “sporadic treatment” for her “allegedly” disabling mental impairments, it appears that the ALJ is undermining the severity of the Plaintiff’s conditions due to a lack of continuous mental health treatment. However, the ALJ cannot hold the Plaintiff’s apparent non-compliance with mental health treatment against her in this case.

In order to deny benefits for refusal to follow treatment, the refusal must be willful and without a justifiable excuse. Mendez v. Chater, 943 F.Supp 503, 508 (E.D. Pa. 1996)(*citing* Schena v. Sec’y of lth and Human Services, 635 F.2d 15 (1st Cir. 1980). When a claimant suffers from mental illness, “any noncompliance on her part could have been a result of her impairment and, therefore, neither willful nor without a justifiable excuse.” *Id.* Frankhauser v. Barnhart, 403 F. Supp. 2d 261, 277-78 (W.D.N.Y. 2005) (*holding* an ALJ must take into account whether a mentally ill (bipolar and personality disordered) claimant's failure to comply with prescribed treatment results from the mental illness itself); Brashears v. Apfel, 73 F. Supp. 2d 648, 650-52 (W.D. La. 1999) (*remanding* case for consideration of whether the claimant's noncompliance with prescribed treatment was excusable due to a mental impairment)). Courts considering whether a good reason supports a claimant's failure to comply with prescribed treatment have recognized psychological and emotional difficulties may deprive a claimant of “the rationality to decide whether to continue treatment or medication.” *See, e.g.,* Zeitz v. Sec’y of Health and Human Servs., 726 F.Supp. 343, 349 (D.Mass.1989) (*recognizing* claimant's agoraphobia, a psychosomatic anxiety-related disorder, “may defy any generally prescribed treatment requiring

the will of the individual claimant to recover,” such that claimant's failure to follow prescribed treatment, including taking prescribed medications and attending group therapy sessions, did not render claimant ineligible for disability benefits); see also Thompson v. Apfel, No. 97CIV.7697, 1998 WL 720676, at *6 (S.D.N.Y. Oct.9, 1998) (*holding* ALJ erred in failing to consider whether claimant's psychological and emotional difficulties deprived claimant of the rationality to decide whether to continue treatment or medication). In this case, the ALJ did not take into account that Ms. [REDACTED]'s struggle with Agoraphobia was a justifiable reason that her treatment was sporadic and why she was discharged from her mental health therapy numerous times due to lack of contact. In fact, Dr. Zlomke specifically recognized that, “[g]iven the longstanding nature of her symptoms and her difficulty with leaving he house, it may prove difficult for her to attend treatment.” Tr. 818. Additionally, she has demonstrated “little insight into herself and her condition”. Tr. 735. Thus, The ALJ erred by apparently holding the Plaintiff’s sporadic treatment against her without considering whether her Agoraphobia deprived her of the rationality to decide whether to continue treatment.

Conclusion.

The ALJ failed to refer to the diagnosis of Agoraphobia and its potential impact on Plaintiff's ability to perform work. The ALJ's failure to address in the decision the medical diagnosis of Agoraphobia, and assess this impairment's impact on the Plaintiff's RFC, was error mandating reversal and remand. Additionally, the ALJ also erred in failing to whether the Plaintiff's Agoraphobia was the cause of her sporadic mental health treatment.

III.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO FORMULATE AN RFC THAT TAKES INTO ACCOUNT RESTRICTIONS RELATED TO ALL SEVERE MEDICAL CONDITIONS.

Applicable law:

A determination that the Claimant's medical condition is a severe impairment means the ALJ found the condition significantly limited the Claimant's physical and/or mental ability to do basic work activities. See 20 C.F.R. § 404.1520(c); Raduc v. Comm'r of Soc. Sec., 380 F. App'x 896, 898 (11th Cir. 2010) (“By definition, a severe impairment limits significantly a claimant's ability to do basic work activities.”). When a medical condition has been found to be a severe impairment, the ALJ must either include functional limitations in the RFC determination that account for the claimant's severe medical conditions or explain why no such limitations were included. Hill v. Saul, No. 8:19-cv-121-T-TGW, 2020 WL 1430917, at *4 (M.D. Fla. Mar. 24, 2020); See Gurske v. Comm'r of Soc. Sec., No. 6:17-cv-2050-Orl-DNF, 2019 WL 643722, at *3 (M.D. Fla. Feb. 15, 2019); Battles, 2016 WL 3360428 at *3; Reis, 2012 WL 3231092, at *4. Where the ALJ fails to do either, courts reverse and remand the ALJ's decision for further proceedings. Id.

