

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
XXXXXX XXXX,

Plaintiff,

Case No.: XXXXX

vs.

ANDREW SAUL, Commissioner of the  
Social Security Administration,

Defendant.

-----X

---

**PLAINTIFF'S BRIEF  
IN SUPPORT OF MOTION FOR  
JUDGMENT ON THE PLEADINGS**

---

BRYAN KONOSKI, ESQ  
*Attorney(s) for the Plaintiff*  
Konoski & Partners, P.C.  
305 Broadway, 7<sup>th</sup> Floor  
New York, NY 10007  
(212) 897-5832  
Fax: (718) 351-1918

# **TABLE OF CONTENTS**

INTRODUCTION .....	1
STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS .....	1
Elements .....	1
Undisputed Material Facts .....	2
Summary and Course of the Administrative Proceedings .....	2
Statement of Facts .....	2
Age, Education and Work Experience .....	2
Bi-Lateral Carpal Tunnel and Use of Wrist Supports. ....	2
Bell’s Palsy .....	3
Headaches. ....	4
Assistive Walking Devices .....	5
Stooping. ....	6
Obesity .....	6
Dr. Weissman’s Experience Treating the Plaintiff .....	6
ISSUES PRESENTED .....	7
STATUTORY AND REGULATORY FRAMEWORK .....	8
STANDARD OF REVIEW .....	9
ARGUMENT .....	9

I.	THE COMMISSIONER ERRED AS A MATTER OF LAW BY IMPROPERLY EVALUATING THE OPINIONS OF THE PLAINTIFF’S MEDICAL PROVIDERS. ....	9
II.	THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY EVALUATE THE PLAINTIFF’S BILATERAL CARPAL TUNNEL SYNDROME, INCLUDING BY FAILING TO PROVIDE FOR ANY RESTRICTIONS FOR THIS CONDITON IN THE RFC AND BY FAILING TO PROVIDE FOR ANY MANIPULATIVE LIMITATIONS IN THE HYPOTHETICAL QUESTION TO THE VE. ....	18
III.	THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO EVALUATE THE PLAINTIFF’S USE OF A CANE IN VIOLATION OF SSR 96-9 .....	20
IV.	THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY CONSIDER AND EVALUATE THE PLAINTIFF’S OBESITY, IN VIOLATION OF SSR 19-2 .....	22
V.	THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO CONSIDER THE PLAINTIFF’S COMPLETE INABILITY TO STOOP, IN VIOLATION OF SSR 96-9P .....	24
VI.	THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER A “CLOSED PERIOD” OF DISABILITY. ....	25
	CONCLUSION .....	30

## **INTRODUCTION**

Pursuant to 42 U.S.C. § 405(g), Plaintiff, XXXXXX XXXXX (“Ms. XXXXX”), 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 his claim for Social Security 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. On August 15, 2017, Ms. XXXXX protectively filed an application for supplemental security income for a period of disability and disability insurance benefits, alleging disability beginning on the application date of August 15, 2017. The claim was initially denied on December 14, 2017. Thereafter the claimant filed a request for a hearing, which was subsequently held on September 17, 2019. The ALJ denied the claim on November 20, 2019. Tr. 9-22.

2. Ms. XXXXX filed a request for review with the Appeals Council on November 27, 2019. Tr. 5. The Appeals Council denied the Request for Review on June 26, 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. XXXXX was born on January 6, 1977. Tr. 20.
4. Ms. XXXXX has less than a high school education. She did not complete her GED. Tr. 20. Her past jobs included working as a childcare worker and medical assistant. Tr. 20.

**Relevant Medical Evidence.**

**Bi-Lateral Carpal Tunnel and Use of Wrist Supports:**

5. On August 11, 2016, due to complaints of numbness and pain in the bilateral hands, the Plaintiff underwent EMG/NCV studies of the upper extremities. The testing revealed evidence of moderate right carpal tunnel syndrome (median nerve entrapment at the wrist) affecting sensory and motor components. It further showed evidence of right ulnar motor nerve neuropathy. Tr. 494. This was reconfirmed in testing performed on November 16, 2017. Tr. 499.

6. On October 23, 2017, the Consultative Examination in Internal Medicine noted

that the Plaintiff has a full range of motion in her forearms and wrists bilaterally. Tr. 325. Also, according to the doctor, hand and finger dexterity was intact, and grip strength was 5/5 bilaterally. Tr. 326. This was a one-time examination of the Plaintiff performed by a non-treating physician.

7. On November 16, 2017, and November 27, 2017, the medical records indicate that Ms. XXXXX experienced numbness in her hands. Tr. 289 and 392.

8. On October 19, 2018, medical records indicate that due to carpal tunnel syndrome her hands fall asleep a lot and are numb a lot. Medical records note that she was using her wrist supports. Tr. 386.

9. On February 1, 2018, the records indicate that the Plaintiff experienced numbness in both hands. Tr. 419.

10. On March 14, 2018, medical records indicate that the Plaintiff experienced numbness in her hands. The records indicate that she had carpal tunnel syndrome. Tr. 414.

11. On June 22, 2018, and again on October 19, 2018, the Plaintiff's medical records indicate that she suffers from bilateral carpal tunnel syndrome. Tr. 440 and 455.

12. On August 12, 2019, Dr. Weissman reported in his Medical Source Statement that Ms. XXXXX has significant limitations with reaching, handling, and fingering, and that she will only be able to engage in fine motor manipulations with her hands approximately 10% of a workday. Tr. 337.

### **Bell's Palsy**

13. The medical records explain the general symptoms of the condition known as Bell's Palsy. The records state that, "Bell's Palsy is a condition in which the muscles on one side of the face become paralyzed. This often causes one side of the face to droop." Tr. 485.

