

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

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XXXXXXXXXXXXXXXXXX,

Plaintiff,
vs.

Case No.: XXXXX

ANDREW SAUL, Commissioner of the
Social Security Administration,

PLAINTIFF'S BRIEF

Defendant.

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INTRODUCTION

Pursuant to 42 U.S.C. § 405(g), Plaintiff, XXXXXX XXXXXXXXXXXX ("Mr. XXXXXXXXXXXX"), 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 March 27, 2017, Mr. XXXXXXXXXXXX protectively filed a Title II application for a period of disability and disability insurance benefits, alleging disability beginning August 9, 2015. The claim was initially denied on June 13, 2017. Thereafter the claimant filed a request for a hearing on June 15, 2017, which was subsequently held on On April 9, 2019. The ALJ denied the claim on June 11, 2019. Tr. 24.

2. Mr. XXXXXXXXXXXX filed a request for review with the Appeals Council on June 27, 2019. Tr. 4. 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. Mr. XXXXXXXXXXXX was born on July 17, 1979. Tr. 23. His date of last insured for Social Security Disability benefits (SSDI) is September 30, 2021. Tr. 12.

4. Ms. Peterson has at least a high school education. His past jobs included working as a bus driver as well as working in sales with the company, Frito-Lay. Tr. 23.

Relevant Medical Evidence.

Back Conditions:

5. On August 31, 2015, a lumbar MRI showed mild interval increase in size of disc herniation L4-5 with suspected impingement on the descending right L5 nerve root in the subarticular recess and stable disc herniations at L3-4 and L5-S1. Tr. 454-455.

6. On September 6, 2015, Mr. XXXXXXXXXXXX had a poor arrange of motion to all back movement, tenderness to palpitation at L5-S1, and positive straight leg raise on the right. He was assessed with right sciatica. Tr. 230-233.

7. On September 9 to September 11, 2015, he was admitted to the hospital and exhibited lower back pain radiating to the right leg associated with paresthesia, some decreased right lower extremity strength, positive straight leg raise, and progressive foot drop. 1F 15-17. He underwent a laminectomy to L4 and L5 and laminectomy to S1 with discectomy. Tr. 243-245.

8. On September 13, 2015 to September 17, 2015, Mr. XXXXXXXXXXXX was admitted to the hospital for pain control and possible inpatient rehabilitation. He was discharged for outpatient rehabilitation services. Tr. 285.

9. From September 21, 2015 to October 1, 2015, he was admitted to the hospital for acute rehabilitation. Tr. 296.

10. On January 20, 2016, he was assessed to have lumbar spondylosis and radiculopathy, degenerative disc disease, spinal stenosis, and left hip labral tear. Tr. 340.

11. On March 30, 2016, a lumbar MRI was performed that indicated bulge and small

central herniations at L4-5 with flattening of the ventral thecal sac and mild foraminal stenosis and bulging broad-based prominent central herniation at L3-4 with mild central foraminal stenosis. Tr. 358.

12. On October 13, 2016, a cervical MRI showed small disc bulge C5-6 and a 2cm cystic appearing lesion with anterior neck at the C4 level. Tr. 355.

13. On October 27, 2016, a CT of the neck soft tissues indicted a 2.4 cm lipoma involving the anterior neck soft tissues Tr. 354.

14. In November of 2016, he was assessed as having lumbar spondylosis and radiculopathy. Tr. 317.

15. On January 31, 2017, a lumbar MRI showed post-operative changes at L5-S1 and additional degenerative changes of the lumbar spine. Tr. 351.

16. On February 13, 2018, a lumbar MRI showed disc desiccation, post-surgical changes of the lower lumbar spine, stable osteoarthritic changes of the facet joints, and epidural lipomatosis producing mild central canal stenosis at L2-3 and L3-4, and stable osteoarthritic changes of the facet joints L4- and L5-S1. Tr. 405-406.

17. In March of 2019, the plaintiff was assessed as having lumbar radiculopathy, mechanical back pain, lumbar spondylosis, spinal stenosis, and degenerative disc disease. Tr. 597-599.

Neck Conditions:

18. On March 28, 2017, the plaintiff had restricted cervical range of motion and tenderness.

19. On October 13, 2016, a cervical MRI showed small disc bulge C5-6 and a 2cm cystic appearing lesion with anterior neck at the C4 level. Tr. 355.

20. On October 27, 2016, a CT of the neck soft tissues indicted a 2.4 cm lipoma involving

the anterior neck soft tissues. Tr. 354.

