UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

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XXXXXXXXXX

Plaintiff,

Case No.: XXXXX

vs.

ANDREW SAUL, Commissioner of the Social Security Administration,

Defendant.

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

XXXXX
XXXXX

INTRODUCTION

Plaintiff, XXXX XXXX ("Mr. XXXX"), honorably served the United States of America as a special agent with the Federal Bureau of Investigations (FBI) and also as a member of the Air National Guard with the United States Air Force. In the year 2006, while working as an FBI agent, Mr. XXXX was involved in a traffic accident. The government work vehicle that he was working in was rear-ended by a vehicle moving at a high rate of speed. Tr. 238. He suffered a severe traumatic brain injury (TBI), with a loss of consciousness. Tr. 470. Then, in the year 2015, while off-duty, he was involved in a second rear-end collision where he suffered a second TBI. Tr. 238. As a result of his injury sustained while working as an FBI agent, he received an award known as the "Police Legion of Honor". This was "awarded in recognition of the grievous injuries sustained in the performance of duties as a law enforcement officer." Tr. 246. As a result of his grievous injuries, and his inability to work as a result of those injuries, Mr. XXXX made a claim for Social Security Disability Benefits. His claim was denied by an Administrative Law Judge (ALJ) on January 10, 2020. Tr. 7.

Pursuant to 42 U.S.C. § 405(g), Plaintiff 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 ("SSDI") benefits for the reasons set forth below.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Elements.

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

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

Undisputed Material Facts.

Summary and Course of the Administrative Proceedings.

1. Mr. XXXX applied for disability benefits on April 16, 2018 alleging disability commencing on July 1, 2017. His claim was denied initially on August 20, 2018. His reconsideration was denied on October 1, 2018. Mr. XXXX filed a written request for a hearing on October 4, 2018, which subsequently was held on December 13, 2019. The ALJ denied the claim on January 10, 2020. Tr. 10. Mr. XXXX filed a request for review with the Appeals Council on January 14, 2020. Tr. 5. The Appeals Council denied the Request for Review on August 31, 2020. Tr. 1. Accordingly, the ALJ's decision became the Commissioner's final decision.

Statement of Relevant Facts.

Plaintiff's age, education, and work experience.

2. Mr. XXXX was born on March 10, 1967. Tr. 18. His date of last insured for Social Security Disability benefits (SSDI) was September 30, 2019. Tr. 12. He was 52-years old on the date of last insured. Tr. 18.

3. Mr. XXXX has at least a high school education. Tr. 18. He testified that he has a Master's Degree in accounting and a Bachelor's degree in finance. Tr. 48. He was previously employed as an FBI agent and a member of the Air National Guard for the United States Air Force. Tr. 18.

Relevant Medical Evidence.

Cognitive testing.

4. The Plaintiff underwent cognitive testing as part of a Consultative Examination in this case. The cognitive testing was performed by Dr. Corgiat. Tr. 545-550. He is status post 2 mild traumatic brain injuries, occurring in 2006 and 2014. "His current pattern of performance on the WAIS-IV places him in the borderline range of functional ability." Tr. 549.

5. Regarding the Plaintiff's capabilities, Dr. Corgiat opined as follows:

> "The claimant does not demonstrate a level of functional cognitive impairment that would compromise his ability to manage funds in his own interest. He **does demonstrate** functional **cognitive difficulties** that would interfere with consistency in understanding, carrying out and remembering both complex **and simple instructions**. The primary contributory factor to that functional impairment is the executive dysfunction noted in his clinical presentation and cognitive assessment. He has foundational executive deficits in his speed of processing, contextual based working memory, and affective reactivity management. That would compromise consistency in meeting those criteria. That would also interfere with his sustained concentration and ability to maintain persistence in work-related activity.

> Notably, it has already been a contributory factor to compromising his appropriate social interaction. As noted above, that has led to him being discharged from a dentist's office, "fired from donating plasma, and ultimately led to some legal charges secondary to inappropriate emotional responses." Tr. 549 (emphasis added).

GAF Scores.

6. On October 15, 2014, Dr. Julie Wiese, evaluated the Plaintiff as having a GAF of 38. Tr. 262 and 485. More than 2-years later, on January 30, 2017, Dr. Julie Wiese again evaluated the Plaintiff as having a GAF of 38. Tr. 263 and 475.

Drowsiness, Fatigue, and Medication.