14. On September 12, 2017, the Plaintiff was seen in NY Presbyterian Hospital for right

sided Bell's Palsy. Tr. 393. She went to the hospital because she lost vision in her eye and experienced numbness in her face. Tr. 41-42.

15. Medical records dated October 10, 2017, note that the Plaintiff was in NY Presbyterian Hospital for right sided Bell's Palsy. An MRI was ordered. Tr. 393.

16. On October 11, 2017, an MRI was performed of the Plaintiff's brain. The MRI was normal. Tr. 394.

17. On December 1, 2017, at the time of her Psychiatric Consultative Examination, doctors noted that she had a "mild articulation problem" and that "half of her face looked numb". Tr. 62.

18. On February 1, 2018, the records indicate that the Plaintiff has a history of Bell's Palsy, and has numbness in both hands, and a feeling of imbalance and numbness in her left leg. Tr. 419.

19. By May 14, 2018, records indicate that the Plaintiff still suffers from Bell's Palsy, but that it is improving. However, she still had numbness on the right side of her face. Tr. 414.

20. Finally, about a year after the Plaintiff's diagnosis of Bell's Palsy, on October 19, 2018, the Plaintiff's doctor noted that there had been much improvement with her right sided Bell's Palsy, although she still had a little eye drooping. Tr. 386.

**Headaches:**

21. On December 23, 2016, the Plaintiff complained to her doctors that she suffered from migraine headaches that were accompanied by nausea and vomiting. As a result, she was referred to neurologist. Tr. 377.

22. Ms. XXXXX's headaches continued to persist over time. On August 24, 2017, a CT scan of the Plaintiff's brain was performed due to her headaches. However, the CT scan was normal. Tr. 396.

23. On October 11, 2017, an MRI was performed of the Plaintiff's brain. The MRI was normal. (Tr. 394).

24. On May 14, 2018, medical records state that the Plaintiff is "always having headaches." (Tr. 416).

25. On September 17, 2019, at her hearing, Ms. XXXXX testified that she suffered from daily headaches. Tr. 38. The headaches last approximately 2 hours at a time. Tr. 39. The headaches cause her difficulty in concentrating and that they are really bad. Tr. 45. When she suffers from her headaches she must go to sleep to control them. Tr. 38. The headaches are alleviated by crying herself to sleep. Tr. 39.

**Assistive Walking Devices:**

26. On November 9, 2017, the Consultative Examination in Internal Medicine noted that the Plaintiff uses no assistive devices to ambulate. (Tr. 325)

27. However, shortly after the Consultative Examination noted above, the symptoms of her medical condition required the use of a cane. The need for a cane is apparently due to the fact that Ms. XXXXX experiences numbness and imbalance in her leg.

28. On February 1, 2018, the records indicate that the Plaintiff has a history of Bell's Palsy and has a feeling of imbalance and numbness in her left leg. She began experiencing the imbalance for the last 2 months. Tr. 419.

29. Approximately a year and half later, Ms. XXXXX was still using her cane due to imbalance. On August 12, 2019, a Medical Source Statement completed by Dr. Weissman, the Plaintiff's treating doctor, noted that she uses a cane. Tr. 334.

30. Moreover, Dr. Weissman reports that the Plaintiff needs to elevate her legs 30-degrees for as much as 4-hours per day due to sciatica. (Tr. 334).



**Stooping**

31. The August 12, 2019, Medical Source Statement completed by the Plaintiff's treating doctor states that she can "never" stoop. (Tr. 337).

**Obesity:**

32. On October 23, 2017, the Consultative Examination in Internal Medicine noted that the Plaintiff is "extremely obese". (Tr. 325). At that time, she was 330-pounds. (Tr. 324).

33. Two years later, on September 17, 2019, at the time of her hearing, Ms. XXXXX testified that she was 280 pounds. (Tr. 43).

**Dr. Weissman's Experience Treating the Plaintiff:**

34. Dr. Weissman is the Plaintiff's treating doctor. He provided his medical records and also provided his opinion in a Medical Source Statement. Tr. 334. He treats Ms. XXXXX once every 3-4 months. Tr. 334. Dr. Weissman has been treating Ms. XXXXX consistently since at least the year 2015. Tr. 339 (date of medical record entry).

## **ISSUES PRESENTED**

- I. WHETHER THE COMMISSIONER ERRED AS A MATTER OF LAW BY IMPROPERLY EVALUATING THE OPINIONS OF THE PLAINTIFF'S MEDICAL PROVIDERS.
- II. WHETHER THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY EVALUATE THE PLAINTIFF'S BILATERAL CARPAL TUNNEL SYNDROME, INCLUDING BY FAILING TO PROVIDE FOR ANY RESTRICTIONS FOR THIS CONDITION IN THE RFC AND BY FAILING TO PROVIDE FOR ANY MANIPULATIVE RESTRICTIONS IN THE HYPOTHETICAL QUESTIONS TO THE VE.
- III. WHETHER THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO EVALUATE THE PLAINTIFF'S USE OF A CANE IN VIOLATION OF SSR 96-9.
- IV. WHETHER THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY CONSIDER AND EVALUATE THE PLAINTIFF'S OBESITY, IN VIOLATION OF SSR 19-2P.
- V. WHETHER THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY CONSIDER THE PLAINTIFF'S COMPLETE INABILITY TO STOOP, IN VIOLATION OF SSR 96-9p.
- VI. WHETHER THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER A "CLOSED PERIOD" OF DISABILITY.

