No. 23-6081

In the United States Court of Appeals
For the Tenth Circuit

[redacted],

Plaintiff-Appellant,

v.

KILOLO KIJAKAZI, ACTING COMMISSIONER OF
THE SOCIAL SECURITY ADMINISTRATION,

Defendant-Appellee.

On Appeal from the United States District Court for the
Western District of Oklahoma, No. 5:22-cv-00834-STE
United States Magistrate Judge Shon T. Erwin

OPENING BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

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RULE 26.1 DISCLOSURE STATEMENT

The Appellant is an individual. There are no entities that have an interest in the outcome of this appeal that are required to be disclosed.

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

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 June 9, 2023. The Plaintiff filed a notice of appeal on June 12, 2023. The notice of appeal was timely filed pursuant to the Federal Rules of Appellate Procedure 4(B). 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 June 9, 2023, disposing of all issues in the case.

STATEMENT OF ISSUES

(1) Did the ALJ fail to account for social limitations limiting the Plaintiff to *superficial contact* with supervisors and coworkers in the RFC and fail to explain why no limitations were set forth in the RFC?

(2) Did the ALJ fail to incorporate the social limitations limiting the Plaintiff to *superficial* contact with supervisors and coworkers in the hypothetical questions posed to the Vocational Expert?

(3) Did the ALJ fail to account for social limitations *precluding* <u>all</u> contact with the general public in the RFC and fail to explain why no such limitations were set forth in the RFC?

(4) Did the ALJ fail to incorporate the social limitations *precluding* <u>all</u> contact with the general public in the hypothetical questions posed to the Vocational Expert?

STATEMENT OF THE CASE

This case has been pending since August 27, 2013, and has a long history of administrative proceedings. Mr. [redacted] applied for Title II and Title XVI social security benefits on September 17, 2013. Aplt. App. Vol. 3 at App - 723. In both applications he alleged disability commencing on August 27, 2013. Aplt. App. Vol. 3 at App - 723. His claim was denied, and Mr. [redacted] filed a written request for a hearing which was subsequently held on September 7, 2018. Aplt. App. Vol. 1 at App - 50. The ALJ denied the claim on May 6, 2019. Aplt. App. Vol. 1 at App - 47. Mr. [redacted] filed a request for review with the Appeals Council and the Appeals Council denied the Request for Review on December 16, 2019. Aplt. App. Vol. 1 at App - 36. Mr. [redacted] filed a civil action on February 18, 2020, in the U.S. District Court for the Western district of Oklahoma (5:20-cv-137). Aplt. App. Vol. 3 at App - 798. On February 3, 2021, the court granted a sentence 4 remand. Aplt. App. Vol. 3 at App - 804. A second hearing was held January 5, 2022. Aplt. App. Vol. 3 at App - 724. The ALJ denied the claim again on January 18, 2022. Aplt. App. Vol. 3 at App - 720. Mr. [redacted] filed a request for review with the Appeals Council and the Appeals Council

denied the Request for Review on June 21, 2022. Aplt. App. Vol. 3 at App - 713. Accordingly, the ALJ's decision became the Commissioner's final decision.

Mr. [redacted] appealed to the 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.

On appeal to the District Court, the Plaintiff raised three substantive issues for review, which were (1) whether the Commissioner erred a matter of law by failing to incorporate Plaintiff's social limitations into the RFC; (2) whether the Commissioner erred as a matter of law by failing to incorporate the Plaintiff's social limitations into the hypothetical questions posed to the Vocational Expert (this issue was incorporated into the argument of the first issue); and (3) whether the Commissioner erred as a matter of law by failing to incorporate Plaintiff's moderate mental limitations in adapting and managing himself into the RFC.

This appeal to the Circuit Court focuses on the issues pertaining to the Plaintiff's social limitations. (See Statement of Issues, *supra*).

