No. 22-50868

In the United States Court of Appeals For the Fifth Circuit

LAURA CORINA MCCORD,

Plaintiff-Appellant,

v.

KILOLO KIJIKAZI, ACTING COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Texas, El Paso Division, No. EP-21-CV-00082-LS

OPENING BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1) Plaintiffs-Appellants: Laura McCord

2) Counsel for the Plaintiffs-Appellants: Bryan Konoski, Kira Treyvus, and Konoski & Partners, P.C. d/b/a THE FEDERAL APPEALS FIRM.

3) Defendants-Appellees: The Commissioner of the Social Security Administration.

Dated: November 3, 2022
New York, NY

Respectfully Submitted:

/s/Bryan Konoski

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant, Laura McCord, does not ask for oral argument in this matter. The Plaintiff-Appellant consents to this Court deciding the case on submission.

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STATEMENT OF JURISDICTION

(A) The basis for subject matter jurisdiction: The Plaintiff brings this appeal of the district court's decision affirming the denial of the Plaintiff's social security disability benefits. Subject matter jurisdiction exists pursuant to 42 U.S.C. § 405(g).

(B) The basis for the court of appeals' jurisdiction: This Court's appellate jurisdiction to review the district court's final order arises from 28 U.S.C. § 1291.

(C) The filing dates establishing the timeliness of the appeal: The Court issued a final judgment on August 25, 2022. The Plaintiff filed a notice of appeal on October 3, 2022. The notice of appeal was timely filed pursuant to the Federal Rules of Appellate Procedure 4(B). The electronic record on appeal was accepted by the Circuit on October 14, 2022. The Plaintiff's brief is timely filed within 40 days after the record is filed, pursuant to Federal Rules of Appellate Procedure 31(a).

(D) The appeal is from a final order or judgment: The district court issued a final judgment on August 25, 2022, disposing of all issues in the case.

STATEMENT OF ISSUES

I.

DID THE DISTRICT COURT ERR AS A MATTER OF LAW BY FINDING NO ERROR IN THE ALJ'S EVALUATION OF THE OPINONS OF THE STATE AGENCY PSYCHOLOGISTS EVEN THOUGH THE ALJ DID NOT EVALUATE SUPPORTABILITY AND CONSISTENCY AS REQUIRED BY 20 C.F.R. §§ 404.1520c, 416.920c ?

II.

DID THE DISTRICT COURT ERR AS A MATTER OF LAW BY FINDING NO ERROR IN THE ALJ'S COMPLETE FAILURE TO EVALUATE THE OPINIONS OF THE PLAINTIFF'S PHYSICAL THERAPIST ?

STATEMENT OF THE CASE

Ms. McCord applied for Title II disability benefits on June 11, 2019, alleging disability commencing on July 13, 2017. (ROA.22-50868.62) (A-12).[1] Her claim was denied and Ms. McCord filed a written request for a hearing which was subsequently held on September 10, 2020. (ROA.22-50868.62) (A-12). The ALJ denied the claim on October 27, 2020. (ROA.22-50868.59) (A-9). Ms. McCord filed a request for review with the Appeals Council on November 3, 2020. (ROA.22-50868.55) (A-33). The Appeals Council denied the Request for Review on January 5, 2021. (ROA.22-50868.52) (A-30). Accordingly, the ALJ's decision became the Commissioner's final decision.

Ms. McCord appealed to federal district court asking the court to overturn the Commissioner's decision and remand the case for further consideration. The federal district court issued an order denying the Plaintiff's request for relief and affirming the Commissioner's decision denying disability benefits to the Plaintiff. (Court Decision, P. 1; A-1).

Two of the issues raised on appeal to the district court are at issue in this appeal to the Fifth Circuit Court of Appeals.

[1] Citations to "A-#" references the bates stamped page numbers in the Appendix.