**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 BY IMPROPERLY EVALUATING THE OPINIONS OF THE PLAINTIFF'S MEDICAL PROVIDERS.**

#### **Applicable law:**

The Tenth Circuit held that the ALJ must consider certain specific factors prior to rejecting the treating physician's opinions. Drapeau v. Massanari, 255 F.3d 1211, 1213 (10<sup>th</sup> 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) consistency 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 contradict the opinion. Id., *citing* Goatcher v. United States Dep't of Health Human Servs., 52 F.3d 288, 290 (10<sup>th</sup> Cir. 1995). See also White v. Massanari, 271 F.3d 1256, 1259 (10<sup>th</sup> 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 discounting the treating doctor's opinion. See also 20 CFR § 404.1520c.

**Argument:**

In this case, the ALJ found the treating doctor's opinion to be "unpersuasive". The ALJ states:

"The opinion of Dr. Weissman is unpersuasive as it is inconsistent with and unsupported by the overall record. The evidence shows that the claimant's bronchial asthma has not resulted in any emergency room or hospitalizations, her lungs are clear, pulmonary function studies have indicated at most mild findings. With respect to her musculoskeletal complaints, the claimant has normal strength in the upper and lower extremities, and grip strength is 5/5 with intact hand and finger dexterity. There is also normal range of motion of the wrists and upper extremities. The claimant uses no assistive devices, she has had only conservative treatment and the physician's overall assessment is contradicted by the substantial evidence." Tr. 19.

The ALJ's assessment above failed to fully evaluate the 6-factors enumerated above. Each factor will be closely analyzed below.

However, before beginning the point-by-point analysis, it is important to note at the outset, that the ALJ found Dr. Weissman's opinion to be "unpersuasive" based solely on outdated information, which appears to be derived from a Consultative Examination by Dr. Teli. Tr. 325-326. Notably, the ALJ does not reference any of the medical records she is relying on to discount the treating physician's opinions. She simply issues a conclusory statement that "the physician's overall assessment is contradicted by the substantial evidence." A close reading of the decision, and the relevant medical evidence, reveals that the reference to "normal strength in the upper and lower extremities, and grip strength of 5/5, with intact hand and finger dexterity", is referenced only in the Consultative Examination by Dr. Teli. Tr. 325-326.

Moreover, the determination that “the claimant uses no assistive devices” is also derived from Dr. Teli’s evaluation. However, as discussed below, relying on this portion of Dr. Teli’s evaluation was clear error. In fact, the **Plaintiff’s uses a cane**. The Plaintiff’s need to use a cane occurred *after* Dr. Teli’s Consultative Examination. Yet, the ALJ completely disregarded the treating physician’s opinion that the Plaintiff needed to use a cane and the medical findings that support the conclusion that the cane was medically necessary.

Besides the Consultative Examination by Dr. Teli, there are no other medical records, that the ALJ could possibly reference to support the ALJ’s decision finding the treating doctor “unpersuasive”. However, as addressed below, relying on Dr. Teli’s Consultative Examination to discredit the treating physician’s opinion was improper pursuant to 20 CFR § 404.1520(c) and the point-by-point analysis.

We will now turn to the point-by-point analysis below.

**(1) the length of the treatment relationship and the frequency of examination:**

Dr. Teli saw Ms. XXXXX only one time for a Consultative Examination. However, Dr. Weissman is the Plaintiff’s regular treating doctor. Dr. Weissman’s provided Ms. XXXXX’s medical records, which are part of the administrative record, and she also provided her opinion in a Medical Source Statement. Tr. 334. She treats Ms. XXXXX once every 3-4 months. Tr. 334. Dr. Weissman has been treating and observing Ms. XXXXX consistently since the year 2015. Tr. 339 (date of medical record entry).

This factor, # 1, was not evaluated or discussed by the ALJ. The ALJ did not compare, or take into account, the lengthy treatment relationship between Ms. XXXXX and Dr. Weissman.

**(2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed:**

As discussed more fully below, the Consultative Examination performed by Dr. Teli was based on a one-time encounter. The treating physician had a treatment relationship with the Plaintiff since at least the year 2015. Moreover, the treating doctor's evaluation and opinions were supported by objective testing such as an EMG/NCV study. This factor, #2, was not analyzed by the ALJ.

**(3) the degree to which the physician's opinion is supported by relevant evidence:**

Dr. Teli issued his opinion on October 23, 2017. Tr. 325-326.

However, before Dr. Teli performed his evaluation, Ms. XXXXX had already been diagnosed with carpal tunnel syndrome. On August 11, 2016, due to complaints of numbness and pain in the bilateral hands, Ms. XXXXX underwent EMG/NCV studies of the upper extremities. The testing revealed evidence of moderate right carpal tunnel syndrome (median nerve entrapment at the wrist) affecting sensory and motor components. It further showed evidence of right ulnar motor nerve neuropathy. Tr. 494. This was reconfirmed in testing performed on November 16, 2017. Tr. 499.

Thus, proof that Ms. XXXXX suffered from carpal tunnel syndrome existed at least 2-months *before* Dr. Teli performed his evaluation.

Moreover, even *after* Dr. Teli performed his evaluation, and for approximately 2 years thereafter and up until the time of the disability hearing, the medical records consistently reflected that the Plaintiff experienced bilateral numbness in her hands due to carpal tunnel syndrome.

Specifically, on November 16, 2017, and November 27, 2017, the medical records indicate that Ms. XXXXX experienced numbness in her hands (Tr. 289 and 392); on October 19, 2018, medical records indicate that due to carpal tunnel syndrome her hands fall asleep a lot and are

numb a lot (Tr. 386), medical records note that she was using her wrist supports (Tr. 386); on February 1, 2018, the records indicate that the Plaintiff experienced numbness in both hands (Tr. 419); on March 14, 2018, medical records indicate that the Plaintiff experienced numbness in her hands and that she had carpal tunnel syndrome (Tr. 414); on June 22, 2018, and again on October 19, 2018, the Plaintiff's medical records indicate that she suffers from bilateral carpal tunnel syndrome (Tr. 440 and 455). Based on extensive experience observing and treating Ms. XXXXX, on August 12, 2019, Dr. Weissman reported in the Medical Source Statement that Ms. XXXXX has significant limitations with reaching, handling, and fingering, and that she will only be able to engage in fine motor manipulations with her hands approximately 10% of a workday. Tr. 337.

