UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

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[redacted],

Plaintiff,

Case No.: [redacted]

vs.

MARTIN J. O'MALLEY
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION,

Defendant.

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PLAINTIFF'S BRIEF

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INTRODUCTION

This case has an unusually long procedural history with a total of **two prior remand orders and three administrative hearings.** [redacted] disability case has been pending since September 26, 2016 (**for over 7 years**) without a fair and just resolution.

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 her claim for Social Security Disability benefits for the reasons set forth below.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Undisputed Material Facts.

Summary and Course of the Administrative Proceedings.

1. [redacted] applied for Supplemental Security Income (Title XVI) disability benefits on September 26, 2016, alleging disability commencing on September 1, 2016. Tr. 143. Her claim was initially denied on November 30, 2016, and denied on reconsideration on March 21, 2017. Tr. 143. Ms. [redacted] filed a written request for a hearing which was subsequently held on October 4, 2018, before ALJ Roger Reynolds. Tr. 143. The ALJ denied the claim on January 2, 2019. Tr. 159. Ms. [redacted] filed a request for review with the Appeals Council and the case was remanded by the Appeals Council on December 16, 2019. Tr. 157. A second hearing was held on June 2, 2020, before ALJ Jerry Lovitt. Tr. 26. At the second hearing, the on-set date was amended to May 5, 2018. Tr. 26. The ALJ denied the claim again on June 12, 2020. Tr. 23. Ms. [redacted] filed a request for review with the Appeals Council and the Appeals Council denied the Request for Review on April 22, 2021.

2. A Civil Action was filed in the District Court for the Eastern District of Kentucky under Docket Number 6:21-cv-00126 and the case was remanded for a new hearing. Tr. 1523.

3. A third hearing was held on July 13, 2023, before ALJ Jerry Lovitt. Tr. 26. ALJ Jerry Lovitt issued a Partially Favorable decision on August 23, 2023, proving her claim only as of May 5, 2023. Tr. 1534. Accordingly, the ALJ's decision dated august 23, 2023 became the Commissioner's final decision.

Statement of Relevant Facts.

Ms. [redacted] age, education, and work experience.

4. Ms. [redacted] was born on May 6, 1968. Tr. 118.

5. Ms. [redacted] has at least a high school education and no past relevant work. Tr. 1533.

Severe Conditions.

6. In this case, the ALJ considered Ms. [redacted] Morbid obesity, IBS/Ulcerative Colitis/Crohn's disease, Osteoarthritis/Low back pain, Degenerative joint disease, Cardiomyopathy and Restricted visual field, to be severe medically determinable impairments. Tr. 1525.

Crohn's Disease.

7. Plaintiff suffers from severe Crohn's Disease. The medical records document Crohn's disease going back to July 25, 2016, when a colonoscopy revealed moderate to severe proctocolitis to proximal transverse colon with polypoid areas. Tr. 429. Biopsies from rectum and polypoid areas also revealed acute and chronically inflamed colon mucosa with marked architectural distortion and microinflammatory debris. Tr. 429.

8. On February 13, 2017, an examination performed by Dr. Nadeem Khan showed that

Plaintiff was positive for diarrhea and reported 2-3 bowl movements a day in the daytime and one at night, on average with days that are more severe. Tr. 432.

9. On March 15, 2017, an examination performed by Dr. Khan showed "on average about **2-3 bowl movements a day in the daytime and one at night**. Tr. 425. The patient has a history of diarrhea off-and-on for the last 3 years or so. **The diarrhea was rather severe with bowel movements over 10 today**. Tr. 425. Furthermore, the patient would also get up several times at night with diarrhea." Tr. 425. Dr. Khan's medical records also noted that plaintiff had small amounts of blood in her stool which is an improvement from the previous three years when she used to have significant amount of bright red blood in her rectum several times a week. Tr. 425. Dr. Khan also noted that the plaintiff still had relatively poor energy levels." Tr. 425. At the March 15, 2017, examination, plaintiff was positive for diarrhea and arthralgias and was diagnosed with Diarrhea, Abdominal pain, Blood in Rectum and Anemia. Tr. 426.