SUMMARY OF THE ARGUMENT

The decision denying Plaintiff social security disability benefits is not supported by substantial evidence because the ALJ failed to include all of the Plaintiff's social limitations into the RFC. The ALJ credited the medical opinion evidence that found that the Plaintiff is limited to "superficial contact" with coworkers and supervisors and that the Plaintiff should have "no contact" with the general public. Despite finding these limitations to be "persuasive", the ALJ did not account for them in the RFC. Moreover, the ALJ did not explain why these limitations were not in the RFC, and the ALJ did not incorporate these limitations into the hypothetical questions posed to the VE. These errors warrant a remand.

The Plaintiff also argues that any legal precedent in the Tenth Circuit that allows for the application of the harmless error doctrine to an ALJ's failure to incorporate all functional limitations into a hypothetical question posed to the VE should be overturned.

For these reasons, in addition to the arguments more fully developed below, both the ALJ and the district court erred and remand is warranted.

STANDARD OF REVIEW

The standard of review in a Social Security appeal is whether the Commissioner's final decision is supported by substantial evidence, and whether she applied the correct legal standards. Hamilton v. Sec'y of Health and Human Servs., 961 F.2d 1495, 1497–98 (10th Cir.1992); 42 U.S.C. § 405(g). Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir.1994); 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). "Evidence is not substantial if it is overwhelmed by other evidence in the record or constitutes mere conclusion." Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir.1992). Moreover, "all the ALJ's required findings must be supported by substantial evidence," Haddock v. Apfel, 196 F.3d 1084, 1088 (10th Cir.1999), and he must consider all relevant medical evidence

in making those findings, Baker v. Bowen, 886 F.2d 289, 291 (10th Cir.1989). Therefore, "in addition to discussing the evidence supporting his decision, the ALJ must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." Clifton v. Chater, 79 F.3d 1007, 1010 (10th Cir.1996). Although the Court does not reweigh the evidence or try the issues de novo, Sisco v. United States Dep't of Health and Human Servs., 10 F.3d 739, 741 (10th Cir.1993), the Court does meticulously examine the record as a whole, including anything that may undercut or detract from the ALJ's findings in order to determine if the substantiality test has been met. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir.1994).

ARGUMENT

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO ACCOUNT FOR ALL THE PLAINTIFF'S SOCIAL LIMITATIONS.

The ALJ erred by failing to incorporate the Plaintiff's social limitations in the RFC, by failing to incorporate the Plaintiff's social limitations into the hypothetical questions posed to the Vocational Expert, and by failing to explain her rejection of the social limitations despite finding the medical opinions that assessed these limitations to be "persuasive". More specifically, the ALJ erred in the following ways:

(1) The ALJ failed to account for social limitations limiting the Plaintiff to *superficial contact* with supervisors and coworkers in the RFC and failed to explain why no limitations were set forth in the RFC;

(2) The ALJ failed to incorporate the social limitations limiting the Plaintiff to *superficial* contact with supervisors and coworkers in the hypothetical questions posed to the Vocational Expert;

(3) The ALJ failed to account for social limitations *precluding* <u>all</u> contact with the general public in the RFC and failed to explain why no such limitations were set forth in the RFC.

(4) The ALJ failed to incorporate the social limitations *precluding* <u>all</u> contact with the general public in the hypothetical questions posed to the Vocational Expert.

The Plaintiff will address each of these errors, in turn, below.

(1) <u>The ALJ failed to account for mental limitations limiting the Plaintiff to *superficial contact* with supervisors and coworkers in the RFC and failed to explain why no limitations were set forth in the RFC.</u>

In this case, two state agency's psychological consultants, Dr. Daugherty and Dr. Pearce, reviewed the plaintiff's medical records and issued concurring opinions pertaining to Plaintiff's functional limitations. Aplt. App. Vol 1 at App – 121 and Aplt. App. Vol 1 at App - 145. Dr. Daugherty and Dr. Pearce both opined that the "claimant **can relate to supervisors and peers on a *<u>superficial</u>* work basis** and the claimant cannot relate to the general public." Aplt. App. Vol 1 at App – 121 and Aplt. App. Vol 1 at App - 145. The ALJ gave these opinions substantial weight and found these opinions "persuasive". Aplt. App. Vol. 3 at App - 734. However, despite finding the opinions of Dr. Daugherty and Dr. Pearce to be "persuasive", which limit the Plaintiff's interactions with supervisors and co-workers to *superficial* contact, the RFC formulated by the ALJ failed to account for *superficial* interactions with supervisors and co-workers.