7. Mr. XXXX testified about his drowsiness and fatigue at his hearing. He stated, "so the mornings are better and then I steadily degrade throughout the day. It's that alternator again. My alternator is not working on my battery and I – I have a charge when I'm – get – when I'm sleeping, I get a charge and then that charge just kind of fades especially my ability – my mental ability fade as the day progresses." Tr. 63. He testified that he needs at least one nap every day, usually around 1:30 in the afternoon. He testified that he cannot get through a day without needing a nap. Tr. 63. Probably twice a week he needs two naps in a day. Tr. 62-63. Typically, each nap lasts about an hour. Tr. 64.

8. Mr. XXXX's medications include Zoloft, 100mg, 2 tablets a day; Prazosin, 2mg capsule, once a day; Clonazepam, 5 mg tablet once a day; and also Aripiprazole. Tr. 336, 529, 530. Some of the most common side effects of these medications are drowsiness and fatigue.[1]

[1] WEBSITE SOURCES:
www.verywellmind.com/zoloft-side-effects-1067484
www.webmd.com/drugs/2/drug-14403-6006/clonazepam-oral/clonazepam-oral/details/list-sideeffects
www.healthline.com/health/prazosin-oral-capsule#about
www.healthline.com/health/aripiprazole-oral-tablet#side-effects

Handling, fingering, and feeling.

9. On April 3, 2018, Dr. Renee Crayton prepared a medical opinion form for the State of Utah, which reported Mr. XXXX's medical conditions. Tr. 518-521. According to the report, it is Dr. Crayton's opinion that Mr. XXXX would be limited to "occasional" "gross manipulation, reaching, handling, grasping, and pushing/pulling." Tr. 520 (emphasis added). Dr. Crayton further opined that, "claimant capable of light strength work with the additional neck injury this would limit his overhead reaching ability, thus eroding claimant's physical functioning to seated light = sedentary." Tr. 521.

Summary of Vocational Testimony.

10. The VE testified that the Plaintiff could not do his past work. However, she provided three possible jobs he could perform at the light level. Tr. 66-67.

11. The VE testified that if "handling, fingering, and feeling" were reduced below the frequent level, those jobs would not be available. Tr. 67. Moreover, the VE testified that there are no jobs that would allow for occasional handling and frequent feeling. Tr. 67 (emphasis added).

12. The VE testified that if the Plaintiff was off task approximately 15% of the average work shift, there would be no jobs available in the competitive economy. Tr. 66-67.

13. The VE testified that if the Plaintiff was unable to make it into work, or was unable to make it through a full work shift, approximately three or more times per month, there would be no jobs available in the competitive economy. Tr. 67.

14. The VE also testified that if the Plaintiff worked slowly and could accomplish 80% of the work product that an average employee would during the day, there would be no work available. Tr. 68-69.

ISSUES PRESENTED

I. The Commissioner erred as a matter of law by failing to include all of the Plaintiff's cognitive limitations in the residual functional capacity.

II. The Commissioner erred as a matter of law by failing to propose a complete hypothetical question to the vocational expert, taking into consideration all of the Plaintiff's limitations, including his cognitive limitation to follow even simple instructions.

III. The Commissioner erred as a matter of law in failing to address a medical opinion that states the Plaintiff has limitations in "gross manipulation, reaching, handling, grasping, and pushing/pulling", in violation of 20 CFR § 404.1527(C).

IV. The Commissioner erred as a matter of law in failing to consider the Plaintiff's drowsiness and fatigue.

V. The Commissioner erred as a matter of law by not considering the Plaintiff's "GAF" scores, which were as low as 38 for a duration of more than 2-years.

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 FAILING TO INCLUDE ALL PLAINTIFF'S COGNITIVE LIMITATIONS IN THE RFC.

Applicable law:

"A proper RFC analysis has three components: (1) evidence, (2) logical explanation, and (3) conclusion. The second component, the ALJ's logical explanation, is just as important as the other two." Thomas v. Berryhill, 916 F.3d 307, 311 (4th Cir. 2019). The ALJ "must both identify evidence that supports [her] conclusion and 'build an accurate and logical bridge from [that] evidence to [her] conclusion.'" Woods v. Berryhill, 888 F.3d 686, 694 (4th Cir. 2018) (second alteration in original) (*quoting* Monroe, 826 F.3d at 189). An ALJ's failure to do so constitutes reversible error. Lewis v. Berryhill, 858 F.3d 858, 868 (4th Cir. 2017). When "meaningful review is frustrated when an ALJ goes straight from listing evidence to stating a conclusion," the Court will remand for further proceedings. Thomas, 916 F.3d at 311 (*citing* Woods, 888 F.3d at 694).