10. On May 1, 2018, plaintiff began seeing Dr. Terrence Barrett at the UK Healthcare Gastroenterology. Dr. Barrett confirmed a diagnosis of active Crohn's Disease with symptoms of diarrhea, fecal incontinence, abdominal pain and arthralgias. Tr. 1316. Medical records from May 1, 2018, indicated that the plaintiff failed multiple previous medications for Crohn's including, Budesonide, Delzicol, Apriso, Azathioprine and Corticosteroids, Humira and Remicaide infusions. Tr. 1313. Dr. Barrett's notes also showed that despite various medications, plaintiff was not showing any symptom improvement except for no longer seeing blood in her stool. Tr. 1313. Dr. Barrett's records documented that plaintiff "continues to experience diarrhea 3-4 times in the mornings, 2-3 times in the evenings, and 2-3 fecal incontinence episodes in a given week." Tr. 1313. Notes further stated that plaintiff reported deep bone pain in her arms, fingers

and knees and stated that her joint pain is constant." Tr. 1313. On May 1, 2018, plaintiff was positive for diarrhea and nausea. Tr. 1313.

11. On May 9, 2018, Dr. Barrett performed a colonoscopy which revealed "congested, erythematous, eroded (linear-pattern), friable (with contact bleeding), inflamed, nodular, ulcerated and thickened fold of the mucosa in the recto-sigmoid colon and in the descending colon." Tr. 1333. The colonoscopy showed **large ulcers in the plaintiff's colon and greater than 30% ulcerated surfaces with greater than 75% of surfaces affected**. Tr. 1333.

12. Medical records from Dr. Shah dated April 5, 2019, noted that the plaintiff still had diarrhea and occasionally still had blood in her stool. Tr. 1358.

13. On August 7, 2018, Dr. Barrett issued a medical opinion that plaintiff suffers from moderate to severe Crohn's Disease which is life-long. Tr. 1291. Dr. Barrett's opinion stated that since the plaintiff was started on Stelara injections, her abdominal pain improved and her nocturnal stooling improving. Tr. 1292. However, the plaintiff was still having loose stool 2 to 3 times per day. Tr. 1292. Dr. Barrett opined that the plaintiff will frequently experience pain or other severe symptoms that would interfere with her attention and concentration. Tr. 1292. Dr. Barrett also opined that the plaintiff would need to take unscheduled breaks from 2 to 8 times per day, with varying lengths depending on the severity of the loose stool and that she would be absent from work more than 4 days per month. Tr. 1294-1295.

14. On February 13, 2019, Plaintiff was prescribed and started Vedolizumab IV Infusions at 300 mg for Crohn's Disease. Tr. 1412.

15. Medical records from Dr. Barrett dated September 24, 2019, showed that Plaintiff was started on Vedolizumab IV Infusions after fecal calprotectin earlier this year was > 2000. TR. 1474. However, the Plaintiff reported that she only noticed a slight improvement in her symptoms

but was still having cramps, abdominal pain, and **six bowel movements per day**. Tr. 1474. She also reported that her fatigue did not improve on infusions. Tr. 1474.

16. On February 18, 2020, medical records from Dr. Barrett showed that Plaintiff was **no longer seeing blood in her stool but continued to have 3-4 loose bowel movements in the morning and 2-3 at night. Tr. 1468.**

17. On February 24, 2020, Dr. Barrett performed another colonoscopy which revealed extensive Pan colonic Ulcerative Colitis despite Entyvio treatment. Tr. 1462.

18. On March 17, 2020, Dr. Barrett issued a second medical opinion stating that he has been seeing plaintiff every 2 to 3 months for office visits and procedures and that each visit was anywhere from 40 minutes to 2 hours. Tr. 1462. Dr. Barrett stated that that the plaintiff experiences severe joint pain and swelling in her hands, knees, ankles and elbows and has significant fatigue. Tr. 1462. Dr. Barrett opined that the plaintiff could only sit 15-20 minutes at a time, stand 15-20 minutes at a time, can walk less than one block, would require unscheduled breaks once per hour for 15020 minutes each and may need bathroom breaks with very little notice. Tr. 1465. Dr. Barrett further opined that plaintiff should not lift and carry more than 10 pounds and would be absent about three days per month. Tr. 1465-1466.

19. In august 2020, Plaintiff underwent a subtotal colectomy with end ileostomy with resumption ulcerative colitis. Tr. 3597. Medical records from Baptist Health that the Plaintiff needed to empty her bag about 3-4 times per day. Tr. 3597.