21. In November of 2016, he was assessed with cervical spondylosis and radiculopathy. Tr. 317.

22. In March of 2017, restricted cervical range of motion and tenderness was noted. He was assessed with cervical radiculopathy. Tr. 366-367.

23. On November 2, 2018, a cervical MRI showed straightening of the cervical spine curvature, small posterior bulge at C5-6 disc level unchanged, no central or neural foraminal spinal canal stenosis, and 2.3cm oval midline submental lesion as seen previously, which could be a lipoma or cyst. Tr. 408.

24. In February of 2019, a cervical facet injection and medial nerve Block was administered. Tr. 514-515.

Hip Conditions:

25. On January 20, 2016, he was assessed to have a left hip labral tear. Tr. 340.

26. On January 20, 2016, he had positive impingement sign in the left hip. Tr. 320.

27. On January 22, 2016, a left hip MRI revealed moderate left hip osteoarthritis with degenerative tearing/fraying of the anterosuperior-anterior labrum and insertional gluteal peritendinitis. Tr. 360.

28. On April 21, 2016, the plaintiff was assessed as having a left hip labral tear, though he was not a surgical candidate due to his weight. Tr. 329.

29. On April 4, 2017, a right hip MRI showed 12mm enchondroma intertochanteric femur without fracture, joint effusion without femoral head fracture or avascular necrosis, and an anterior superior labral tear. Tr. 409.

30. On October 13, 2016, a left hip injection was administered. Tr. 376.

31. In late November of 2016, he was assessed as having a right labral tear.

32. On January 19, 2017, another left hip injection was administered. Tr. 375.

33. From November of 2018 to January of 2019, the plaintiff underwent a series of five left hip injections. Tr. 456-516.

Knee Conditions:

34. On August 2, 2017, he received a cortisone injection of the left knee due to pain. Tr. 421.

35. On August 14, 2017, a left knee MRI revealed patella alta and chronic lateral patellar subluxation, degenerative patellaofemoral chondral loss, and joint effusion. Tr. 411.

36. In August and November of 2017 additional cortisone injections were administered to the left knee. Tr. 423-425.

37. In January of 2018 a cortisone injection was administered to the right knee. Tr. 427.

38. In October of 2018, left knee Osteoarthritis. Tr. 478.

39. On October 22, 2018, the claimant received a left knee injection. Tr. 481.

40. From November of 2018 to January of 2019, the plaintiff underwent a series of five Supartz injections. Tr. 456-516.

Medications:

41. On February 17, 2016, Mobic, Neurontin, and Percocet were prescribed. Tr. 337.

42. In April of 2016, Vicodin was prescribed. Tr. 330.

43. In late November of 2016, Percocet was refilled, and Neurontin and Flexeril was prescribed, and anti-inflammatories were continued. Tr. 317.

44. On May 9, 2017, Norco was continued for pain. Tr. 415.

45. In February of 2018, Medrol was continued. Tr. 429.

46. On May 17, 2018, Vicodin and Xtampsa were continued. Tr. 458-459.

47. In February of 2019, the plaintiff was using Norco as needed for short-term pain.
Tr. 514-515.

48. In March of 2019, Mobic was continued. Tr. 599.

Assistive Walking Devices:

49. In October of 2015, Mr. XXXXXXXXXXXX was ambulating with a walker. Tr. 347.

50. In November of 2015, he was prescribed a cane and was walking with a cane. Tr. 348.

51. On May 11, 2017, he did not use a cane during a consultative examination. Tr. 392.

Obesity:

52. In September of 2015 Mr. XXXXXXXXXXXX weighed 413 pounds. Tr. 238. At the hearing, he testified that he weighed 434 pounds. Tr. 38.

53. Mr. XXXXXXXXXXXX was advised that he needed to reduce his weight to 350 pounds before he could have hip replacement surgery. Tr. 439.

54. Mr. XXXXXXXXXXXX's BMI was 56.2 to 68.5 during the relevant period. Tr. 16.

Testimonial Evidence.

Mr. XXXXXXXXXXXX:

55. Mr. XXXXXXXXXXXX testified that he has to take pain medications to even get out of bed in the morning. Tr. 44. He takes Xtampsa every 12 hours. He also takes Vicadone. Tr. 44.

56. He can only sit for about 15-20 minutes before he needs to get up and walk around a little until the pain subsides. Tr. 45, 48. He cannot stand in one position for more than maybe 15 minutes. Tr. 45.