Argument:

In this case, the ALJ found that the Plaintiff's had numerous physical conditions that were severe, but failed to incorporate any limitations for these conditions into the RFC. The ALJ wrote:

“With respect to the claimant's physical impairments, viewing the evidence in the light most favorable to the claimant, the undersigned has limited the claimant to light work. The claimant has had minimal recurrent treatment for any physical impairment. She has been diagnosed with **asthma** and prescribed an inhaler at one time, but her asthma is stable with generally normal respiratory exams. The claimant did not require emergency room treatment or inpatient treatment for an acute exacerbation of her asthma during the adjudication

period. The claimant has been diagnosed with migraines. Her migraines are managed with medication (Topomax). The claimant's neurological exams are generally normal, she has not been under the regular care of a neurologist, and as with her asthma, the claimant did not require emergency room or inpatient treatment for migraines during the adjudication period. The claimant sought treatment for back pain in 2015. Treatment records document minimal abnormal findings related to claimant's back and X-rays of the claimants' lumbar spine taken in July 2014 were normal. The claimant's back pain was treated conservatively with medication and occasional abdominal pain. She was evaluated by a gastroenterologist in 2017 but her workup was largely unremarkable other than gastritis, an H. Pylori like infection and a ruptured ovarian cyst. There are no further complaints of abdominal pain after August 2017 until February 2019. The claimant was diagnosed with Raynaud's Phenomenon in August 2015. The claimant's treating provider recommended lifestyle changes and monitoring only. The claimant has not required medication for treatment of Raynaud's or other treatment for this condition since 2015." Tr. 36-37.

For the purpose of this Argument, we will address only three of these physical conditions, which we believe strongly support remand: Raynaud's Phenomenon, Asthma, and Migraines. In this case, the RFC does not contain any limitations for these conditions. For each of these conditions, the ALJ erred by failing to assign limitations in the RFC. Additionally, the ALJ did not explain why no limitations were assigned. The ALJ simply limits Ms. [REDACTED] to "light work", and then proceeds to list each condition with some of the treatment history. However, for each of the three conditions we will address below, the ALJ does not assign any limitations to the RFC, nor does he adequately state why no limitation is included in the RFC.

Reynaud's Phenomenon.

Ms. [REDACTED] was diagnosed with Reynaud's Phenomenon. This condition, "causes some parts of the body particularly fingers and toes to be affected causing them to be numb and cold in response to cold temperatures or stress. The smaller arteries that provide blood to your skin get

narrow and limit blood flow to those affected areas. Women are more likely than men to have this. Lifestyle changes can help avoid things that may trigger Raynaud's like cold temperatures, emotional stress. Protecting self from cold temperatures can help. Will monitor for now. Patient is asymptomatic today. If lifestyle changes are attempted and symptoms worsen will consider medication. RTC as needed." Tr. 829, 860.

The ALJ states: "the claimant was diagnosed with Raynaud's Phenomenon in August 2015. The claimant's treating provider recommended lifestyle changes and monitoring only. The claimant has not required medication for treatment of Raynaud's or other treatment for this condition since 2015." Tr. 36-37.

This is essentially a recitation of the diagnosis of the condition, and medical recommendation as to how to properly care for the condition. The medical records clearly state that the Plaintiff must protect herself from cold temperatures and avoid emotional stress. However, the ALJ does not include any environmental limitations in the RFC, nor does the ALJ include any limitations or accommodations to help Ms. [REDACTED] avoid or reduce stress while at work. The ALJ also does not explain why such restrictions or accommodations were omitted. This was error.

Additionally, the ALJ did not ask the Vocational Expert any questions related to whether the number of available jobs would be reduced, or eliminated altogether, if additional environmental limitations or additional accommodations to reduce stress levels at work were required. This was also error.

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); *Jones v. Apfel*, 190 F.3d 1224, 1229 (11th Cir.1999), *cert. denied*, 529 U.S. 1089, 120 S.Ct. 1723, 146 L.Ed.2d 644 (2000)(*holding* that In order for a vocational expert's testimony to constitute substantial evidence, the ALJ must pose a hypothetical question which comprises all of the claimant's impairments); *Wilson v. Barnhart*, 284 F.3d 1219 (11th Cir. 2002).

In this case, the ALJ failed to pose a hypothetical question to the VE that accounted for certain environmental limitations (i.e., such as avoidance of cold). The ALJ also failed to pose a hypothetical question to the VE that accounted for an accommodation to help reduce the Plaintiff's stress levels at work. The ALJ failed to pose such hypotheticals to the VE despite the fact that the medical records clearly specified that such lifestyle changes were necessary. In fact, the ALJ recognized that Ms. [REDACTED]'s doctors recommended lifestyle changes, yet the ALJ failed to incorporate such lifestyle changes into the RFC or into the hypothetical presented to the VE. Moreover, there is no explanation whatsoever in the decision as to why such lifestyle changes were not incorporated into the RFC.

Asthma.

The Plaintiff's Asthma was determined to be a severe condition. The ALJ acknowledges that at one time the Plaintiff was prescribed an inhaler. However, the ALJ does not explain why environmental limitations, such as no exposure to dust and irritants, were not provided for in the RFC. Moreover, similar to Raynaud's Phenomenon, above, the VE was not asked any questions pertaining to the availability of jobs if Ms. [REDACTED] required additional environmental limitations due to her asthma. This is reversible error.

Migraines.