The first issue that the Plaintiff raised in the district court appeal, and which is in contention here, was that that the ALJ did not properly consider *supportability* and *consistency* with respect to the state agency psychologists' opinions, in violation of 20 C.F.R. §§ 404.1520c(b)(2) and 416.920c(b)(2). The ALJ grouped the state agency medical consultants together, who issued opinions related to the Plaintiff's physical conditions, along with the state agency psychologists who issued opinions related to the Plaintiff's mental limitations. There were 4 opinions in total. After grouping all 4 opinions together, the ALJ found all of the opinions "mostly persuasive". (ROA.22-50868.72) (A-22). However, the ALJ only expressly analyzed supportability and consistency with respect to the Plaintiff's physical conditions and limitations. The ALJ failed to perform any analysis whatsoever regarding supportability and consistency with respect to the Plaintiff's mental limitations. (ROA.22-50868.72) (A-22). This error is problematic here because Dr. White found moderate limitations in the Plaintiff's ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. (ROA.22-50868.144) (A-62). Dr. White also opined that the Plaintiff was moderately limited in the ability to maintain

attention and concentration for extended periods. (ROA.22-50868.144) (A-62). These limitations relate to absenteeism and time off task, which were limitations that were not addressed in the RFC.

The district court did not find an error with respect to this first issue. In so finding, the district court stated:

> "McCord argues that the ALJ "completely fail[ed] to address [the] 'supportability' and 'consistency'" of, and "rejected," Dr. White's assessment. The record belies this argument. The ALJ explicitly states that he "evaluated the opinion evidence of the State non-examining medical consultants," to include the opinions that McCord "exhibited no more than moderate difficulties affecting her ability to sustain concentration" and had moderate difficulty interacting with others. These conclusions derive from Dr. White's report, and the ALJ opinion cites to it." (Court Decision, P. 5; A-5).

The district court's analysis is problematic. The ALJ's statement that he "evaluated the opinion evidence of the State non-examining medical consultants" is not a sufficient substitution for a supportability and consistency analysis that is required by the Regulations. The ALJ did not provide any meaningful analysis as to the supportability and consistency factors as required by the Regulations and the district court failed to recognize and remand on this error.

The second issue that the Plaintiff raised in the district court appeal, and which is in contention here, is that that the ALJ did not properly consider the opinions of the Plaintiff's physical therapist. The Plaintiff's physical therapist issued an opinion in on November 14, 2018 and opined that the Plaintiff would be limited to sedentary level work because her ability to lift and carry was limited to a maximum of 10 pounds occasionally. The physical therapist further opined that the Plaintiff's ability to stand and walk was limited to occasional (meaning, up to 1/3 of the workday). (ROA.22-50868.382) (A-67). The ALJ did not evaluate the physical therapist opinions anywhere in the decision. The district court erred by simply upholding the ALJ's rejection of the physical therapist's opinions. The district court reasoned that the ALJ did not have to consider the physical therapist's opinions because two other doctors, Drs. Rowlands and Reddy, reviewed later medical records and, in 2019, issued opinions finding less functional limitations. (ROA.22-50868.141) (A-46; A-59). Essentially, the district court determined that Drs. Rowlands and Reddy issued a more recent opinion based on more recent medical records and, as a result, the ALJ was free to disregard the earlier opinion of the physical therapist. However, this

is not the law. The law is clear that the ALJ must evaluate all medical evidence and all opinions. As such, the district court erred by failing to remand the case for further consideration and for failing to require the ALJ to consider the opinions of the physical therapist.

SUMMARY OF THE ARGUMENT

The ALJ erred not properly considering *supportability* and *consistency* with respect to the state agency psychologists' opinions, in violation of 20 C.F.R. §§ 404.1520c(b)(2) and 416.920c(b)(2). The district court erred in failing to recognize the error and in failing to remand the case for further consideration.

The ALJ also erred by not properly considering the opinions of the Plaintiff's physical therapist. The ALJ did not evaluate the physical therapist opinions anywhere in the decision. The district court erred by improperly upholding the ALJ's decision despite the ALJ's failure to evaluate the physical therapist's opinions.

STANDARD OF REVIEW

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).

The Fifth Circuit has held that review of Social Security disability cases "is limited to two inquiries: (1) whether the decision is supported by substantial evidence on the record as a whole, and (2) whether the Commissioner applied the proper legal standard." Perez v. Barnhart, 415 F.3d 457, 461 (5th Cir.2005) *citing* Greenspan v. Shalala, 38 F.3d 232, 236 (5th Cir.1994).