Argument:

In this case, Dr. Corgait performed a consultative examination of the Plaintiff. As part of the examination, Dr. Corgait administered the WAIS-IV test. After his evaluation of the Plaintiff, Dr. Corgait's opinion was as follows:

> "The claimant does not demonstrate a level of functional cognitive impairment that would compromise his ability to manage funds in his own interest. He **does demonstrate** functional **cognitive difficulties** that would interfere with consistency in understanding, carrying out and remembering both complex **and simple instructions**. The primary contributory factor to that functional impairment is the executive dysfunction noted in his clinical presentation and cognitive assessment. He has foundational executive deficits in his speed of processing, contextual based working memory, and affective reactivity management. That would compromise consistency in meeting those criteria. That would also interfere with his sustained concentration and ability to maintain persistence in work-related activity. Notably, it has already been a contributory factor to compromising his appropriate social interaction. As noted above, that has led to him being discharged from a dentist's office, "fired from donating plasma, and ultimately led to some legal charges secondary to inappropriate emotional responses." Tr. 549 (emphasis added).

The ALJ found Dr. Corgait's opinion persuasive. The ALJ found that the ". . . opinion is supported by the examination report, including the claimant's performance on the WAIS-IV test, and is consistent with the claimant's consistent reports of a decline in cognitive function since his traumatic brain injuries." Tr.17. The ALJ makes a point to note that Dr. Corgait found Mr. XXXX ". . . **does demonstrate** functional **cognitive difficulties** that would interfere with consistency in understanding, carrying out, and remembering both complex **and simple instructions**". Tr. 17 (emphasis added).

The ALJ clearly finds Dr. Corgait's opinion persuasive, adopts the findings in the opinion, and specifically adopts the finding that Mr. XXXX's cognitive difficulties would interfere with his ability to understand, carry out, and remember even simple instructions. However, the RFC is inconsistent with these opinions.

Contrary to the medical opinion that the ALJ found persuasive, the RFC limits Mr. XXXX to "short and simple instructions" and states "he can understand, remember, and carry out only short and simple instructions." Tr. 17.

On the one hand, the ALJ finds that the Plaintiff demonstrates cognitive difficulties in handling simple instructions. On the other hand, the ALJ creates an RFC stating that the Plaintiff can handle simple instructions. The ALJ does not explain why he disregarded and dismissed a portion of Dr. Corgait's opinion after finding it to be persuasive. This is clearly an inconsistency that is not reconciled anywhere else in the decision. There is no accurate and logical bridge built between the evidence, the findings and analysis in the written decision, and the assigned RFC.

Conclusion:

This discrepancy between the findings in the decision, and the RFC, is a reversible error. As a result, the ALJ decision is not based on substantial evidence and must be reversed and remanded.

II.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO PROPOSE A COMPLETE HYPOTHETICAL QUESTION TO THE VOCATIONAL EXPERT, TAKING INTO CONSIDERATION ALL OF THE PLAINTIFF'S LIMITATIONS INCLUDING HIS LIMITATION IN FOLLOWING SIMPLE INSTRUCTIONS.

Applicable law:

The hypothetical question posed by the ALJ to the Vocational Expert "must relate all of claimant's impairments with precision." Taylor v. Callahan, 969 F.Supp. 664, 669 (D. Kan. 1997) citing Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991). In Taylor, the court held that the ALJ's hypothetical question did not duplicate the claimant's condition as precisely as possible because the ALJ failed to refer to the claimant's numerous other impairments besides his diabetes and cardiac arrhythmia. Id. A Colorado district court held that the ALJ posed a flawed hypothetical to the VE when he failed to accurately include all the claimant's established limitations, mental impairments, as well as the claimant's pain. Ricketts v. Apfel, 16 F.Supp.2d 1280, 1293-1295 (D. Colo 1998), *citing* Williams v. Bowen, 844 F.2d 748, 752 (10th Cir. 1988). See also Underwood v. Shalala, 985 F.Supp. 970, 979 (D. Colo. 1997)(*finding* error in the ALJ's failure to include in his hypothetical the claimant's limitations of finger dexterity, abstract reasoning, special perception, verbal reasoning, and writing, as well as all the restrictions set forth by the treating physician).