57. He can lift approximately 10-pounds, but doctors told him not to lift more than 10-

pounds or he could hurt himself. Tr. 46, 47.

58. He drives only when he does not take medication. Tr. 47.

59. About 4 or 5 months before the hearing date, his doctors finally approved him going to the gym to get some exercise. Tr. 49. He was told he could use the pool, but he has to stay away from the elliptical, lifting weights, or the treadmill. Tr. 49-50.

60. Once he loses weight he will be able to have hip surgery. Tr. 48.

61. All of his medications make him drowsy. Tr. 51. Gralise can sometimes cause vomiting and diarrhea. Tr. 51. Cyclobenzaprine causes him to fall asleep. Tr. 51.

62. The plaintiff was not asked any questions regarding the continued use of the cane that was prescribed to him in 2015.

Vocational Expert:

63. The VE testified as follows:

Q: What if this individual needs to sit for up to 20-minutes and stand for up to 20-minutes alternately throughout the work day.

A: As long as they do not leave the area where the work is performed, that should be acceptable.

Q: What if during the 20-minute walk, it—it's away from – well, the individual would be off task?

A: As during a walk?

Q: Yeah.

A: A 20-minute walk?

Q: Yes.

[. . .]

Q: Yes, 20—20—I'm sorry, off task during the 20-minute walk correct.

A: Okay, that would preclude work.

64. No questions were asked of the VE regarding restrictions related to the plaintiff's use of a cane.

ISSUES PRESENTED

- I. 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?
- II. Whether the Commissioner erred as a matter of law in failing to consider the cumulative effects of all plaintiff's medications?
- III. Whether the Commissioner erred in the RFC assessment by finding that he plaintiff can sit for 20 minutes and stand for 20 minutes alternatively throughout the workday without specifying if he would be on or off task during the times he was standing?
- IV. Whether the Commissioner erred as a matter of law in failing to consider the plaintiff's obesity, in violation of SSR 19-2?
- V. 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 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.”¹ SSR 96-9. 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). 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 (11th 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.

¹ The occupational base is not significantly eroded if the and-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 ALJ acknowledges that in October of 2015, Mr. XXXXXXXXXXXX was ambulating with a walker. In November of 2015, he was walking with a cane. Tr. ((P.8 of Dec)). Approximately a year and half later, on May 11, 2017, Mr. XXXXXXXXXXXX attended an internal medicine consultative examination. At the examination, he weighed 411 pounds, had a limping gait, difficulty walking on his heels and toes, had a wide stance gait, he needed help getting on and off the table due to his weight, and he could squat 1/3 of a full squat. The ALJ notes that he did not require help changing, he was able to rise from a chair without difficulty, and he did not require an assistive device. Tr. 391-394.

The ALJ's statement in the Decision that the plaintiff "did not require an assistive device" (Tr. 19) is a mischaracterization of the medical report. The report states that Mr. XXXXXXXXXXXX "used no assistive devices". Tr. 392. There is a substantial difference between whether Mr. XXXXXXXXXXXX did not use an assistive walking device during a short consultative examination, and whether he actually required the use of one during his usual day-to-day activities. The consultative examination report does not opine as to whether Mr. XXXXXXXXXXXX's use of an assistive device is "required" or "medically necessary", nor does it address whether he owns, was ever prescribed, or uses a cane in his day-to-day life.

The medical records consistently demonstrate that the plaintiff is morbidly obese with severe neck, back, and knee conditions that required significant medical treatment, surgeries, injections for pain, and management through pain medication.

There are no medical records that demonstrate the on-going use of an assistive walking device since the November 2015 records. Tr. 348. However, that does not mean that Mr. XXXXXXXXXXXX was not using a cane – that may simply mean that he was prescribed the cane and

the doctors could have assumed he would have been continuously using it as needed after it was prescribed. In fact, considering his obesity (over 400 pounds) in conjunction with his back and hip conditions, it is reasonable that he used the cane for a long time after it was prescribed. Yet, the ALJ does not reach any conclusion as to whether the plaintiff was still using a cane at the time of the hearing, when (if at all) he stopped using a cane, whether the cane was medically necessary, and what limitations, if any, were caused by the plaintiff's use of the cane. Considering the plaintiff's severe conditions, and obesity, it would have been reasonable and necessary for the ALJ to develop the record and to inquire further as to the cane use. However, the ALJ did not discuss the use of the cane anywhere else in the decision, did not take it into consideration in formulating the RFC, and did not ask the VE any hypothetical questions that took into account the plaintiff's restrictions when using the cane.