Additionally, "[i]f the Commissioner fails to apply the correct legal standards, or fails to provide a reviewing court with a sufficient basis to determine that the correct legal principles were followed, it is grounds

for reversal." Porter v. Colvin, 2014 WL 1330279 at *2 (M.D. La. Mar. 31, 2014) *citing* Bradley v. Bowen, 809 F.2d 1054, 1057 (5th Cir.1987).

ARGUMENT

I.

THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FINDING NO ERROR IN THE ALJ'S EVALUATION OF THE OPINONS OF THE STATE AGENCY PSYCHOLOGISTS EVEN THOUGH THE ALJ DID NOT EVALUATE SUPPORTABILITY AND CONSISTENCY AS REQUIRED BY 20 C.F.R. §§ 404.1520c, 416.920c.

Applicable law:

The Social Security Administration has promulgated a new rule for assessing medical opinion evidence, which governs all claims filed on or after March 27, 2017. 20 C.F.R. §§ 404.1520c, 416.920c. The new rule provides that the Commissioner "will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from [claimant's] medical sources." 20 C.F.R. § 416.920c(a). Rather, the Commissioner shall "evaluate the persuasiveness" of all medical opinions and prior

administrative medical findings using the factors set forth in the regulations: (1) supportability; (2) consistency; (3) relationship with the claimant, including length of the treatment relationship, frequency of examinations, purpose of the treatment relationship, extent of the treatment relationship, and examining relationship; (4) specialization; and (5) other factors including but not limited to evidence showing a medical source has familiarity with the other evidence in the claim or an understanding of the agency's disability program's policies and evidentiary requirements. 20 C.F.R. § 416.920c(a), (c)(1)-(5).

The most important factors to be considered when the Commissioner evaluates persuasiveness are *supportability* and *consistency*. See 20 C.F.R. §416.920c(a), 416.920b(2). The ALJ must articulate medical opinions pursuant to these factors. Guillory v. Saul, 2021 WL 1600283 (EDTX, Apr. 23, 2021). Most importantly, the ALJ must articulate how he considered the supportability and consistency factors for a medical opinion. . . in his determination. William T. v. Comm'r of Soc. Sec., 2020 WL 6946517 (NDTX, Nov. 25, 2020).

The ALJ "will explain how [he] considered the supportability and consistency factors for a medical source's medical opinions ... in [the] ...

decision." 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2)(emphasis added). Supportability generally refers to "the objective medical evidence and supporting explanations provided by a medical source." Id. §§ 404.1520c(c)(1), 416.920c(c)(1). Consistency generally refers to the consistency between the opinion and "the evidence from other medical sources and nonmedical sources in the claim." Id. §§ 404.1520c(c)(2), 416.920c(c)(2).

In cases like this one, the ALJ is required to provide a sufficient explanation of consistency and supportability to allow the reviewing court to undertake a meaningful review of whether his reasoning was supported by substantial evidence. See, Ramirez v. Saul, 2021 WL 2269473, at *6 (W.D. Tex. June 3, 2021); Todd v. Comm'r of Soc. Sec., 2021 WL 2535580, at *9 (N.D. Ohio, June 3, 2021); Burba v. Comm'r of Soc. Sec., 2020 WL 5792621 (N.D. Ohio Sept. 29, 2020). The revieing Court should not be left to merely speculate about reasons behind the ALJ's persuasiveness finding or lack thereof. See, e.g., Moore v. Saul, 2021 WL 754833, at *3 (S.D. Miss., Feb. 26, 2021); Ramirez, 2021 WL 2269473, at *6. Stated differently, there must be a discernible "logic

bridge" between the evidence and the ALJ's persuasiveness finding. Ramirez, 2021 WL 2269473, at *6.

Argument:

The ALJ erred as a matter of law by improperly evaluating the medical opinions of State Agency psychologists, Drs. Smith and White. The ALJ failed to evaluate the "consistency" and "supportability" factors that are required by 20 C.F.R. §§ 404.1520c.

In this case, four separate State Agency consultant's provided medical opinions. Two of the State Agency consultants, Dr. Rowlands and Dr. Reddy, provided opinions as to plaintiff's physical limitations. (ROA.22-50868.126) (ROA.22-50868.143) (A-44; A-61). The other two State Agency Consultants, Dr. Smith and Dr. White, provided medical opinions as to plaintiff's mental health limitation. (ROA.22-50868.123) (ROA.22-50868.144) (A-41; A-62). The ALJ grouped all four of the State Agency Consultant opinions into one joint analysis. The ALJ then concluded that all four State Agency Consultant opinions were "mostly persuasive". (ROA.22-50868.72) (A-22). However, the ALJ failed to give any reason whatsoever as to why Dr. Smith's and Dr. White's opinions were found to be mostly persuasive, as opposed to fully persuasive. The

ALJ utterly failed to discuss or consider the "supportability" or "consistency" of Dr. Smith's or Dr. White's opinions.