For the error related to the omission of *superficial* contact, the relevant portion of the RFC formulated by the ALJ provided that:

> "The claimant is able to perform simple, routine, repetitive tasks; free of production rate pace; and, **is able to have occasional interaction with supervisors, coworkers,** and the general public." (Emphasis added). Aplt. App. Vol. 3 at App - 729.

The RFC formulated by the ALJ did not accurately reflect the social interaction limitations contained in the opinions of Dr. Daugherty and Dr. Pearce which limited the Plaintiff to *superficial* contact with supervisors and coworkers. Moreover, the ALJ did not provide an explanation as to why these limitations were not adopted. The Plaintiff asserts that the RFC formulated by the ALJ is not supported by substantial evidence because a limitation to *occasional interaction with supervisors and coworkers,* does not adequately reflect Plaintiff's limitations.

The reason why the limitation to "occasional interaction" with supervisors and coworkers does not adequately reflect the Plaintiff's limitations is because the terms "'[o]ccasional' and 'superficial' are not coterminous." Wood v. Comm'r of Soc. Sec., 2019 WL 1614591, at *3 (S.D. Ohio Apr. 16, 2019), *report and recommendation adopted*, 2019 WL 1958663 (May 2, 2019); see also Mack v. Berryhill, N2018 WL 3533270, at *2-3 (N.D. Ill. July 23, 2018); Cote v. Colvin, 2017

WL 448617, at *6-7 (W.D. Wis. Feb. 2, 2017). "'Occasional contact' goes to the quantity of time spent with the individuals, whereas 'superficial contact' goes to the quality of the interactions." Wartak v. Colvin, 2016 WL 880945, at *7 (N.D. Ind. Mar. 8, 2016). "Even a job that requires only occasional interaction could require an employee to engage in prolonged or meaningful conversations during those few occasions." 2012 WL 1657922, at *12-13 (D. Minn. Apr. 17, 2012), *report and recommendation rejected in part*, No. CIV. 11-1356 JNE/JJG, 2012 WL 1658988 (D. Minn. May 11, 2012) (ultimately finding that ALJ's RFC determination was supported by substantial evidence and that jobs ALJ found claimant could perform did not require "more than 'brief' and 'superficial' contact with coworkers," but agreeing with "[t]he magistrate judge's point that it is possible for a person to have occasional but lengthy and in-depth interactions with coworkers"). See also Miller v. Kijakazi, 2021 WL 4311811 (ED Oklahoma, Sept. 22, 2021)(holding that "occasional" and "superficial" are not coterminous.).

The District Court acknowledged that "[c]learly, the ALJ's RFC determination does not reflect, verbatim, the MRFC findings form Drs. Daugherty and Pearce regarding Plaintiff being limited to only

"superficial" contact with supervisors and co-workers . . .." (Memorandum Opinion and Order, P. 7). The District Court noted that the ALJ erred by failing to account for the limitation to "superficial" contact with coworkers and supervisors in the RFC. (Id., at P. 11). However, the Court further stated, "[t]he Court agrees with Mr. [redacted], but concludes the error is harmless." (Id., at P. 8, 11).

The District Court agreed with the Plaintiff that the ALJ committed legal error. However, the error is not harmless and this Court should reverse the Commissioner's decision denying benefits and remand the case for further consideration.

The District Court rationalized the error as harmless because each job listed by the VE had a "People" rating of 8, which is the "lowest rating", and results in contact that is "essentially nil". (Id., at P. 12).[1] As such, the Court concluded that the RFC which allowed for "occasional interaction" with supervisors and coworkers is harmless.

The error is not harmless because (A) the POMS states that the ability to work with others and the ability to accept instructions and

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[1] The District Court inaccurately described the social contact associated with a People rating 8 as "essentially nil". As explained below, under the discussion concerning the Plaintiff's ability to interact with the public (Point 2), this description is inaccurate and resulted in the District Court issuing an incorrect decision in this case.

criticism from supervisors is "critical" to the performance of unskilled work; and (B) the ALJ failed to incorporate the Plaintiff's restriction to *superficial* contact in the hypothetical questions to the VE. Moreover, even assuming, *arguendo*, that the error is harmless under current Tenth Circuit precedent, such precedent should be overturned because such precedent has the untenable result of chilling cross examination from claimant's counsel.