Thus, Dr. Teli's opinion that the Plaintiff effectively had no significant issues with her hands was sandwiched between positive testing that conclusively proved the existence of carpal tunnel syndrome, followed by approximately 2 years of medical records that consistently showed that Ms. XXXXX suffered from bilateral numbness in her hands and bilateral carpal tunnel syndrome.

Notably, Dr. Teli's opinion did not address the positive testing that conclusively proved the existence of carpal tunnel syndrome, did not address the numbness in Ms. XXXXX's hands, and did not address whether it was necessary for Ms. XXXXX to use wrist support. Moreover, Dr. Teli's diagnosis did not include, nor did his evaluation fully consider, the existence of carpal tunnel syndrome (Tr. 326), despite the fact that Ms. XXXXX was already diagnosed as having carpal tunnel syndrome after an objective EMG/NCV study. Tr. 494.

Dr. Teli's evaluation and opinion is clearly not reliable considering the fact that he completely overlooked and failed to even discuss the positive EMG/NCV study finding. In fact, Dr. Teli never mentioned the carpal tunnel syndrome and failed to address the numbness in Ms.



XXXXXX's hands. Nonetheless, the ALJ erroneously chose to rely on the evaluation and findings of Dr. Teli in order to discredit the treating physician, Dr. Weissman. This rationale simply makes no sense and is not supported by substantial evidence in the record. Additionally, the fact that the ALJ failed to cite directly to any medical records in finding Dr. Weissman "unpersuasive" further underscores the point that the ALJ's decision is flawed.

The ALJ chose to disregard the observations and opinions of Ms. XXXXXX's treating physician who Ms. XXXXXX was consistently treating with since at least the year 2015. Dr. Weissman reported in her Medical Source Statement that Ms. XXXXXX has significant limitations with reaching, handling, and fingering, and that she will only be able to engage in fine motor manipulations with her hands approximately 10% of a workday. Tr. 337.

Instead of relying on Dr. Weissman's opinions, which are based on a long-standing treatment relationship and objective studies, the ALJ focused on the unreliable evaluation and findings of Dr. Teli that were formulated after a brief one-time encounter – and which patently overlooked the existence of carpal tunnel syndrome. The ALJ did not provide any reasonable explanation for relying on Dr. Teli's evaluation other than by providing a conclusory statement that "the [treating physician's] overall assessment is contradicted by the substantial evidence", without actually citing to any evidence in the record for that conclusion (other than a brief recitation of Dr. Teli's evaluation).

Moreover, the ALJ did not analyze or discuss the fact that Dr. Teli completely failed to discuss or even note the positive diagnosis of carpal tunnel syndrome or the numbness that Ms. XXXXXX experiences. This alone should have rendered Dr. Teli's evaluation and findings unreliable.

If the ALJ properly and logically evaluated the evidence, the only reasonable outcome would have been to reject Dr. Teli's opinion, which would have ultimately resulted in Dr. Weissman's opinions being found persuasive. This would have resulted in Ms. XXXXX being awarded disability benefits.

**(4) consistency between the opinion and the record as a whole:**

The discussion set forth above under #3 is incorporated herein by reference.

However, under this point, it is also important to note that the ALJ states "the claimant uses no assistive devices", which is inaccurate. Once again, the ALJ seems to quote this statement from Dr. Teli's evaluation. The ALJ seems to rely on the fact that Ms. XXXXX purportedly does not use assistive devices as another basis to find the treating physician's opinion to be "unpersuasive". However, this is incorrect. In fact, the Plaintiff uses a cane to ambulate, which the ALJ failed to take into consideration (this is also addressed under Point III, below).

Dr. Weissman, the treating physician, specifically notes that Ms. XXXXX uses a cane to ambulate. In fact, a fair reading of the medical records demonstrates that the cane was medically necessary. The cane is medically necessary due to the fact that Ms. XXXXX experiences numbness and imbalance in her leg. On February 1, 2018, the records indicate that the Plaintiff has a history of Bell's Palsy and has a feeling of imbalance and numbness in her left leg. She began experiencing the imbalance approximately 2-months before the February 1, 2018 medical appointment with her treating physician. Tr. 419.

It is important to note that the Plaintiff's balance difficulties and the need for the cane developed *after* Dr. Teli's evaluation of October 23, 2017 (i.e., 2-months before the February 1, 2018 examination where imbalance was first reported, would place the onset of imbalance on or about December 1, 2017). In all fairness to Dr. Teli, it would not have been possible for him to

have considered the cane usage since the Plaintiff was not using a cane at the time of the Consultative Examination.

However, this is exactly why the ALJ's finding that the claimant does not use assistive devices is erroneous and not based on substantial evidence. The ALJ reached this conclusion based on Dr. Teli's evaluation. However, at the time of Dr. Teli's evaluation the Plaintiff was not yet experiencing imbalance and did not yet need a cane. Thus, the fact that the ALJ found that the Plaintiff did not need an assistive device, which was derived from Dr. Teli's evaluation, was plain error and not based on substantial evidence.