Argument:

In this case, the ALJ's hypothetical questions were insufficient. The ALJ incorporated into his hypothetical questions that, "due primarily to his mental impairments, the individual should only make simple work-related judgments and decisions; can understand, remember, and carry out

only short and simple instructions . . .." Tr. 65. This hypothetical is insufficient because it fails to consider, with sufficient precision, the restrictions that the ALJ found to exist. As discussed above, the ALJ credited Dr. Corgait's opinion that the Plaintiff had difficulties carrying out simple instructions. However, there was no hypothetical question presented to the VE that takes into consideration difficulties carrying out simple instructions, despite the fact that the ALJ found such restrictions to exist. The failure to craft a hypothetical question to include the limitations in carrying out simple instructions, which the ALJ specifically found to exist, is reversible error.

Conclusion:

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

III.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO ADDRESS A MEDICAL OPINION THAT STATES THE PLAINTIFF HAS LIMITATIONS IN "GROSS MANIPULATION, REACHING, HANDLING, GRASPING, AND PUSHING/PULLING", IN VIOLATION OF 20 CFR § 404.1527(C).

Applicable law:

20 C.F.R. § 404.1527(c), states, "regardless of its source, we will evaluate every medical opinion we receive." Thus, the Commissioner is required to evaluate every medical opinion it receives, regardless of its source. Pena v. Chater, 968 F.Supp. 930, 937 (SDNY 1997), *aff'd*, 141 F.3d 1152 (2d Cir. Feb 26, 1998), *citing* 20 C.F.R. § 404.1527; Schisler v. Sullivan, 3 F.3d 563 (2d. Cir 1993)

Argument:

On April 3, 2018, Dr. Renee Crayton prepared a medical opinion form for the State of Utah, which reported Mr. XXXX's medical conditions. Tr. 518-521. According to the report, it is Dr. Crayton's opinion that Mr. XXXX would be limited to "occasional" "gross manipulation, reaching, handling, grasping, and pushing/pulling." Tr. 520 (emphasis added). Dr. Crayton further opines that, "claimant capable of light strength work with the additional neck injury this would limit his overhead reaching ability, thus eroding claimant's physical functioning to seated light = sedentary." Tr. 521.

The ALJ failed to consider this opinion evidence. The opinion of Dr. Crayton is not addressed by the ALJ anywhere in the decision. Moreover, the limitations addressed by Dr. Crayton are not included in the RFC. These errors require reversal and remand.

Moreover, the VE testified that if "handling, fingering, and feeling" were reduced below the frequent level, those jobs would not be available. Tr. 67. Furthermore, the VE testified that there are no jobs that would allow for occasional handling and frequent feeling. Tr. 67 (emphasis added).

. If the ALJ properly considered Dr. Crayton's medical opinion limiting Mr. XXXX to occasional handling, then the ALJ may have been constrained to find the Plaintiff disabled pursuant to the VE's testimony that stated there were no jobs available if the Plaintiff was limited to occasional handling.

Additionally, if, as Dr. Crayton opines, the Plaintiff is reduced to sedentary work, then the ALJ would be required to consider whether the Plaintiff is disabled under the GRID rules. However, the ALJ failed to consider whether the Plaintiff is disabled under the GRID rules. This was also error. See 20 C.F.R. pt. 404, subpt. P, app. 2 § 200.00(a).

IV.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO CONSIDER THE PLAINTIFF'S DROWSINESS AND FATIGUE.

Applicable law:

The ALJ is required to consider the cumulative effects of all of the claimant's ailments, and, if relevant, medications. Martin v. Apfel, 118 F.Supp.2d 9, 15 (D.D.C. 2000). 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).

Regarding medications, the regulations require consideration of the type, dosage, effectiveness and side effects of any medication taken to deal with a claimant's ailments. Id., *citing* 20 C.F.R. Sec. 404.1529(c)(3)(iv), 416.929(c)(3)(iv). It is not sufficient to list the impairments individually and to state that separately the are non-severe. Id. at 15 *citing* Cook v. Heckler, 783 F.2d 1168, 1174 (4th Cir. 1986). Instead, the ALJ must "make a particularized finding on the effect of combination of impairments and, if necessary, the medication that the claimant must take." Id. at 15-16, *citing* Hines v. Bowen, 872 F.2d 56, 59 (4th Cir. 1989). In Martin, the court held that the ALJ did not properly consider or explain the effect of the combination of impairments or the consequences of the sleep-inducing medication the claimant takes to control her impairments, which made her sleep for three hours each morning. Id. at 16. "This failure on the part of the ALJ constitutes an obvious violation of his obligation to view the plaintiff's situation not atomistatically but synergistically but understanding the interrelated consequences to her of her physical and psychological problems and of the medication she had to take to secure relief from them". Id. Even in cases where the ALJ finds that the claimant was not receiving any significant pain regimen, the ALJ must assess the side effects of medication to properly evaluate

the claimant's ability to perform substantial gainful activity. Simmonds v. Massanari, 160 F.Supp.2d 1235, 1244 (D. Kan. 2001).