Accompanying this memorandum is an Affidavit in Support signed by the plaintiff attesting to the fact that he was continuously using the cane until approximately October of 2018. He also discusses his limitations while using the cane from 2015 until October of 2018. While the contents of this Affidavit were not part of the record at the Administrative hearing, it is submitted as part of this federal appeal to demonstrate that had the ALJ further explored the plaintiff's use of the cane, there is a reasonable likelihood that there would have been a different outcome at the hearing and the plaintiff would likely have been awarded benefits.² Moreover, this Affidavit

² We assert that the submission of this Affidavit is appropriate because the ALJ did not adequately consider the use of the cane, the medical records do not discuss the use of the cane after it was prescribed in 2015, that the information contained in the Affidavit is material to the determination of disability, and the plaintiff was not asked any questions about the cane at the hearing, so the record is silent on this issue. See Schaffer v. Apfel, 992 F. Supp. 233, 235 (WDNY 1997); Shalala v. Schaefer, 509 US 292, 297-98 (1993)(*holding* that a remand for new evidence allows the court to, at any time, order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. . . .”).

further supports the above argument that the ALJ failed to provide a proper hypothetical to the VE. Thus, the decision reached by the ALJ is not based upon substantial evidence.

Conclusion:

In this case, the ALJ failed to (1) develop the record regarding the plaintiff's use of a cane; (2) failed to properly evaluate the plaintiff's use of a cane to ambulate and any restrictions caused by using the cane; (3) failed to question the plaintiff at the hearing about the use of the prescribed cane; and (4) 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.

II.

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

Applicable law:

The ALJ is required to consider the cumulative effects of all claimant's ailments, and, if relevant, medications. Martin v. Apfel, 118 F.Supp.2d 9, 15 (D.D.C. 2000). Regarding medications, the regulations require consideration of the type, dosage, effectiveness and side effects of any medication taken to deal with a claimant's ailments. Id., citing 20 C.F.R. Sec. 404.1529(c)(3)(iv), 416.929(c)(3)(iv). In Martin, the court held that the ALJ did not properly consider or explain the effect of the combination of impairments or the consequences of the sleep-inducing medication the claimant takes to control her impairments, which made her sleep for three hours each morning. Id. at 16. "This failure on the part of the ALJ constitutes an obvious violation of his obligation to view the plaintiff's situation not atomistically but synergistically but

understanding the interrelated consequences to her of her physical and psychological problems and of the medication she had to take to secure relief from them” Id. Even in cases where the ALJ finds that the claimant was not receiving any significant pain regimen, the ALJ must assess the side effects of medication to properly evaluate the claimant's ability to perform substantial gainful activity. Simmonds v. Massanari, 160 F.Supp.2d 1235, 1244 (D. Kan. 2001).

The failure to discuss the medication side-effect of drowsiness is reversible error. Glenn v. Apfel, 102 F.Supp.2d 1252, 1258 (D. Kan. 2000), *citing* Dvorak v. Celebrezze, 345 F.2d 897 (10th Cir. 1965). See also Bergeron v. Astrue, 2011 WL 6255372 (NDNY 2011).

Where an ALJ fails to (1) properly consider the type, dosage, effectiveness, and adverse effects of the claimant’s pain medications, and (2) adequately develop the record of the claimant’s pain medications, it is reversible error. Musto v. Halter, 135 F.Supp.2d 220, 229 (D.Mass2001). In Musto, the court held that since the ALJ failed to adequately develop the record regarding the claimant’s pain medications, his conclusion that the claimant’s pain allegations were not credible, and his finding that the claimant retained the residual functional capacity to perform sedentary work, were not supported by substantial evidence. Id. At 230-231.

Even where medical records do not address the side-effects of medication, where a claimant testifies regarding the side-effects, the ALJ still has a duty to properly address the side-effects and assign the side-effects a limitation. In Crowley v. Apfel, 197 F.3d 194, 199 (5th Cir. 1999), the court held that the ALJ’s conclusion that the claimant suffered from no adverse effects from prescribed medications was not supported by substantial evidence in the record. In so holding, the court noted that contrary to the ALJ’s finding that the claimant reported no adverse side-effects to his medications, he testified at the hearing that he experienced nausea, dizziness, and sore throats and that he had problems maintaining his blood sugar level and that the side effect

he suffered as a result include blurred vision, tremors, and diminished coherence. The court noted that the Commissioner is required to consider the “type, dosage, effectiveness, and side effects of any medication [the claimant] take[s] or ha[s] taken alleviate [] pain or other symptoms.” *Id.*, quoting 20 CFR Sec. 4041529(c)(3)(iv).