Dr. Weissman clearly states that the Plaintiff requires a cane for ambulation due to imbalance. In fact, it appears that the Plaintiff was using her cane for a prolonged period of time. On August 12, 2019, approximately a year and a half after she first reported her imbalance, a Medical Source Statement completed by Dr. Weissman represented that Ms. XXXXX was using a cane for balance. Tr. 334

The ALJ did not reach any conclusion that the cane usage is not medically necessary. The ALJ did not even acknowledge Dr. Weissman's opinion that the Plaintiff required the cane. The ALJ simply ignored the cane usage and found the Plaintiff "uses no assistive devices". The ALJ was clearly wrong.

A medically necessary cane can impact the available jobs and render the Plaintiff disabled and eligible for benefits. This is further discussed below (See Point III).

The fact that the ALJ used Dr. Teli's evaluation to discredit the treating doctor's observations and opinions is clearly erroneous, illogical, and not based on substantial evidence. Thus, the ALJ failed to properly evaluate the treating doctor's observations and opinions under #4, and the case must be reversed.

**(5) whether or not the physician is a specialist in the area upon which an opinion is rendered:**

As discussed above, objective testing was performed by specialists to diagnose Plaintiff's carpal tunnel syndrome. However, the diagnosis of carpal tunnel, which was based on that objective testing, was overlooked or not analyzed by Dr. Teli. Moreover, the ALJ failed to explain why she would still rely on Dr. Teli despite this fact. For this reason, the ALJ failed to properly analyze the credibility of the treating doctor under #5.

**(6) other factors brought to the ALJ's attention which tend to support to contradict the opinion.**

This factor does not seem to be pertinent to the overall analysis and will not be addressed in this brief.

**Conclusion:**

The ALJ completely failed to analyze the medical opinions in accordance with the factors set forth in 20 CFR Sec. 404.1520(c). Notably, as discussed in the numerous points above, the treating physician's opinions are very consistent with the overall record when analyzed properly.

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.

It is also important to note that the discussion above demonstrates that the ALJ had a number of illogical or erroneous statements and conclusions. It is reversible error where an ALJ makes a substantial number of illogical or erroneous statements that materially impact on her conclusion that the claimant is not disabled. Sarchet v. Chater, 78 F.3d 305, 307 (7<sup>th</sup> Cir. 1996). Moreover, an ALJ is required to weigh medical source opinions and to provide "appropriate explanations for accepting or rejecting such opinions." SSR 96-5p, *see also* Keyes-Zachary, 695

F.3d at 1161 (“It is the ALJ’s duty to give consideration to all the medical opinions in the record,” and to “discuss the weight he [or she] assigns to such opinions.” (*citing* 20 C.F.R. §§ 404.1527(c), (e)(2)(ii), 416.927(c), (e)(2)(ii)). As demonstrated above, the ALJ failed to provide appropriate explanations for rejecting the treating physician’s opinions – especially where, as here, the ALJ demonstrated substantial reliance on another medical opinion that was outdated and failed to evaluate severe conditions that were proven to exist.

## II.

**THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY EVALUATE THE PLAINTIFF’S BILATERAL CARPAL TUNNEL SYNDROME, INCLUDING BY FAILING TO PROVIDE FOR ANY RESTRICTIONS FOR THIS CONDITION IN THE RFC AND BY FAILING TO PROVIDE FOR ANY MANIPULATIVE RESTRICTIONS IN THE HYPOTHETICAL QUESTIONS TO THE VE.**

**Applicable law:**

In formulating a proper RFC, the ALJ must consider all of the claimant’s “symptoms, including pain, and the extent to which [these] symptoms can reasonably be expected to affect the capacity for work as consistent with the objective medial evidence and other evidence.” 20 C.F.R. § 404.1529(a). This requires the ALJ to consider medical signs and laboratory findings, statements by the claimant’s treating or non-treating source(s), statements by the claimant, or any other source regarding a claimant’s symptoms to determine whether a physical or mental impairment(s) could reasonably produce the claimant’s symptoms. See 20 C.F.R. § 404.1529(a)-(c). Next, the ALJ must determine the extent to which the intensity, persistence, and limiting effects of the claimant’s symptoms limit his functional abilities. See id.; *see also* Social Security Ruling (“SSR”) 96-8p

(*explaining* that an RFC assessment must discuss the claimant’s “ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis.”).

Additionally, a 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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:**

The ALJ found that the Plaintiff’s carpal tunnel was a severe impairment. Tr. 11. The medical records clearly demonstrate that the Plaintiff underwent EMG/NCV studies that conclusively determined she has carpal tunnel syndrome. Moreover, the medical records consistently demonstrate that the Plaintiff experiences bilateral numbness in her hands. She also uses wrist supports.

The ALJ does not discredit the Plaintiff's experience of numbness in her hands anywhere in the decision. Presumably, this is because it is credited. The ALJ also does not discredit the Plaintiff's need to use wrist supports. Presumably, this is because it is credited.

Although the ALJ finds that carpal tunnel is a severe condition, and although the medical records demonstrate the Plaintiff experiences bilateral hand numbness and uses wrist supports, the RFC completely fails to provide for any manipulative limitations whatsoever. Tr. 13. Moreover, if the ALJ did not believe any manipulative restrictions were necessary in the RFC, there is no explanation anywhere in the decision as to why the ALJ reached such a conclusion. This is clear error and the case must be reversed and remanded for further consideration.

Additionally, the ALJ failed to ask the VE any hypothetical questions that took into account the Plaintiff's carpal tunnel syndrome, hand numbness, or need to use wrist supports. Because the ALJ failed to formulate an appropriate hypothetical to the VE, which took into account all of the Plaintiff's limitations, the case must be reversed and remanded for further consideration.

### **Conclusion**

The ALJ's found that the Plaintiff's carpal tunnel was a severe condition. The failure to provide for adequate limitations in the RFC was clear error. Moreover, the ALJ's failure to present the VE with a hypothetical question that took into account the Plaintiff's carpal tunnel syndrome, hand numbness, and need to use wrist supports is also reversible error. Thus, the case must be remanded for further consideration.