(A) The error is not harmless because the POMS states that the ability to work with others and the ability to accept instructions and criticism from supervisors are "critical" to the performance of unskilled work.

Program Operations Manual System ("POMS") provides a list of mental abilities that are critical for performing unskilled level work. POMS DI 25020.010(B)(2)(c). Regarding social interactions related to coworkers, the POMS states that, "the ability to work in coordination with or in proximity to others without being distracted by them is "critical" for the performance of unskilled work." POMS DI 25020.010(B)(3)(g). Furthermore, regarding social interactions related to supervisors, the POMS states that the ability to accept instructions and respond appropriately to criticism from supervisors is "critical" for the performance of unskilled work, and as distinct from nearly all other

"critical" abilities, "[t]hese tolerances are usually strict." Id. 25020.010(B)(3)(k).

Since these social interactions are "critical" to the performance of even unskilled work, the failure to account for these limitations in the RFC, and the failure to explain why they were not accounted for in the RFC, cannot be considered "harmless".

(B) The error is not harmless because the ALJ failed to incorporate the Plaintiff's restriction to *superficial* contact with coworkers and supervisors in the hypothetical questions to the VE. The ALJ's failure to account for these limitations in the hypothetical question also amounts to a separate and independent legal error.

The hypothetical question posed by the ALJ to the Vocational Expert "must relate all of claimant's impairments with precision." Taylor v. Callahan, 969 F.Supp. 664, 669 (D. Kan. 1997) *citing* Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991). In Taylor, the court held that the ALJ's hypothetical question did not duplicate the claimant's condition as precisely as possible because the ALJ failed to refer to the claimant's numerous other impairments besides his diabetes and cardiac arrhythmia. Id. A Colorado district court held that the ALJ posed a flawed hypothetical to the VE when he failed to accurately include all the

claimant's established limitations, mental impairments, as well as the claimant's pain. Ricketts v. Apfel, 16 F.Supp.2d 1280, 1293-1295 (D. Colo 1998), *citing* Williams v. Bowen, 844 F.2d 748, 752 (10th Cir. 1988). See also Underwood v. Shalala, 985 F.Supp. 970, 979 (D. Colo. 1997)(*finding* error in the ALJ's failure to include in his hypothetical the claimant's limitations of finger dexterity, abstract reasoning, special perception, verbal reasoning, and writing, as well as all the restrictions set forth by the treating physician); Jones v. Apfel, 190 F.3d 1224, 1229 (11th Cir.1999), *cert. denied,* 529 U.S. 1089, 120 S.Ct. 1723, 146 L.Ed.2d 644 (2000)(*holding* that In order for a vocational expert's testimony to constitute substantial evidence, the ALJ must pose a hypothetical question which comprises all of the claimant's impairments); Wilson v. Barnhart, 284 F.3d 1219 (11th Cir. 2002).

The law holds that hypothetical questions should be crafted carefully to reflect a claimant's RFC, because "[t]estimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d at 1492 (10th Cir. 1991); Smith v. Barnhart, 172 Fed.Appx. 795 (10th Cir.

2006); see also Stephens v. U.S. Dept. of Health & Human Services, 1993 WL 498168 (10th Cir. 1993) ("In order for vocational expert's testimony to constitute substantial evidence, the ALJ's hypothetical questions eliciting that testimony must relate with precision all of a claimant's impairments.").

In this case, the ALJ's hypothetical question to the Vocational Expert only accounted for *occasional* interaction with coworkers and supervisors. (Tr. 52). The hypothetical question posed to the VE did not incorporate the limitation to *superficial* contact with coworkers and supervisors. Therefore, the hypothetical question was not posed with the requisite *precision* required under 10th Circuit law and, as such, is reversible error.