The only time an ALJ is only not faulted for failing to discuss the dosage, effectiveness, or side effects of medications is where there are no medical records and also no testimony before the ALJ that addresses the side effects. See Parker v. Apfel, 99 F.Supp. 1070, 1076 (ED Mo. 1998).

When there are side-effects to medication, the ALJ must assign a level of limitation to the effects, such as, for example, “mild limitation” or “moderate limitation”. An Alabama district court found that the ALJ properly determined that the claimant’s medication side effect of drowsiness had only mild to moderate limitation, noting the lack of medical records to support the need for a one and one-half hour nap each day, and the absence of complaints to any physician that the medication was causing drowsiness to the point alleged. Daniels v. Apfel, 92 F.Supp.2d 1269, 1281 (SD Ala. 2000). This decision was upheld because the ALJ properly evaluated the claimant’s testimony regarding the side-effects and assigned a limitation to the effects.

Argument:

Mr. XXXXXXXXXXXX testified that he still has to take pain medications to even get out of bed in the morning. Tr. 44. He takes Xtampsa and Vicadone. Tr. 44. He sometimes takes Cyclobenzaprine, which is a muscle relaxer. When he takes that medication he is very drowsy and falls asleep. Tr. 51. But, all of his medications make him drowsy. Tr. 51. The medication Gralise sometimes causes vomiting and diarrhea. Tr. 51. He does not drive when he takes medication. Tr. 47. A common side effect of Xtampza, Vicodin, and Gralise is drowsiness. See Affirmation in Support, Para 3.

In this case, the ALJ acknowledges that the plaintiff used various medications including Medorl, Vicodi, Xtapza and Norco. However, the ALJ also states, “[a]lthough the claimant testified that his medications made him drowsy and nauseous, the record does not show any reports of these side effects to treating providers.” Tr. 21.

Although the ALJ noted that the medical records did not indicate that Mr. XXXXXXXXXXXX suffered from the side effects of his medications, he was still required to properly evaluate the side-effects of the medications. That is because Mr. XXXXXXXXXXXX testified about the side-effects he experienced. See Crowley v. Apfel, supra.

In this case, the ALJ failed to properly consider the type, dosage, effectiveness, and adverse effects of the claimant’s pain medications. In fact, the decision does not address all medications, the dosage amounts of each medication, or their effectiveness, their side-effects. The ALJ also failed to assign a level of limitation to the side-effects. See Daniels v. Apfel, supra. Additionally, the ALJ failed to properly develop the record regarding the medications and the side-effects of the medications, despite having testimony that Mr. XXXXXXXXXXXX experienced side-effects. See Musto v. Halter, supra.

Conclusion:

The decision denying benefits is not based on substantial evidence because the ALJ failed to properly evaluate the side-effects of the plaintiff’s numerous medications, which included drowsiness. The failure to discuss drowsiness, standing alone, is reversible error. See Glenn v. Apfel, supra. Thus, the case must be reversed and remanded for further consideration.

III.

THE COMMISSIONER ERRED IN THE RFC ASSESSMENT BY FINDING THAT THE PLAINTIFF CAN SIT FOR 20 MINUTES AND STAND FOR 20 MINUTES ALTERNATIVELY THROUGHOUT THE WORKDAY WITHOUT SPECIFYING IF HE WOULD BE ON OR OFF TASK DURING THE TIMES HE WAS STANDING.

Applicable law:

Normally, an ALJ's reliance on a vocational expert testimony as substantial evidence in determining that a claimant could perform sedentary work, provide he could alternate sitting and standing, is acceptable. Palmer v. Apfel, 995 F.Supp. 549, 554 (ED Pa. 1998). However, under the circumstances present in this case, the decision, as written, erred and is not based on substantial evidence.

Argument:

In this case, the ALJ found that "due to the impairments and reported pain, the claimant should be able to sit for twenty minutes and stand for twenty minutes alternatively throughout the workday." Tr. 16, 23. However, in the hypothetical questions presented to the VE at the hearing, the VE testified that this sit stand option would be adequate only if the employee remained on task and was not off task during that time standing. If the employee was off task during the times that they were standing, there would be no jobs available. Tr. 53-54.