Regarding the State Agency consultants' opinions, the ALJ wrote:

> "Finally, the undersigned has evaluated the opinion evidence of the State non-examining medical consultants at both the initial and reconsideration levels of determination. There, it was opined that the claimant exhibited no more than moderate difficulties affecting her ability to sustain concentration or maintain pace and, could perform work activities at the light exertional level with some postural restrictions to climbing and balancing. (Ex. 1A). Analogous conclusions were reached at the reconsideration level of determination except the consultants at that stage of determination found moderate difficulties affecting the claimant's ability to interact effectively was moderately limited. (Ex. 4A). The undersigned finds the opinions by the state consultants are mostly persuasive, as they are supported by the documented finding as noted above, For example, objective assessments showed that the claimant exhibited restricted flexion and extension in the lumbar spine. (Ex. 4F / 6). However, there was no spinal process tenderness noted in other assessments of the claimant's lumbar spine. (Ex. 12F / 27). However, while the claimant continued to use an assistive device however (Ex. 17F / 7), there were instances where she exhibited normal gait (Ex. 2F / 22, Ex. 4F / 18). The claimant has not undergone any other invasive form of treatment such as surgical

> intervention in the spinal region at this time. The claimant was also consistently prescribed Ultram for back pain, which did offer some relief (Ex. 1F / 4) and there were no reports that the medication was not working to alleviate some of her pain symptoms or caused side effects. Likewise, the claimant was able to perform some daily activities such as preparing light meals, doing the dishes, and making her bed. (*See* Ex. 5F / 3)." (ROA.22-50868.72) (A-22).

Dr. Rowlands and Dr. Reddy were the state agency medical consultants that reviewed the Plaintiff's *physical* conditions. Dr. Smith and Dr. White were the state agency consultants that reviewed the Plaintiff's *psychological* or *mental* conditions.

The ALJ in this case focused his "supportability" and "consistency" analysis of the 20 C.F.R. § 404.1520c factors exclusively on the opinions related to *physical* conditions, which relate directly to the opinions of Dr. Rowlands and Dr. Reddy.

In the above excerpt, which is the analysis of the State Agency consultants' opinions, the ALJ does not address the supportability or consistency of even a single mental limitation opined by Drs. Smith and White. The ALJ does not address whether the opined mental limitations were supported by any medical record review or analysis by the State

Agency psychologists, nor does the ALJ address whether the opined mental limitations were consistent with any other medical records or evidence in the record. The ALJ did not perform any "supportability" or "consistency" analysis of the opinions of the state agency *psychological* consultants, Drs. Smith and White. (ROA.22-50868.72) (A-22).

Since the ALJ failed to perform a "supportability" and "consistency" analysis of Drs. Smith and White's opinions, the ALJ erred by failing to comply with the requirements of 20 C.F.R. § 404.1520c.

The Plaintiff raised this issue in the district court. The Plaintiff argued, in sum and substance, that the ALJ erred by failing to perform a "supportability" and "consistency" analysis as required under 20 C.F.R. § 404.1520c. The Plaintiff further argued that the ALJ's error was not harmless because Dr. White found moderate limitations in the Plaintiff's ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. (ROA.22-50868.144) (A-62). The Plaintiff also noted that Dr. White opined that the Plaintiff was moderately limited in the ability to maintain attention and concentration for extended periods. (ROA.22-50868.144) (A-62). The Plaintiff correctly pointed out that these

limitations relate to absenteeism and time off task, which were limitations that were not addressed in the RFC. Moreover, the Plaintiff correctly pointed out that the ALJ did not directly address these opinions anywhere in the decision.