### III.

#### **THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO EVALUATE THE PLAINTIFF'S USE OF A CANE IN VIOLATION OF SSR 96-9.**

##### **Applicable law:**

Use of a “medically required hand-held assistive device” may “significantly erode” the “occupational base for [a claimant] who must use such a device.”<sup>1</sup> SSR 96-9. The hypothetical question posed by the ALJ to the Vocational Expert “must relate to claimant’s impairments with precision.” Taylor v. Callahan, 969 F.Supp. 664, 669 (D. Kan. 1997) citing Hargis v. Sullivan, 945 F.2d 1482 (10<sup>th</sup> Cir. 1991). Thus, if a claimant has a genuine medical need for a cane, such a limitation should be included in the hypothetical questions the ALJ presents to the vocational expert. See Wilson v. Barnhart, 284 F.3d 1219, 1227 (11<sup>th</sup> Cir. 2002)(explaining that “[i]n 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”). A VE’s testimony is unreliable when the ALJ’s questioning is based on hypothetical examples which do not accurately describe the claimant’s abilities. Lugo v. Chater, 932 F.Supp. 497, 503-504 (SDNY 1996). In Lugo, the ALJ’s hypotheticals improperly assumed that the claimant possessed a limited ability to communicate in English and failed to include the claimant’s left eye pain. Id. This was considered reversible error.

---

<sup>1</sup> The occupational base is not significantly eroded if the hand-held assistive device is needed only for prolonged, walking on uneven terrain, or ascending, or ascending or descending slopes, the unskilled sedentary occupational base, but it may be significantly eroded if the individual needs the device for balance. See SSR 96-9p at \*7.



**Argument.**

The discussion under Point I is incorporated herein by reference. As addressed above under Point I, the medical records demonstrate that the Plaintiff's use of a cane was medically necessary. It was necessary for her balance. Any reference in the ALJ's decision that the Plaintiff did not require an assistive device was incorrect and based on a medical decision that pre-dated the need for the cane. Moreover, if the ALJ believed the evidence supported a finding that the cane was not medically necessary, the ALJ failed to discuss this anywhere in the decision.

Although there are medical records that demonstrate that the Plaintiff required the use of a cane for balance, the ALJ completely failed to incorporate that restriction into the questioning presented to the Vocational Expert. Consequently, the RFC, and the potential jobs that the VE provided, do not account for the Plaintiff's need to use a cane for balance. It is quite possible that if a proper hypothetical question were presented to the VE, which accounted for the use of a cane for balance, that the number of available jobs would have been substantially eroded, thus resulting in the Plaintiff being found disabled.

**Conclusion:**

In this case, the ALJ failed to properly evaluate the plaintiff's use of a cane to ambulate and any restrictions caused by using the cane and failed to present a question to the Vocational Expert that took the use of a cane into consideration. Consequently, the decision is not based on substantial evidence and must be reversed and remanded for further consideration.

#### IV.

### **THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY CONSIDER AND EVALUATE THE PLAINTIFF'S OBESITY, IN VIOLATION OF SSR 19-2P.**

#### **Applicable law:**

SSR 19-2P provides guidance on how the Social Security Administration establishes whether a person has a medically determinable impairment (MDI) of obesity and how obesity is evaluated in social security disability claims. An ALJ must meaningfully consider the effect of a claimant's obesity, individually and in combination with her impairments, on her workplace function at step three and at every subsequent step. See Diaz v. Commissioner of Social Security, 08-4067 (3<sup>rd</sup> Cir. 2009). An ALJ must make “specific factual findings” on the application of this rule on evaluating obesity in reaching any RFC assessment. See Campbell v. Barnhart, 178 F.Supp.2d 123, 139 (D. Conn. 2001). It is error when the agency fails to consider the “exacerbating effect of her obesity on her other impairments . . . before rejecting her disability claim. Kokal v. Massanari, 163 F.Supp. 2d 1122, 1134 (ND Cal. 2001).<sup>2</sup>

#### **Argument:**

The decision finds that Ms. XXXXX's obesity is a severe impairment. Tr. 11. Her weight fluctuated between 330 pounds (Tr. 324) and 280 pounds (Tr. 43).

Regarding obesity, the decision states, “the undersigned has further considered the claimant's obesity in combination with her other impairments and has factored this in the formulation of the residual functional capacity. As noted, the claimant does not use an assistive device. When examined by the consultative examiner she displayed a normal gait and stance,

---

<sup>2</sup> Each of these decisions address SSR 00-3p, which relates to how the Social Security Administration evaluates obesity. SSR 19-2p superseded and replaced SSR 00-3p. However, there are no material changes between the rules. As such, this case law applies.

needed no help getting on and off the examination table or risking from the chair, and she was not in any acute distress.” Tr. 15.

As discussed under Points I and III, the ALJ clearly erred in relying on the Consultative Examination to determine that the Plaintiff did not need to use a cane. As discussed above, the need to use a cane developed *after* the Consultative Examination was performed. Moreover, a year and a half later, the Plaintiff was still using the cane for balance. The ALJ’s determination that the Plaintiff did not use an assistive device is not based on substantial evidence and is, independently, a basis for remand.

Moreover, the ALJ failed to properly evaluate the Plaintiff’s obesity. Although the ALJ states that she has “factored this in the formulation of the residual functional capacity”, it is unclear *how* the ALJ factored obesity into the RFC. The ALJ’s statement is rather conclusory, and only relies on limited information already demonstrated above to be inaccurate.