The ALJ did not clarify in the decision whether Mr. XXXXXXXXXX would be off task during any part of the time he was standing. However, since the VE testified that there are no jobs if the plaintiff was standing – and off task while standing – the decision is unclear and, therefore, not based on substantial evidence. Because the VE testified that there are available jobs if the plaintiff was standing (and on-task), but would not be any jobs if the plaintiff was standing (and

off-task), the ALJ needed to be more clear in the decision as to whether there was a finding that the plaintiff would be on, or off, task during all or part of the time he was alternating between sitting and standing. Without reaching such a finding, the decision, when read in conjunction with the VE testimony, is not sufficiently clear to withstand scrutiny. Thus, the decision must be remanded for further consideration and clarification.

Additionally, it is also important to note that because the ALJ failed to consider the plaintiff's use of a cane, and failed to ask the VE any questions related to use of a cane, it is impossible to tell if the VE would have opined that the use of the cane while alternating to his standing position would have rendered him unemployable. See also, Point I, *above*.

Conclusion:

Based on the foregoing, the decision cannot withstand judicial scrutiny and is not based on substantial evidence. Thus, the case must be remanded for further consideration.

IV.

**THE COMMISSIONER ERRED AS A MATTER OF
LAW IN FAILING TO CONSIDER 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 (3rd 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).³

Argument:

The decision finds that Mr. XXXXXXXXXXXX’s obesity is a severe impairment. Tr. 13. Moreover, the decision states that at the time of the hearing, the claimant was 39, is 5’11” tall, and weighs 434 pounds. Prior to surgery he was 289 pounds, but gained 167 pounds since he stopped working. Tr. 17. In July of 2018, he weighed 491 pounds. Tr. 16. Furthermore, the decision recognizes, “the claimant would be a candidate for arthroscopies but he needed to weigh 350 pounds before surgery could proceed.” Tr. 19.

The ALJ states “I have considered that obesity may significantly limit physical and mental abilities to do basic work activities, including the ability to sit, stand, walk, lift, climb, perform postural maneuvers, limit range of motion in the spine and extremities, possibly limit manipulative movements, and exposure to heat, humidity, or hazards, pursuant to SSR 19-2p.” Tr.16. Although the ALJ states he “considered” obesity and SSR 19-2p, 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 specific findings was error.

³ 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.

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 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 treatment, surgeries, injections, and the effects of medication. It is clear from the record that the plaintiff suffered from serious back, neck, knee, and hip conditions for many years starting in 2015. It was not until about 4 or 5 months before the disability hearing (approximately February of 2019) that the plaintiff's doctors finally approved his going to the gym; likely in an effort to lose weight so he could have hip surgery. Tr. 49. However, he was told he could only use the pool and he could not use the weights, elliptical, or treadmill. Tr. 49-50. His doctors also informed him that he could not lift more than 10-pounds. Tr. 46,47.

Moreover, the plaintiff was prescribed a cane in November of 2015. Tr. 348. As noted in his Affidavit, he used that cane until approximately October of 2018. Notably, at the hearing, he was not asked about the use of the cane, and the VE was not asked any hypothetical questions involving the use of a cane.

In this case, there are two possible points that could have created a possible "closed period" of disability:

First, if the ALJ fully evaluated all of the evidence or developed the record properly regarding the plaintiff's use of a cane from the year 2015 through approximately October of 2018, there is a reasonable possibility that the ALJ may have reached a conclusion that a "closed period" of disability was appropriate up until that point in time as well. See Affidavit in Support, Tr. 348 (*demonstrating* the cane was prescribed in 2015). See also, Point I, *above*. That could have resulted in "closed period" of disability from the Date of Onset in 2015 until the plaintiff stopped using a cane in October of 2018.

Second, the ALJ could have considered the doctor's approval to use the gym as a date where the plaintiff was sufficiently functional to work a sedentary job. That could have resulted in a "closed period" of disability from the Date of Onset in 2015 until the plaintiff was able to return to the gym in or about February of 2019.

In this case, the ALJ failed to consider whether there was enough evidence to demonstrate a "closed period" of disability during either of these two possible time periods discussed above.

Conclusion:

The ALJ failed to consider or address the possibility that the plaintiff may be eligible for a "closed period" of disability. For that reason, 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: New York, NY
XXXXXX

Yours, etc.,

SAMPLE

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