20. On July 1, 2022, a Flexible Sigmoidoscopy revealed mild patchy inflammation involving the rectal stump and the distal sigmoid stump. Tr. 3603. Biopsies were consistent with chronic active colitis. Tr. 3603. Terminal ileum biopsy also revealed quiescent ileitis. Tr. 3603. Plaintiff was started on Remicade infusion for diarrhea. Tr. 3603.

21. On October 12, 2022, Plaintiff was seen by Dr. Shah for evaluation of Crohn's Disease and reported that she could not tolerate Remicade as it caused significant abdominal pain and joint pain. Humira was prescribed but Plaintiff needed to wait for insurance approval. Tr. 3596.

Medical Opinion of Dr. Gaurang Shah.

22. On February 6, 2020, Dr. Shah issued a medical opinion that plaintiff requires a cane for balance and use on all surfaces because the plaintiff can only walk 2-3 feet without an assistive device. Tr. 1335.

Relevant Hearing Testimony.

Paula [redacted] Testimony.

23. At the second hearing, Ms. [redacted] testified that she could not perform full-time work because of the frequency with which she had to use the restroom. Tr. 61. She stated that if she goes anywhere, she wears an adult diaper in case she is unable to access the restroom. Tr. 61. Plaintiff also stated that she had to evacuate her bowels 5 to 6 times a day and 2-3 times at night, and that along with her frequent bowel movements she also has bladder leakage. Tr. 61. At the third hearing, Ms. [redacted] testified that since 2020 she has had an ileostomy bag and that she did not need to go the bathroom for bowel movements because it went in the bag. Tr. 1566. However, because of her loose bladder, she still needs to urinate frequently. Tr. 1566. Plaintiff also testified that she is exhausted all the time because of Crohn's Disease. Tr. 1564.

Plaintiff also testified that she used a cane for balance because some of the medications she takes make her dizzy. Tr. 1568.

Vocational Expert's Testimony.

24. The vocational expert testified that the majority of the people in the workforce would

not be wearing a colostomy bag and "I think it would come down to whether it interferes with the ability to perform the responsibilities of the job functions. Tr. 1573. The expert further testified that "I think it would be a question whether it is visible, whether it would affect, you know, public interaction or the perception, you know, that would come into play, but it just depends on the job and the employer and how they do it." Tr. 1574.

25. When the vocational expert was asked to state which of the three jobs provided previously would still be available if the individual needed to work away from the public as a result of the colostomy bag, the expert replied that the only job that would remain would be that of a housekeeping cleaner and the jobs would be substantially reduced to no more than 10,000 nationally. Tr. 1574.

ISSUES PRESENTED FOR REVIEW

I.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO GIVE CONTROLLING WEIGHT TO THE OPINION OF THE TREATING PHYSICIAN, DR. TEERENCE BARRETT.

II.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO INCLUDE THE NEED FOR THE ILEOSTOMY/COLOSTOMY BAG IN THE RFC.

III.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO ADEQUETLY EVALUATE THE MEDICAL OPINION OF THE STATE AGENCY'S CONSULTANTS AND BY RELYING ON THEIR OUTDATED MEDICAL OPINIONS.

ARGUMENT

I.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO GIVE CONTROLLING WEIGHT TO THE OPINION OF THE TREATING PHYSICIAN, DR. TEERENCE BARRETT.

Applicable law:

The treating physician rule set forth in 20 CFR § 404.1527 applies to all cases filed before March 27, 2017. This case was filed on September 26, 2016, and therefore, 20 CFR § 404.1527 applies in this case. Tr. 143.

Greater deference is generally given to the opinions of treating physicians than to those of non-treating physicians, commonly known as the **treating physician rule**. See Soc. Sec. Rul. 96–2p, 1996 WL 374188 (July 2, 1996); Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, 544 (6th Cir.2004). Because treating physicians are "the medical professionals most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone," their opinions are generally accorded more weight than those of non-treating physicians. 20 C.F.R. § 416.927(d)(2). Therefore, if the opinion of the treating physician as to the nature and severity of a claimant's conditions is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in [the] case record," then it will be accorded controlling weight. Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, 544.