(C) Even assuming, *arguendo*, that the error in failing to account for *superficial* limitations in the RFC and question posed to the VE is harmless under current 10th Circuit precedent, such precedent should be overturned because it has the untenable result of chilling cross examination from claimant's counsel.

The District Court rationalized the error as harmless because each job listed by the VE had a "People rating" of 8, which is the "lowest rating", and results in contact that is "essentially nil". (Id., at P. 12). As

such, according to the Court, the RFC which allowed for "occasional interaction" with supervisors and coworkers is harmless.

The Plaintiff concedes that the three jobs provided by the VE have a "People rating" of 8, which is the "lowest rating" on the People scale. In the Tenth Circuit, a "People rating" of 8 has been held to be consistent with "superficial contact" with supervisors and coworkers. See Christopher G. v. Kijakazi, 2022 WL 4484558 (D. Utah, Sept. 27, 2022); Click v. Kijakazi, 2022 WL 4463182 (D. New Mexico, Sept. 26, 2022); Lane v. Colvin, 643 Fed. Appx. 766 (10th Cir. 2016)(holding that the Dictionary of Occupational Titles ("DOT") job definition for "bottling line attendant" required only superficial contact with supervisors because the amount of interaction with people required was an 8 on a 0–8 scale where 8 is the "lowest possible level of interaction that exists in the labor force," the amount of "taking instructions" was "not significant," and the activity of talking was "not present."). In accordance with this case law, Courts have held that an ALJ's failure to formulate a hypothetical question to the VE that incorporates a limitation to superficial contact with coworkers and supervisors is harmless error when the jobs provided are consistent with a restriction to superficial

contact (i.e, a "People rating" of 8). See Duncan v. Colvin, 608 Fed.Appx. 566 (10th Cir. 2015).

One problem with the rationale set forth in Click, Lane, and Duncan, *supra*, which allows for a finding of harmless error when an ALJ fails to incorporate a limitation to superficial contact in the hypothetical questions posed to the VE is that it is inconsistent with the case law in Hargis, Taylor, Ricketts, Williams, Underwood, Jones, Wilson, Smith, and Stephens, *supra* (*hereinafter* "Hargis, et-al"). That is because the line of cases in Hargis, et-al, holds that "[t]estimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments ***cannot*** constitute substantial evidence to support the [Commissioner's] decision." Id. (emphasis added). Thus, the holdings in Click, Lane, and Duncan conflict with Hargis, et-al, because these cases essentially state that posing hypothetical questions that do not relate with precision all a claimant's impairments ***can*** constitute substantial evidence. This is an inherent inconsistency in the Tenth Circuit holdings.

A second problem is that the holdings of Click, Lane, and Duncan, *supra*, which allows for a finding of harmless error when an ALJ fails to

incorporate a limitation to superficial contact in the hypothetical questions posed to the VE, has the effect of chilling cross examination by a claimant's counsel. By allowing an ALJ to formulate a hypothetical question that does not incorporate all limitations will not place that limitation at issue for the VE to discuss. As a result, that issue will not be clearly placed at issue through the VE testimony and will not be subjected to being tested through cross examination by the claimant's attorney. This is problematic because an attorney can choose to incorporate case-specific facts into a cross-examination question that could change the VE's testimony. Moreover, upon being confronted through cross-examination, the VE could change his or her testimony based on his or her professional experience. This is particularly important where the DOT is known to be very old and outdated. In fact, it is widely known that the DOT was last updated in the year 1991 (32 years ago) and has since been replaced by O*Net (yet, the Social Security Administration continues to use the DOT instead of O*Net).[2] As such,

[2] See Office of Administrative Law Judges, OALJ Law Library, Dictionary of Occupational Titles, Parts:

https://www.dol.gov/agencies/oalj/PUBLIC/DOT/REFERENCES/DOTPARTS#:~:text=Office%20of%20Administrative%20Law%20Judges%20Law%20Library,was%20last%20updated%20in%201991.

allowing a hypothetical question to be posed that does not incorporate every limitation with precision tends to chill an attorney's cross examination, which could impact the outcome of the disability claim – especially when the ALJ's decision is simply relying upon the DOT without the additional input from a Vocational Expert. A Vocational Expert could conceivably change his or her testimony based on the content of the newer information contained in the O*Net, or based on case-specific facts, or based upon his or her professional experience. However, if the ALJ never places the facts at issue in the hypothetical question, the claimant's attorney never has the opportunity to challenge the older and outdated content of the DOT.