Argument:

Mr. XXXX testified that he suffers from fatigue as a result of his condition. He testified that he needs at least one nap every day, usually around 1:30 in the afternoon. He testified that he cannot get through a day without needing a nap. Tr. 63. Probably twice a week he needs two naps in a day. Tr. 62-63. Typically, each nap lasts about an hour. Tr. 64.

Although it is unclear if the fatigue that Mr. XXXX is describing is the result of his medications, or a result of the combined effects of his physical and mental conditions, what is noteworthy is that the ALJ failed to address the cumulative effects of all of the Plaintiff's ailments, including his reported fatigue. The ALJ did not address whether the fatigue is caused by medications, or the combined effects of all of his conditions. The ALJ does not credit, or discredit, the Plaintiff's reported fatigue. The decision is completely silent on the issue of fatigue. But, it is certainly possible that the reported fatigue is a result of the numerous prescribed medications that the Plaintiff takes. According to the record, he regularly takes Zoloft, 100mg, 2 tablets a day; Prazosin, 2mg capsule, once a day; Clonazepam, 5 mg tablet once a day; and also Aripiprazole. A common side effect of each of these medications is drowsiness and fatigue. See FN 1. As a result, the ALJ was required to address the cumulative effects of all of Mr. XXXX's conditions, including his reported fatigue, and also address whether the reported drowsiness and fatigue is a result of known side effects associated with the medications prescribed to the Plaintiff, or whether the fatigue was the cause of the combined effects of Mr. XXXX's physical and mental conditions. The ALJ did not take into consideration Mr. XXXX's reported fatigue and drowsiness.

If the ALJ considered Mr. XXXX's fatigue in formulating the RFC, the ALJ may have been constrained to find him disabled. That is because the VE testified that excessive time off task, excessive absenteeism, and reduced productivity would render him unemployable. Tr. 66-69.

Conclusion:

Certainly, drowsiness and fatigue can impact a claimant's functioning. The failure of the ALJ to discuss the Plaintiff's cumulative effect of all of Mr. XXXX's conditions, including his drowsiness and fatigue, and the effects of his medication, is reversible error. The ALJ was required to address the impact of fatigue on Mr. XXXX's already hampered cognitive functioning.

V.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY NOT CONSIDERING THE PLAINTIFF'S "GAF" SCORES, WHICH WERE AS LOW AS 38 FOR MORE THAN 2-YEARS.

Applicable law:

Many courts, including the Tenth Circuit and other districts in the Tenth Circuit, indicate that failure to consider GAF scores at Step 2 are reversible error or that a Step 2 decision of non-severity when the record contains GAF scores of lower than 50 are not supported by substantial evidence. See Lee v. Barnhart, 117 Fed. App'x 674, 678 (10 Cir. 2004) ("A GAF score of fifty or less, however, does suggest an inability to keep a job. . . In a case like this one, decided at step two, the GAF score should not have been ignored."); Bronson v. Astrue, 530 F. Supp. 2d 1172 (D. Kan. 2008) (decision where ALJ considered GAF scores at Step 2, ultimately concluding that all of the medical evidence did not establish requisite severity); see also, e.g., Magwood v. Commissioner of Social Sec., 2008 WL 4145443 at *2 (3 Cir. 2008) (medical evidence that claimant was "receiving psychiatric services on a regular basis, was engaged in therapeutic