There is an additional procedural requirement associated with the treating physician rule. Specifically, the ALJ must provide "*good reasons*" for discounting treating physicians' opinions, reasons that are "sufficiently specific to make clear to any subsequent reviewers the weight the

adjudicator gave to the treating source's medical opinion and the reasons for that weight." Wilson v. Comm'r of Soc. Sec., 378 F.3d 541. The purpose of this procedural aspect of the treating physician rule is two-fold. First, the explanation "'let[s] claimants understand the disposition of their cases,' particularly where a claimant knows that his physician has deemed him disabled and therefore 'might be bewildered when told by an administrative bureaucracy that she is not, unless some reason for the agency's decision is supplied.'" Id. (*quoting* Snell v. Apfel, 177 F.3d 128, 134 (2d Cir.1999)). Second, the explanation "ensures that the ALJ applies the treating physician rule and permits meaningful appellate review of the ALJ's application of the rule." Id. Because of the significance of the notice requirement in ensuring that each denied claimant receives fair process, a failure to follow the procedural requirement of identifying the reasons for discounting the opinions and for explaining precisely how those reasons affected the weight accorded the opinions denotes a lack of substantial evidence, even where the conclusion of the ALJ may be justified based upon the record. Id. See also Rogers v. Comm'r of Soc. Sec., 486 F.3d 234.

Argument:

The Plaintiff asserts that the opinions of her treating physician, Dr. Barrett, should have been given controlling weight pursuant to 20 CFR § 404.1527. Dr. Barrett issued two medical opinions in this case. Dr. Barrett's first opinion, dated August 7, 2018, provided that,

> "plaintiff suffers from moderate to severe Crohn's Disease which is life-long. Tr. 1291. Since the plaintiff was started on Stelara injections, her abdominal pain improved and her nocturnal stooling improving. Tr. 1292. However, the plaintiff was still having loose stool 2 to 3 times per day. Tr. 1292. The plaintiff will frequently experience pain or other severe symptoms that would interfere with her attention and concentration. Tr. 1292. Moreover, the plaintiff would need to take unscheduled breaks from 2 to 8 times per day, with varying lengths depending on the severity of the loose stool and

> that she would be absent from work more than 4 days per month." Tr. 1294-1295.

Dr. Barrett second opinion issued on March 17, 2020, provided that,

> "The plaintiff experiences severe joint pain and swelling in her hands, knees, ankles and elbows and has significant fatigue. Tr. 1462. The plaintiff could only sit 15-20 minutes at a time, stand 15-20 minutes at a time, can walk less than one block, would require unscheduled breaks once per hour for 15-20 minutes each and may need bathroom breaks with very little notice. Tr. 1465. Moreover, the plaintiff should not lift and carry more than 10 pounds and would be absent about three days per month." Tr. 1465-1466.

Dr. Barrett's opinions were well supported by the objective testing and medical examinations of the plaintiff and Dr. Barrett's opinions were consistent with the medical records from other treating sources. Consequently, the ALJ committed reversible error by not giving Dr. Barrett's opinions controlling weight and by failing to provide a "*good reason*" for discounting the opinions of this treating physician. See Wilson v. Comm'r of Soc. Sec., 378 F.3d 541, (*holding* that the ALJ must provide "*good reasons*" for discounting treating physicians' opinions.)

A physician is a *treating source* if he has provided medical treatment or evaluation and has had an ongoing treatment relationship with the claimant ... "with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation [that is] typical for the [treated condition(s)]." 20 C.F.R. § 404.1502. In this case, Dr. Barrett, is a gastroenterologist, who treated Ms. [redacted] continuously since May 1, 2018. Tr. 1462. Dr. Barrett diagnosed Ms. [redacted] with Crohn's Disease and with Pan Colonic Ulcerative Colitis. Tr. 1316, 1462. Dr. Barrett was seeing the plaintiff for office visits and procedures every 2 to 3 months with visits lasting from 40 minutes to 2 hours each time. Tr. 1462. Since starting her care, Dr. Barrett performed multiple examinations of the plaintiff, prescribed multitude of various medications, administered Stelara infusions, and performed two colonoscopies.

In Blakley v. Comm'r of Soc. Sec., 581 F. 3rd 399, (6th Cir., 2009), the court held that a doctor who performed a discectomy, provided ongoing medical records from April 2004 through April 2005 and who continued to send [plaintiff] for MRIs, CT scans, and x-rays based on complaints of pain was a treating physician, and any opinions made by this doctor should have been given controlling weight absent justifiable reasons-made on the record-for discounting those opinions. Soc. Sec. Rul. 96–2p, 1996 WL 374188, at *4–5."