When an ALJ avoids placing every limitation before the VE, such as by failing to incorporate the limitation to *superficial* contact in the question posed to the VE, the issue will not be clearly raised so that the claimant's attorney would have the opportunity to test the Vocational Expert's testimony and opinion through cross-examination. As such, the ALJ essentially has the ability to conceal certain findings of fact and certain limitations from the VE, which does not flag for the claimant's attorney that the ALJ is considering certain findings of fact, and which

then tends to chill cross-examination from claimant's counsel because counsel would not know to test that issue through cross examination.

The Plaintiff asks that this honorable Court overturn any prior legal precedent that permits the harmless error doctrine to be applied in a manner that would allow the ALJ to fail to incorporate functional limitations into the hypothetical questions posed to the VE. The Plaintiff asks that this Court hold that the ALJ must ask a hypothetical question to the VE that incorporates all limitations *with precision* and that the failure to do so is plain error requiring remand. Thus, in this case, because the ALJ did not incorporate all limitations into the hypothetical question posed to the VE, and specifically did not incorporate any limitations related to *superficial* contact with coworkers and supervisors, the ALJ committed reversible error and remand is warranted.

(2) The ALJ failed to account for social limitations *precluding* all contact with the public in the RFC and failed to explain why no such limitations were set forth in the RFC.

In this case, two state agency's psychological consultants, Dr. Daugherty and Dr. Pearce, reviewed the plaintiff's medical records and issued concurring opinions pertaining to Plaintiff's functional limitations. Aplt. App. Vol 1 at App – 121 and Aplt. App. Vol 1 at App -

145. Dr. Daugherty and Dr. Pearce both opined that the "claimant can relate to supervisors and peers on a superficial work basis and the **claimant cannot relate to the *general public*.**" Aplt. App. Vol 1 at App – 121 and Aplt. App. Vol 1 at App - 145. The ALJ gave these opinions substantial weight and found these opinions "persuasive". Aplt. App. Vol. 3 at App - 734. However, despite finding the opinions of Dr. Daugherty and Dr. Pearce to be "persuasive", which precludes the Plaintiff from all interaction with the general public, the RFC formulated by the ALJ failed to account for the limitation to "no contact with the general public".

For the error related to the omission of social limitations related to the general public, the relevant portion of the RFC formulated by the ALJ provided that:

> "The claimant is able to perform simple, routine, repetitive tasks; free of production rate pace; and, **is able to have occasional interaction with** supervisors, coworkers, and **the general public.**" (Emphasis added). Aplt. App. Vol. 3 at Appt - 729.

The RFC formulated by the ALJ did not accurately reflect the social interaction limitations contained in the opinions of Dr. Daugherty and Dr. Pearce which *precluded* all contact with the general public.

Moreover, the ALJ did not provide an explanation as to why these limitations were not adopted. The Plaintiff asserts that the RFC formulated by the ALJ is not supported by substantial evidence because a limitation to *occasional interaction with the general public,* does not adequately reflect Plaintiff's limitations, which were found persuasive, and which *precluded* all contact with the general public.

The District Court acknowledged that "[c]learly, the ALJ's RFC determination does not reflect, verbatim, the MRFC findings form Drs. Daugherty and Pearce regarding Plaintiff . . . having *no contact* with the general public." (Memorandum Opinion and Order, P. 7). The District Court noted that the ALJ erred by failing to account for the limitation to "no contact" with the general public in the RFC. (Id., at P. 11). However, the Court further stated, "[t]he Court agrees with Mr. [redacted], but concludes the error is harmless." (Id., at P. 8, 11).

The District Court agreed with the Plaintiff that the ALJ committed legal error. However, the error is not harmless and this Court should reverse the Commissioner's decision denying benefits and remand the case for further consideration.