Moreover, the fact that the ALJ erred in finding the Plaintiff did not require the use of a cane inherently also means that the ALJ erred in performing a sufficient analysis of restrictions caused by obesity. This is because the Plaintiff clearly required the use of a cane for balance. It is reasonable to conclude that the Plaintiff’s extremely high weight (varying from a high of 330 pounds to a lower weight of 280 pounds) could be a complicating factor in the Plaintiff’s imbalance. Yet, the ALJ does not discuss or fully analyze the Plaintiff’s imbalance – and impact of obesity as a complicating factor on her imbalance – in the decision.

Although the ALJ states she “considered” obesity, the ALJ failed to make “specific factual findings” regarding the application of this rule. See Campbell v. Barnhart, 178 F.Supp.2d 123, 139 (D. Conn. 2001)(*requiring* “specific factual findings”). There is no indication as to what the

ALJ's specific findings were with respect to obesity-related limitations. This failure to set forth adequate specific findings was error.

Finally, it does not appear that the ALJ specifically considered the application of SSR 19-2p. The decision completely fails to reference SSR 19-2p or the requirements and procedures that the ALJ must follow in analyzing obesity and which are set forth in SSR 19-2. Consequently, it is impossible to determine if the ALJ properly analyzed obesity under SSR 19-2.

**Conclusion:**

For the foregoing reasons, the decision must be reversed and remanded so the ALJ can make "specific factual findings" regarding the application of SSR 19-2p.

V.

**THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO PROPERLY CONSIDER THE PLAINTIFF'S COMPLETE INABILITY TO STOOP, IN VIOLATION OF SSR 96-9P.**

**Applicable law:**

A complete inability to stoop would significantly erode the unskilled sedentary occupational base and a finding that the individual is disabled would usually apply. SSR 96-9p.

**Argument:**

As discussed under Point I, the ALJ improperly discredited the opinion of Dr. Weissman, the Plaintiff's treating physician. Had the ALJ properly analyzed the doctor's opinion and found her opinion persuasive, the ALJ would have been legally required to find the Plaintiff disabled. That is because Dr. Weissman found that the Plaintiff was unable to stoop. Tr. 337.

**Conclusion:**

Upon remand, the Court should instruct the ALJ to properly analyze the opinion evidence, as discussed under Point I. Moreover, the Court should instruct the ALJ to also fully

consider and evaluate whether the Plaintiff is unable to stoop and whether that inability to stoop renders her unemployable.

If the ALJ finds the opinion of the treating doctor persuasive, the ALJ may be legally obligated to find the Plaintiff is disabled.

## VI.

### **THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER A “CLOSED PERIOD” OF DISABILITY.**

#### **Applicable law:**

In some cases, a social security applicant’s disability ceases prior to the Commissioner rendering a decision. In recognition of the potential for such circumstance, and as long as certain requirements are met, the SSA allows for an award of benefits relegated to a finite or closed period of disability. See SSA’s Program Operations Manual System (POMS) at § DI 25510.

Closed periods of disability are available for SSDI and SSI applications. POMS at §§ DI 25510.010 (DIB) & DI 25510.015 (SSI). Generally, when an applicant’s disability ceases prior to a final determination, a closed period of disability can be rendered in the same decision as the finding of disability. Myers v. Richardson, 471 F.2d 1265 (6th Cir. 1972); Pickett v. Bowen, 833 F.2d 288, 289 n.1 (11th Cir. 1987) (explaining what a closed period case entails). See also Wooding v. Commissioner of Social Security, 03-CV-1282 (NDNY 2008).

#### **Argument:**

In this case, it is our position that the plaintiff is entitled to a full award of disability benefits. However, alternatively, and based on the available evidence, there was reasonable view of the evidence that could have also resulted in a finding that the plaintiff was eligible for a “closed

period” of disability. However, the ALJ failed to consider whether a closed period of disability was appropriate.

In this case, the ALJ was obligated to consider a closed period of disability. Based on the evidence actually considered, the ALJ should have performed a full and complete longitudinal evaluation of the medical conditions to consider whether there was a closed period. That includes a full evaluation of all medical conditions and treatment.

As an initial matter, it is important to note that the ALJ improperly found the Plaintiff’s Bell’s Palsy to be a non-severe condition. In reaching this finding, the ALJ stated:

“On September 12, 2-17, the claimant was seen in the ER of New York Presbyterian Hospital. She was diagnosed with Bell’s Palsey. No radiology tests or surgical procedures were performed. The [Plaintiff] was prescribed Prednisone and Valacyclovir and discharged within 2 hours (referencing Exhibit 6F). In the aftermath of the ER treatment, the claimant was seen for an MRI of the brain on October 11, 2017, to determine if there was any demyelinating disease. The study was, however, normal ,but for maxillary sinus disease (referencing Exhibit 8F).” Tr. 16.

The standard to apply in determining if a condition is severe is a *de minimis* one, which is designed to weed out only the most undeserving disability claims. See Bowen v. Yunckert, 482 U.S. 137 (1987), Newell v. Barnhart, 347 F.3d 541 (3d Cir. 2003) and McCrea v. Barnhart, 370 F.3d 357 (3d Cir. 2004). Moreover, SSR 85-21, provides the following explanation for determining whether an impairment or combination of impairments is severe at step two:

“An impairment or combination of impairments is found “not severe” and a finding of “not disabled” is made at step two when medical evidence establishes only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual’s ability to work even if the individual’s age, education, or work experience were specifically considered.”

In this case, the Plaintiff's Bell's Palsy satisfied the *de minimis* standard and should have been found to be a severe condition.