Like in Blakely, Dr. Barrett provided ongoing treatment to the plaintiff from May 1, 2018, to the date of the hearing on July 13, 2023. Dr. Barrett also diagnosed plaintiff with Crohn's Disease and with Pan Colonic Ulcerative Colitis. Tr. 1316, 1462. Dr. Barret also performed two colonoscopy procedures on May 9, 2018, and February 24, 2020, to confirm his findings. Tr. 1333, 1462. Therefore, as a treating physician, any opinions Dr. Barrett made should have been given controlling weight absent justifiable reasons on the record-for discounting those opinions. See Blakley v. Comm'r of Soc. Sec., 581 F. 3rd 399, (6th Cir., 2009).

The plaintiff asserts that the ALJ in this case did not provide "*good reasons*" for discounting the opinions of Dr. Barrett. In evaluating Dr. Barrett's opinion, the ALJ erroneously concluded as follows:

> "Accordingly, the undersigned gives little weight to the opinions of Dr. Barrett in Exhibits 18F and 25F. Dr. Barret stated in the 18F exhibit that the claimant would require up to 8 unscheduled restroom breaks per day and would miss 4 days per month from work. **His opinion is contrary to, and unsupported by, the longitudinal medical evidence of record that clearly indicates the claimant has had no more than 3 bowel movements a day since as early as January 2017**, and has continually improved with treatment. The opinion is also internally inconsistent because Dr. Barrett himself acknowledged the claimant only had - loose stools of 2-3/day," and that the "Stelara has improved or resolved: nocturnal stooling, hematochezia, nausea, vomiting, fevers, and decrease in appetite." The fatigue and joint pain have also improved with initiation of

> Stelara. (Exhibit 18F2). Dr. Barrett's later opinion at Exhibit 25F is also given little weight as it is also unsupported by the record, such as stating claimant could sit or stand for no more than 15 minutes at a time and could walk for no more than 2 hours out of an eight-hour day. Even viewing claimant's impairments in combination would not reach this conclusion. His statement is also in contradiction to the claimant's own testimony. He stated claimant could lift/carry only 10 pounds rarely, and she testified that she could lift 20 pounds occasionally. He stated claimant would need a bathroom break every hour, **but claimant testified that her ileostomy procedure and adjustment of medication had alleviated her gastrointestinal issues** to the point that her arthritis was now her biggest complaint." Tr. 1532. (Emphasis added).

The ALJ rejected Dr. Barrett's opinions because he erroneously concluded that, (a) Dr. Barrett's opinion is contrary to, and unsupported by, the longitudinal medical evidence of record that clearly indicates the claimant has had no more than 3 bowel movements a day since as early as January 2017and (b) because Dr. Barrett's opinions were inconsistent with plaintiff's improved symptoms. The Plaintiff asserts that the reasons provided by the ALJ for giving Dr. Barrett's opinions little weight are not supported by substantial evidence and amount to a mischaracterization of the medical evidence and testimony in this case.

First, the ALJ's statement that Dr. Barrett's opinion "is contrary to, and unsupported by, the longitudinal medical evidence of record that clearly indicates the claimant has **had no more than 3 bowel movements a day since as early as January 2017**" is a mischaracterization of the medical record and is simply inaccurate. The medical records established that the plaintiff's Crohn's Disease had flare ups which caused significantly more than 3 bowl movements per day. Although it is true that medical records from Dr. Khan from February to March 2017 showed that the plaintiff on average had 2-3 bowl movements in the daytime and one at night, those very same records also showed that plaintiff's diarrhea was rather severe with **bowel movements over 10 today**. Tr. 425. Furthermore, the patient would also get up **several times at night with diarrhea**."