However, the district court erred in the findings on this issue. The court's decision states:

> "McCord argues that the ALJ "completely fail[ed] to address [the] 'supportability' and 'consistency'" of, and "rejected," Dr. White's assessment. The record belies this argument. The ALJ explicitly states that he "evaluated the opinion evidence of the State non-examining medical consultants," to include the opinions that McCord "exhibited no more than moderate difficulties affecting her ability to sustain concentration" and had moderate difficulty interacting with others. These conclusions derive from Dr. White's report, and the ALJ opinion cites to it." (Court Decision, P. 5; A-5).

It is true that the ALJ stated he "evaluated the opinion evidence" and that the doctors opined that the Plaintiff "exhibited no more than moderate difficulties affecting her ability to sustain concentration." However, this is still an insufficient analysis by the ALJ because the ALJ still failed to analyze supportability and consistency as required under the Regulations. The ALJ's bare assertion that he, essentially, 'took a

look at' the opinion evidence does not equate to performing a proper and meaningful analysis under the Regulations. The district court erred by failing to properly require the ALJ to adhere to the law. The law is clear that when evaluating medical opinion evidence the most important factors to be considered when the Commissioner evaluates persuasiveness are supportability and consistency. See 20 C.F.R. §416.920c(a), 416.920b(2). The ALJ must articulate medical opinions pursuant to these factors. Guillory v. Saul, 2021 WL 1600283 (EDTX, Apr. 23, 2021)(emphasis added). Most importantly, an ALJ **must articulate how he considered the supportability and consistency factors for as medical opinion** . . . in his determination. William T. v. Comm'r of Soc. Sec., 2020 WL 6946517 (NDTX, Nov. 25, 2020).

In this case, the ALJ clearly did not analyze the supportability and consistency factors as it related to the state agency psychological opinions of Drs. Smith and White. The failure to analyze the supportability and consistency factors in violation of 20 C.F.R. §416.920c(a) and 416.920b(2), is plain error requiring remand. The district court erred by not properly applying the law and by not requiring the ALJ to apply 20 C.F.R.

§416.920c(a) and 416.920b(2) to the analysis of Dr. White and Dr. Smith's opinions.

This error is problematic here because Dr. White found moderate limitations in the Plaintiff's ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances. (ROA.22-50868.144) (A-62). The Plaintiff also noted that Dr. White opined that the Plaintiff was moderately limited in the ability to maintain attention and concentration for extended periods. (ROA.22-50868.144) (A-62). These limitations relate to absenteeism and time off task, which were limitations that were not addressed in the RFC. If the ALJ properly analyzed supportability and consistency as he was required to do, he may have determined that limitations related to absenteeism and time off task were appropriate and that an RFC limitation was necessary. However, since the ALJ never performed a supportability and consistency analysis of Dr. Smith and Dr. White's opinions this reviewing court is only left guessing as to how such an analysis would have unfolded. However, this Court should not be left to such guesswork. See Spoor Park v. Comm'r of Soc. Sec., 2018 WL 3093624 (ND Ohio, June 22, 2018), (*holding* that ALJ decisions

requiring the reviewing court to engage in guesswork court cannot be affirmed); Schwartz v. Kijakazi, 2021 WL 3620071 (SD Texas, Aug. 16, 2021)("… *post hoc* rationalizations are not to be considered").

The district court also stated that: "Dr. White crystallized his mental health assessment of McCord as follows: [McCord] can understand, remember, and carry out detailed but not complex instructions, make decisions, attend and concentrate for extended periods, accept instructions, and respond appropriately to changes in routine work setting." (Court Decision, P. 5; A-5). However, when reviewing the State Agency psychologists' opinions together, it is clear that Dr. White's narrative explanation did not crystallize or clarify the overall mental health assessment.

The problem with the district court's analysis is that both Dr. Smith and Dr. White both have the same narrative explanation in their reports. Yet, their overall assessments as to the severity of the limitations were different. Dr. Smith performed the review of the medical records and formulated his opinion at the initial level of review. Dr. White performed a review of medical records and formulated his opinion at the reconsideration level of review. Dr. Smith, at the initial level of review,

found that the Plaintiff was "not significantly limited" in his "ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances." (ROA.22-50868.127). In so finding, Dr. Smith prepared a narrative explanation as part of the opinion. The narrative explanation stated that [McCord] can understand, remember, and carry out detailed but not complex instructions, make decisions, attend and concentrate for extended periods, accept instructions, and respond appropriately to changes in routine work setting." Essentially, this narrative explanation contained no limitations related to absenteeism or time off task, which was consistent with Dr. Smith's findings that the Plaintiff was "not significantly limited" in that regard.