The District Court rationalized the error as harmless because each job listed by the VE had a "People rating" of 8, which is the "lowest rating", and results in contact that is "essentially nil". (Id., at P. 12). As such, according to the District Court, the RFC which allowed for "occasional interaction" with the general public is harmless. It appears that the District Court found that because the jobs listed by the VE had "essentially nil", meaning "essentially no" contact with other people, the ALJ's error in failing to account for "no contact with the general public" was harmless. In other words, it appears that the District Court found that a job with a "People rating" of 8 has "essentially no contact" with the general public. This is inaccurate.

In the Tenth Circuit, a "People rating" of 8 has been held to be consistent with "superficial contact". See Christopher G. v. Kijakazi, 2022 WL 4484558 (D. Utah, Sept. 27, 2022); Click v. Kijakazi, 2022 WL 4463182 (D. New Mexico, Sept. 26, 2022); Lane v. Colvin, 643 Fed. Appx. 766 (10th Cir. 2016)(holding that the Dictionary of Occupational Titles ("DOT") job definition for "bottling line attendant" required only superficial contact with supervisors because the amount of interaction with people required was an 8 on a 0–8 scale where 8 is

the "lowest possible level of interaction that exists in the labor force," the amount of "taking instructions" was "not significant," and the activity of talking was "not present."). A "People rating" of 8 is not the equivalent of "essentially no" contact. It is consistent with "superficial contact", which is still substantially more contact than having "no contact". The "People scale" does not address "no contact" with any particular classification of people, and does not address "no contact" with the general public. As such, the District Court's finding that the jobs provided by the VE have "essentially nil" or "essentially no" contact with the general public, because they have a "People rating" of 8, was erroneous and not consistent with legal precedent in the Tenth Circuit.

Because the "People scale" does not address the impact of having "no contact" with any classification of people, including the general public, the ALJ erred as a matter of law by failing to account for "no contact" in the RFC and by failing to adequately explain why no such limitation was assessed. Because the "People scale" does not address the impact of having "no contact" with general public, the ALJ's error cannot be deemed harmless. The only way for the ALJ to have resolved the impact of having "no contact" with the general public on the available

jobs in the national economy would have been to incorporate the limitation into the RFC and into the hypothetical question posed to the VE in order to elicit expert testimony on the issue. Since the ALJ failed to do either, the ALJ erred. The only adequate remedy in this case is to vacate the Commissioner's decision denying disability benefits and to remand the case for further consideration.

Additionally, the ALJ's error is also not harmless because the Program Operations Manual System ("POMS") provides a list of mental abilities that are critical for performing unskilled level work. POMS DI 25020.010(B)(2)(c). Regarding social interactions related to others, the POMS states that, "the ability to work in coordination with or in proximity to others without being distracted by them is "critical" for the performance of unskilled work." POMS DI 25020.010(B)(3)(g). Since the ability to work in proximity to "others", including the general public, is "critical" for the performance of unskilled work, the ALJ's failure to account for "no contact" with the general public in the RFC was legal error that was not harmless.

(A) <u>The ALJ also erred by failing to incorporate the Plaintiff's restriction to *"no contact"* with the general public in the hypothetical questions to the VE.</u>

The hypothetical question posed by the ALJ to the Vocational Expert "must relate all of claimant's impairments with precision." <u>See</u> <u>Hargis</u>, et-al, *supra*. "Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments ***<u>cannot</u>*** constitute substantial evidence to support the [Commissioner's] decision." <u>Id</u>. (emphasis added).

In this case, the ALJ did not incorporate the social limitation of "no contact" with the general public in the RFC. The ALJ simply asked about "occasional interaction with the general public". (Tr. 52). Following the holdings in <u>Hargis</u>, et-al, *supra*, the ALJ committed reversible error.

Moreover, the error is not harmless because, as explained above, the "People scale" rating of 8 does not address the impact of "no contact" with any classification of people, including the general public.

<u>CONCLUSION</u>

For the reasons stated above, Mr. [redacted] 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: July 10, 2023
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 10th day of July 2023, 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: July 10, 2023
New York, NY

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(g)(1) because it contains 5,302 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface 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: July 10, 2023
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