In Dial v. Soc. Sec., 2020 WL 551338 (MDFL Sept. 14, 2020), the Court held that despite having found the Claimant's migraines to be severe, the ALJ did not appear to account for the Claimant's migraines in the RFC determination. The Court found this was error and reversed and remanded the case for further consideration.

Similarly, in this case, the ALJ found that the Plaintiff's headaches were severe. However, the ALJ does not account for Ms. [REDACTED]'s migraines in the RFC determination. The ALJ also does not explain why no such limitations were included.

Conclusion:

In this case, the ALJ found that the Plaintiff's Raynaud's Phenomenon, Asthma, and Migraines, were all severe conditions. However, the ALJ failed to incorporate any limitations for these conditions into the RFC. The ALJ also failed to explain why no such limitations were included in the RFC. Thus, the ALJ erred and the decision denying benefits must be vacated and the case remanded for further consideration.

IV.

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

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).

Winschel v Commissioner, 631 F.3d at 1180 (11th Cir. 2011) holds, “[W]hen medical evidence demonstrates that a claimant can engage in simple, routine tasks or unskilled work despite limitations in concentration, persistence, and pace, courts have concluded that limiting the hypothetical to include only unskilled work sufficiently accounts for such limitations.” However, the District Court will find error when the ALJ did not state in his decision that medical evidence

supports a finding that claimant could perform basic work activities in spite of his moderate limitation in concentration, persistence, and pace and where the ALJ also did not include, either explicitly or implicitly, those limitations in the hypothetical question. Blair v. Social Security, Case No: 6:11-cv-401 (MDFL, Aug. 18, 2012)

Argument:

In this case, the ALJ states, “the undersigned finds that the claimant is able to perform a range of unskilled work notwithstanding her severe mental impairment, including her intellectual disorder.” Tr. 32. Moreover, the ALJ limits the claimant to “simple and routine tasks” to “account for her moderate limitations . . . in concentrating, persisting and maintaining pace.” Tr. 33.

However, despite these findings, the ALJ did not explicitly or implicitly include those limitations in the hypothetical question posed to the VE.

The Vocational Expert Testimony was as follows:

Q: I want you to assume a hypothetical individual of the claimant’s age and education and the past work you have described. Further assume they can do a range of light work, except their ability to **understand, remember and apply information** would be limited to performing simple and routine tasks. She can read and understand short and simple information. **Her ability to use judgment is limited to performing simple work-related decisions.** She can interact with supervisors and coworkers occasionally. She could work around the public but should avoid direct interaction with them. She could deal with occasional changes in the routine work setting. Could that hypothetical individual perform any of the past – any work in the national economy?

A Yes, Your Honor. I’ll identify – excuse me – a poultry eviscerator. The DOT 525.687-074. Light and unskilled with an SVP of 2. In the United States approximately 154,000 jobs. I would identify silver wrapper. The DOT is 318.687-018. Light with an SVP of 1. In the United States approximately 106,200 jobs. And I would identify a maid in the industry. The DOT is 323.687-014. Light and unskilled with an SVP of 2. In the United States, an excess of 500,000.

Q Is that testimony consistent with the DOT?

A It is, Your Honor.

Q If they were unable to interact with supervisors would there be any national work they could do?

A Oh, no. Actually, no.

Q If they missed two or more days of work a month that were unexcused would there be any national work they could do?

A No, Your Honor.

Q If they were **unable** to do simple, routine and repetitive tasks would there be any national work they could do?

A No.

Tr. 72-73.

In this series of hypothetical questions, the Plaintiff was limited to simple and routine tasks for very specific reasons. First, the limitation to simple and routine tasks was as a result of limitations in understanding, remembering and applying information. Second, the limitation is a result of limitations in use of judgment. The limitation to simple routine tasks, as posed to the VE, was not connected to limitations in concentrating, persisting, or maintaining pace. There is no question simply limiting the claimant to the ability to do “simple, routine, and repetitive tasks”, and there is no question limiting the claimant to “simple, routine, and repetitive tasks” specifically as a result of difficulties with concentration, persistence, and pace.

The problem with the hypothetical questions provided by the ALJ is that they resulted in the VE providing three possible jobs, all of which involve repetitive or short cycle work which are relatively fast-paced. The Plaintiff asserts that repetitive or short cycle work is performed at a production pace, which is inconsistent with moderate limitations in concentration, persistence, and

pace. If the ALJ presented a hypothetical to the VE that was specific to the limitations that were found to exist – namely moderate limitations with concentration, persistence, and pace – it is possible the VE would have found that the jobs presented were not appropriate any longer, or that, perhaps, there were not a significant number of jobs available in that national economy that would have been appropriate for Ms. [REDACTED].

Conclusion:

The ALJ erred in not presenting a complete hypothetical to the VE. Thus, the ALJ erred and the decision denying benefits must be vacated and the case remanded for further consideration.

CONCLUSION

For the reasons stated above, the ALJ's decision is not based upon substantial evidence. Therefore, Ms. [REDACTED] asks that the denial of benefits be vacated and that the claim be remanded for further proceedings.

Dated: New York, NY
[REDACTED]

Yours, etc.,

SAMPLE

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