Dr. White, at the reconsideration level of review, found that the Plaintiff was "moderately limited" in her "ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances." (ROA.22-50868.127). Thus, at a later stage of review, Dr. White found that the Plaintiff was more limited than opined by Dr. Smith.

The narrative explanations of Dr. Smith and White are exactly the same. However, the narrative explanations should not be the exact same explanation where one doctor opined to no limitations, while another doctor opined to moderate limitations, in the same categories. It should be the case that moderate limitations would result in more limitations in the narrative explanation. As such, Dr. White's narrative explanation should account for the moderate limitations he found to exist in the Plaintiff's "ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances." Dr. White found moderate limitations, which were not accounted for in the narrative explanation. Common sense tells us that it is highly likely that Dr. White, at the reconsideration level of review, did a poor copy and paste job of the prior narrative explanation and used the prior narrative explanation without updating it to account for his own opinion that the Plaintiff had moderate limitations in her "ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances." What is clear, however, is that the narrative explanation in Dr. White's report contains no limitations related to time off task or absenteeism despite the fact that the doctor found moderate

limitations in the Plaintiff's "ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances."

The district court erred by stating that Dr. White "crystallized" his mental health assessment in the narrative report. In fact, when comparing the opinions of Dr. Smith (at the initial level) and the opinions of Dr. White (at the reconsideration level), the issue of whether the Plaintiff's moderate limitations in her "ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances" are not crystalized at all. If anything, this Court is, once again, left guessing – this time as to whether Dr. White left out restrictions from the narrative explanation. Certainly, Dr. Smith and Dr. White differed on the limitations that the Plaintiff experienced, yet they both created the same exact narrative explanation. This makes no sense. The district court erred by concluding that Dr. White's explanation "crystallized" the opinion without comparing the opinions side-by-side. In fact, Dr. White's opinion, and the narrative explanation, appears to have omitted any restrictions related to the Plaintiff's moderate limitations in her "ability to perform activities within a schedule,

maintain regular attendance, and be punctual within customary tolerances." As such, the doctor's narrative explanation did not "crystallize" the opinion but, instead, only further created more confusion.

It is important to note that this confusion may have been averted had the ALJ performed a proper supportability and consistency analysis in the first instance. Had the ALJ properly analyzed supportability and consistency thoroughly, as required by the Regulations, this issue may have been resolved at the administrative hearing level. As such, this issue again circles back to the primary issue at hand, which is that the ALJ improperly evaluated supportability and consistency, which was reversible error.

Finally, the district court states, "[m]oreover, given the totality of the records on which this restrictive mental RFC is based, I find no support for McCord's second argument that Dr. White's records show the RFC is flawed based on work attendance and punctuality grounds. My review of the record reflects that substantial evidence supports the ALJ's decision on these issues and he applied the proper legal standards." (Court Decision, P. 7; A-7).

This argument is error because the district court provides no meaningful analysis to support this conclusion. The district court states that he finds *no support* for the argument that Dr. White's records show that the RFC is flawed based on work attendance and punctuality grounds. However, the district court does not cite to any medical records or any proof whatsoever for this statement. Moreover, the Plaintiff did, in fact, provide support for the argument that the ALJ failed to account for work attendance and punctuality limitations – those records are Dr. White's own medical opinion that the Plaintiff was "moderately limited" in that regard, as addressed above. Again, this, once again, circles back to the problem with the supportability and consistency analysis. The doctor opined that the Plaintiff was "moderately limited" in her "ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances", which is the support the Plaintiff relies upon for the argument that the ALJ did not properly account for an absenteeism and time off task limitation in the RFC.

The fact of the matter remains that the ALJ did not analyze supportability and consistency of the state agency psychological consultants. The district court erred by failing to find the ALJ erred and

by failing to remanding the case for a proper analysis under 20 C.F.R. §416.920c(a), 416.920b(2).

II.

THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FINDING NO ERROR IN THE ALJ'S COMPLETE FAILURE TO EVALUATE THE OPINIONS OF THE PLAINTIFF'S PHYSICAL THERAPIST.