It is clear from the record that the plaintiff suffered from Bell's Palsy starting in September of 2017. At that time, she lost vision and experienced numbness in her face. Tr. 41-42. She was treated at NY Presbyterian hospital for her condition. At a Consultative Examination that was conducted on December 1, 2017, the doctor noted that the Plaintiff had a "mild articulation problem" and that "half her face looked numb". Tr. 62. It was not until approximately 1 year later, in October of 2018, that the medical records finally demonstrate that there was much improvement with her right sided Bell's Palsy although there was still a little eye drooping. Tr. 386.

It is unclear why the ALJ determined that the Bell's Palsy should not be found severe. Presumably, the ALJ was relying on the October 11, 2017 MRI results, which were normal. Tr. 394. However, if the ALJ's determination that this condition was non-severe is based solely on the MRI results which is improper. Although the October 11, 2017 MRI results were normal, two months later, on December 1, 2017, a doctor still noted that the Plaintiff had a "mild articulation problem" and that "half her face looked numb". Tr. 62. Thus, it is clear that the MRI results did not tell the whole story. Moreover, it was not until about a year later when the medical records finally note "much improvement" in the Bell's Palsy condition. Tr. 386.

It is hard to imagine a scenario where Ms. XXXXX could go out and work with numbness in her face. Her facial numbness was clearly severe because it was documented to have been creating a speech and articulation problem. And, most certainly, the fact that Ms. XXXXX experienced a sudden change in her life that caused temporary blindness followed by a year of a numb face with drooping facial features could cause a psychological effect. This effect could

reasonably cause the Plaintiff mental difficulties, such as difficulties concentrating, being on-task, and could result in absenteeism. Not to mention being self-conscious as a result of these symptoms could result in the Plaintiff not wanting to have contact with the public, supervisors, or employees, which could impact the number of available jobs in the national economy.

The ALJ did not explore whether (1) the Plaintiff's "articulation problem" would impact available jobs in the national economy, (2) during the 1-year time period before there was "much improvement", whether the Plaintiff's Bell's Palsy caused additional problems, such as problems in focusing, or in concentration, persistence, and pace, or absenteeism; or whether the Plaintiff's condition would have resulted in problems interacting with the public or with supervisors and employees, which would have precluded work.

To the extent that the record is silent on whether such limitations existed or were considered. The ALJ failed in her duty to develop the record despite knowing this condition existed. The law is clear that an ALJ has a duty to ensure that the administrative record is fully and fairly developed. See 20 CFR 404.1512(b) and 416.912(b). In fact, the ALJ must inquire fully into all matters at issue. 20 C.F.R. § 404.927; *see also Hess v. Secretary of Health, Education and Welfare*, 497 F.2d 837, 840 (3d Cir.1974). Supplementing and developing the record may be as simple as asking detailed questions as necessary. Nelms v. Astrue, 553 F.3d 1093 (7<sup>th</sup> Cir. 2009).

In this case, the reason the record is silent on all of the Plaintiff's limitations related to the Bell's Palsy is apparently because the ALJ stopped analyzing this condition once she incorrectly found the Bell's Palsy was non-severe. The ALJ did not ask the Plaintiff any questions about the impact of the Bell's Palsy over the 1-year time period in question and seems to have simply disregarded the condition entirely due to the negative MRI results. This was error.



Moreover, the ALJ failed to consider the fact that the symptoms of Bell's Palsy were not significantly improved for over a year. This fact should have resulted in a finding that the condition was severe and produced limitations on work related activity.

Additionally, the ALJ completely failed to take into account the Plaintiff's "articulation difficulties" or any other possible impacts of the Bell's Palsy when formulating hypothetical questions to the VE. There is not a single question in the record posed to the VE regarding the "articulation difficulties" that the Plaintiff suffered from. Tr. 62. Thus, the ALJ erred in this regard as well.

The only questions posed to the VE that could have arguably been related to the Bell's Palsy were the questions that pertained to time off task and absenteeism. Tr. 54-55. However, these questions were not directly linked to the Bell's Palsy. Moreover, the ALJ did not adequately ask questions of the Plaintiff regarding the limitations of Bell's Palsy. Thus, the ALJ did not adequately explore all limitations related to Bell's Palsy in order to reach a conclusion as to whether the Bell's Palsy would have resulted in substantial time off task or absenteeism.

In any event, it is clear that the symptoms of Bell's Palsy began in September of 2017. The symptoms were reported as "much improved" a year later in October of 2018. Thus, there is a 1-year time period at issue where the ALJ should have fully and fairly analyzed the record to determine if all of the Plaintiff's medical conditions considered together, including the symptoms of the Bell's Palsy, resulted in circumstances where the Plaintiff should have, at minimum, been awarded a "closed period" of disability.

The Plaintiff asserts that the facts of this case justify a "fully favorable" finding and that she should have been awarded disability benefits. She was deprived an award of benefits due to the numerous errors committed by the ALJ as discussed in this brief. However, at minimum, there

were sufficient facts to warrant a finding that the Plaintiff was entitled to at least a “closed period” of disability. The ALJ’s failure to discuss and consider the possibility of a “closed period” of disability was error. Thus, the case must be reversed and remanded for further consideration.

**Conclusion:**

The Plaintiff asserts that the facts of this case justify a “fully favorable” finding and that Ms. XXXXX should have been awarded disability benefits. She was deprived an award of benefits due to the numerous errors committed by the ALJ. However, at minimum, there were sufficient facts to warrant a finding that the Plaintiff was entitled to at least a “closed period” of disability. The ALJ erred by not discussing or considering whether a “closed period” of disability was appropriate in this case. Thus, the case must be reversed and 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: XXXXX

Yours, etc.,

**SAMPLE**

---

BRYAN KONOSKI, ESQ  
*Attorney(s) for the Plaintiff*  
Law Offices of Treyvus & Konoski, P.C.  
305 Broadway, 7<sup>th</sup> Floor  
New York, NY 10007  
(212) 897-5832  
Fax: (718) 351-1918