counseling on a weekly basis, was taking antidepressants, was assessed as functioning with a GAF of 55-60, and had an opinion from a treating psychiatrist that she was unable to work on a sustained basis . . . was more than sufficient to satisfy step two's *de minimis* threshold," thus, Step 2 decision held "not supported substantial evidence"); McPherson v. Astrue, 2009 WL 529221 at *12 (S.D.W.Va. 2009) ("Plaintiff's GAF score may be relevant in a more generalized assessment of the severity of mental impairment at step two"); Jackson v. Astrue, 2009 WL 248491, 8 (D. Kan. 2009) ("The step two requirement is generally considered a *de minimis* screening device to dispose of groundless claims; thus, reasonable doubts on severity are to be resolved in favor of the claimant. . . . Mr. Garrett's RFC assessment and GAF scores provide evidence which would support a finding that plaintiff had severe mental impairments, i.e., that plaintiff's mental impairment would have more than a minimal effect on his or her ability to do basic work activities. The ALJ improperly ignored the GAF score of 50 by Darlys Miller, another treating source. Such a score suggests an inability to keep a job, and thus would clearly suggest that plaintiff has a severe mental impairment. Thus, contrary to the findings of the ALJ, Mr. Garrett's assessment has some support in the record from another treating source which should be considered when this case is remanded."); Miller v. Astrue, 2008 WL 5129874 at **1-2 (W.D. Wash. 2008) ("Here, the ALJ erred when he did not consider Plaintiff's depression a severe impairment at step-two. Ms. Miller has a long history of treatment for depression. DDS, staff psychologists, Dr. van Dam and Dr. Clifford, opined Ms. Miller suffered from depressive disorder, recurrent, moderate; and dependent personality traits . . . The doctors opined that Ms. Miller is moderately limited in her ability to understand and remember detailed instructions; moderately limited in her ability to carry out detailed instructions; and moderately limited in her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a

consistent pace without an unreasonable number and length of rest periods . . . Treatment records in evidence show she was being treated at the Center for Behavioral Solutions (CBS) from July 2003 through the time of hearing, for major depressive disorder . . . Her treatment records show GAF scores in the 40's and 50's, with suicidal ideation, poor hygiene, pressured speech, agitated mood, anxious and tearful affect, inability to act to preserve state assisted support, and scattered thoughts and need of multiple re-directions"); Salazar v. Astrue, 2008 WL 5046403 at *7 (W.D. Okla. 2008) ("GAF score reflects serious impairment in social, occupational, or school functioning, such as inability to keep a job" but ALJ did not discuss it or other evidence and it "'is improper for the ALJ to pick and choose among medical reports, using portions of evidence favorable to his position while ignoring other evidence)'; Hardman v. Barnhart, 362 F.3d 676, 681 (10 Cir. 2004) . . . the ALJ's step two finding is flawed."); Stewart v. Astrue, 2008 WL 4829926 at *4 (C.D. Cal. 2008) (though evidence not sufficient to establish a disability, fact that Plaintiff worked with a mental impairment did not establish non-severity as diagnosis of depression was confirmed by consultative psychiatrist; Plaintiff given GAF of 58 yet "ALJ did not address any of plaintiff's GAF scores," and holding that in "light of this evidence, plaintiff has proven that she suffered from more than a slight mental impairment.").

Argument:

In the Decision and Order, the ALJ omitted pertinent discussion. "GAF" scores are acceptable tests for consideration of whether a claimant is disabled and unable to work. In this case, the record demonstrates that the plaintiff's GAF scores were well under 50. On October 15, 2014, and again on January 30, 2017, Dr. Julie Wiese assessed Mr. XXXX as having a GAF of 38. Thus, for over 2-years, Mr. XXXX had an extremely low GAF score. Yet, nowhere in the Decision does the ALJ discuss this evidence.

Many courts, including the Tenth Circuit and other districts in the Tenth Circuit, indicate that failure to consider GAF scores at Step 2 is reversible error or that a Step 2 decision of non-severity when the record contains GAF scores of lower than 50 are not supported by substantial evidence. In this case, the plaintiff's GAF score was as low as 38 for over 2 straight years. And, presumably the GAF score continued to be extremely low even after the Alleged Onset Date since the Plaintiff's condition did not improve thereafter.

The GAF scores, which were 38 for over 2-years, are suggestive of the fact that Mr. XXXX's mental limitations may have been, at times, "marked" in severity. Such low GAF scores are indicative of the fact that Mr. XXXX is unemployable and should have been awarded Social Security Disability benefits. Such a marked impairment could have a substantial impact on concentration, persistence, and pace, or memory, or other cognitive functions. The ALJ was required to consider the Plaintiff's GAF scores and committed reversible error by failing to do so.

Conclusion:

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

CONCLUSION

Mr. XXXX was a special agent with the FBI and also a member of the Air National Guard for the United States Air Force. He faithfully served our country for many years. Now that he is unable to work as a result of injuries he sustained in the line of duty, he deserves to have his claim for social security benefits properly and fairly evaluated.

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

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XXXXX