Applicable Law:

The ALJ is required to discuss all medical opinions in the decision. The failure to consider medical opinions, and failure to mention medical opinions, is legal error. Id. § 404.1520c(a); See William T. v. Comm'r of Soc. Sec., 2020 WL 6946517 (NDTX, Nov. 25, 2020); see also Kneeland v. Berryhill, 850 F.3d 749, 761 (5th Cir. 2017) (*finding* that under the analogous section of the prior regulations, an ALJ's failure to mention the opinion of an examining physician required a remand).

In evaluating a non-acceptable medical source opinion, the ALJ is instructed to consider the same factors that guide consideration of the opinion from a treating physician or psychologist. See 20 C.F.R. §§ 404.1527(c), (f).

20 C.F.R. §§ 404.1527(c), (f) provides that "[o]pinions from medical sources who are not acceptable medical sources and from nonmedical sources may reflect the source's judgment about some of the same issues addressed in medical opinions from acceptable medical sources. Although we will consider these opinions using the same factors as listed in paragraph (c)(1) through (c)(6) in this section, not every factor for weighing opinion evidence will apply in every case because the evaluation of an opinion from a medical source who is not an acceptable medical source or from a nonmedical source depends on the particular facts in each case. Depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, **an opinion from a medical source who is not an acceptable medical source or from a nonmedical source may outweigh the medical opinion of an acceptable medical source**, including the medical opinion of a treating source. For example, it may be appropriate to give more weight to the opinion of a medical source who is not an acceptable medical source if he or she has seen the individual more often than the treating source, has provided better supporting evidence and a better explanation for the opinion, and the opinion is more consistent with the evidence as a whole."

The Program Operations Manual System ("POMS") provides that "[o]nce we establish that a claimant has an MDI based on objective medical evidence from an [acceptable medical source], we use all evidence from all sources for all other findings in the sequential evaluation process, including showing the severity of a claimant's MDI at step 2. These sources include: . . . therapists." POMS DI 22505.003 (A)(3).

Argument:

In this case, the ALJ failed to consider the results from a functional test conducted by Mr. Torres which pertained to plaintiff's functional limitations. Mr. Torres is the plaintiff's physical therapist. Mr. Torres administered 26 physical therapy sessions to plaintiff to improve her mobility and functioning. (ROA.22-50868.383) (A-68). On November 14, 2018, Mr. Torres performed a functional assessment test and recorded numerous functional limitations in his medical records. (ROA.22-50868.382) (A-67). More specifically, Mr. Torres wrote that based on the testing performed, the plaintiff would be limited to **sedentary level** work because her ability to **lift and carry was limited to a maximum of 10 pounds** occasionally. (ROA.22-50868.382) (A-67). Mr. Torres further recorded that the plaintiff's ability to **stand and walk** was

limited to **occasional (up to 1/3 of the work day**). (ROA.22-50868.382) (A-67).

The ALJ failed to consider and evaluate the results of this functional assessment. Although Mr. Torres is a physical therapist and not a medical doctor, his findings are nonetheless entitled to consideration. See. POMS DI 22505.003 (A)(3). In this case, the ALJ already establish that the plaintiff had medically determinable impairments of degenerative disease of the lumbar spine and degenerative joint disease of the left knee based on acceptable medical sources. (ROA.22-50868.65) (A-15). Therefore, pursuant to POMS DI 22505.003 (A)(3), the ALJ was obligated to consider the functional test findings, and opinions, provided by Mr. Torres because these findings and opinions pertained to the severity of plaintiff's impairments and their impact on the plaintiff's ability to function.

In evaluating a non-acceptable medical source opinion, the ALJ is instructed to consider the same factors that guide consideration of the opinion from a treating physician or psychologist. See 20 C.F.R. §§ 404.1527(c), (f).

20 C.F.R. §§ 404.1527(c), (f) provides that:

> "[o]pinions from medical sources who are not acceptable medical sources and from nonmedical sources may reflect the source's judgment about some of the same issues addressed in medical opinions from acceptable medical sources. Although we will consider these opinions using the same factors as listed in paragraph (c)(1) through (c)(6) in this section, not every factor for weighing opinion evidence will apply in every case because the evaluation of an opinion from a medical source who is not an acceptable medical source or from a nonmedical source depends on the particular facts in each case. Depending on the particular facts in a case, and after applying the factors for weighing opinion evidence, **an opinion from a medical source who is not an acceptable medical source or from a nonmedical source may outweigh the medical opinion of an acceptable medical source**, including the medical opinion of a treating source. For example, it may be appropriate to give more weight to the opinion of a medical source who is not an acceptable medical source if he or she has seen the individual more often than the treating source, has provided better supporting evidence and a better explanation for the opinion, and the opinion is more consistent with the evidence as a whole."

In this case, the opinion and finding of Mr. Torres addressed the same functional issues as the opinions of the State Agency Consultant's

Dr. Rowlands and Dr. Reddy. (ROA.22-50868.126) (ROA.22-50868.143) (A-44; A-61). Dr. Rowlands and Dr. Reddy provided opinions that the plaintiff could perform light work in that she could lift and carry up to 20 pounds occasionally and up to 10 pounds frequently. (ROA.22-50868.125) (ROA.22-50868.142) (A-43; A-60). Dr. Rowlands and Dr. Reddy provided opinions that the plaintiff could stand and walk up to 6 hours in a workday. (ROA.22-50868.125) (ROA.22-50868.142) (A-43; A-60). The ALJ found the opinions of light level work determined by Dr. Rowlands and Dr. Reddy mostly persuasive without ever discussing or considering the conflicting opinion of the physical therapist, Mr. Torres, who determined that the plaintiff was limited to sedentary level work. The ALJ's failure to consider Mr. Torres' opinion and functional assessment is a violation of 20 C.F.R. §§ 404.1527(c), (f) and POMS DI 22505.003 (A)(3).

Likewise, the district court also erred. Mr. Torres' opinion was issued in 2018. Thereafter, Drs. Rowlands and Reddy reviewed medical records and issued their opinions in 2019. The district court also disregarded Mr. Torres' opinion. In doing so, the district court effectively stated that the ALJ did not have to consider Mr. Torres' opinion because

Drs. Rowlands and Reddy reviewed later medical records and issued opinions in 2019 finding less limitations. (Court Decision, P. 7; A-7).

Thus, the district court allowed for Mr. Torres' opinions to be completely ignored by the ALJ because Drs. Rowlands and Reddy issued more recent opinions. This is error because the ALJ cannot just simply ignore Mr. Torres' opinions because the state agency medical doctors reached a different opinion more recently. These doctors may not be correct, which is the whole reason why it is necessary to evaluate all medical evidence and all opinion evidence. The appropriate course of action would be for the ALJ to analyze all of the opinions, weigh those opinions against the evidence, and then reach a conclusion as to which opinion is more persuasive and explain why. The district court erred by simply upholding the ALJ's carte blanch rejection of Mr. Torres' opinions without requiring the ALJ to provide a proper analysis and explanation. Thus, the district court erred and allowed the ALJ to violate 20 C.F.R. §§ 404.1527(c), (f) and POMS DI 22505.003 (A)(3).

It is clear that the ALJ never gave a reason as to why he completely ignored Mr. Torres' opinion, never evaluated the persuasiveness of the opinion, and never compared it to the opinions of the other doctors. The ALJ simply ignored the opinion. The ALJ's decision did not address the opinion of Mr. Torres. Moreover, the district court erred by failing to require the ALJ to follow the Regulations set forth in 20 C.F.R. §§ 404.1527(c), (f) and POMS DI 22505.003 (A)(3). Therefore, this decision must be reversed and remanded for further consideration.

CONCLUSION

For the reasons stated above, Ms. McCord asks that this Court find that the ALJ and district court erred and issue an Order that the denial of benefits be vacated and that the claim be remanded back to the Commissioner of the Social Security Administration for further proceedings.

Dated: November 3, 2022
New York, NY

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CERTIFICATE OF SERVICE

I, the undersigned, being sworn, say: I am not a party to the action, am over 18 years of age, and practice law with offices located in New York, NY. On the 3rd day of November, 2022, I served the within **OPENING BRIEF BY APPELLANT,** by: electronically filing said documents with the Clerk of the Court through the ECF system, which was then electronically served upon the Defendant through Defendant's Counsel.

Dated: November 3, 2022
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **5,834 words**, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced type font using Microsoft word in 14 point font size and Century Schoolbook font style.

Dated: November 3, 2022
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