Tr. 425. Additionally, medical records from Dr. Barrett dated May 1, 2018, indicated that the plaintiff failed multiple previous medications for Crohn's including, Budesonide, Delzicol, Apriso, Azathioprine and Corticosteroids, Humira and Remicade infusions. Tr. 1313. Dr. Barrett's notes also show that despite various medications, plaintiff was **not showing any symptom improvement** except for no longer seeing blood in her stool. Tr. 1313. Dr. Barrett's records documented that plaintiff "continued to experience **diarrhea 3-4 times in the mornings, 2-3 times in the evenings, and 2-3 fecal incontinence episodes in a given week**." Tr. 1313. Medical records from Dr. Barrett dated September 24, 2019, showed that Plaintiff was started on Vedolizumab IV Infusions after fecal calprotectin earlier this year was > 2000. TR. 1474. However, the Plaintiff reported that she only noticed a slight improvement in her symptoms but was still having cramps, abdominal pain, and **six bowel movements per day**. Tr. 1474. On February 18, 2020, medical records from Dr. Barrett showed that Plaintiff was no longer seeing blood in her stool but continued to **have 3-4 loose bowel movements in the morning and 2-3 at night. Tr. 1468.** This medical evidence shows that the Plaintiff continued to have more than 3 bowel movements a day years after January 2017 ranging anywhere from 4-10 per day. Accordingly, medical records appear to be fully consistent with Dr. Barrett's findings that the plaintiff would need anywhere from 2-8 bathroom breaks per day. The ALJ's statement that the Plaintiff did not experience more than 3 bowl movements per day is therefore inaccurate and not supported by the medical records.

Similarly, the ALJ's assertion that additional bathroom breaks were not necessary because the "**claimant testified that her ileostomy procedure and adjustment of medication had alleviated her gastrointestinal issues"** was also inaccurate and amounted to a mischaracterization

of evidence. As an initial matter, the ileostomy procedure occurred in August 2020 and therefore the ALJ effectively discounted Plaintiff's severe gastric symptoms January 2016 to August 2020. Notably, at the second hearing, Ms. [redacted] testified that she could not work because of the frequency with which she had to use the restroom. Tr. 61. She stated that if she goes anywhere, she wears an adult diaper in case she is unable to access the restroom. Tr. 61. Plaintiff also stated that she had to evacuate her bowels 5 to 6 times a day and 2-3 times at night, and that along with her frequent bowel movements she also has bladder leakage. Tr. 61. At the third (last) hearing, Ms. [redacted] testified that since 2020 she has had **an ileostomy bag** and that she did not need to go to the bathroom for bowel movements because it went in the bag. Tr. 1566. However, **because of her loose bladder, she still needs to urinate frequently**. Tr. 1566. This shows that the need for frequent bathroom breaks is still present. Moreover, the ALJ's rejection of Dr. Barrett's opinions on the grounds that plaintiff's symptoms improved is an error.

In 2017, Dr. Khan's medical notes indicated that plaintiff had small amounts of blood in her stool which is an improvement from the previous three years when she used to have significant amount of bright red blood in her rectum several times a week. Tr. 425. Dr. Khan also noted that the plaintiff still had **relatively poor energy levels**." Tr. 425. This improvement pertained only to the reduced amount of blood in plaintiff's stool. Tr. 425. On May 1, 2018, plaintiff began seeing Dr. Terrence Barrett at the UK Healthcare Gastroenterology. Medical records from May 1, 2018, indicated that the plaintiff **failed** multiple previous medications for Crohn's including Budesonide, Delzicol, Apriso, Azathioprine and Corticosteroids, Humira and Remicaide infusions. Tr. 1313. Dr. Barrett's notes also showed that despite various medications**, plaintiff was not showing any symptom improvement** except for no longer seeing blood in her stool. Tr. 1313. Dr. Barrett's records documented that plaintiff "continues to experience diarrhea 3-4 times in the

mornings, 2-3 times in the evenings, and 2-3 fecal incontinence episodes in a given week." Tr. 1313. Notes further stated that plaintiff reported deep bone pain in her arms, fingers and knees and stated that her joint pain is constant." Tr. 1313. On May 9, 2018, Dr. Barrett performed a colonoscopy which revealed large ulcers in the plaintiff's colon and greater than 30% ulcerated surfaces with greater than 75% of surfaces affected. Tr. 1333. Medical records from Dr. Shah dated April 5, 2019, noted that the plaintiff still had diarrhea and occasionally still had blood in her stool. Tr. 1358. On February 13, 2019, Plaintiff was prescribed and started Vedolizumab IV Infusions for Crohn's Disease. Tr. 1412. Medical records from Dr. Barrett dated September 24, 2019, showed that Plaintiff reported that she **only noticed a slight improvement in her symptoms** but was still having cramps, abdominal pain, and **six bowel movements per day**. Tr. 1474. She also reported that her fatigue did not improve on infusions. Tr. 1474. On February 18, 2020, medical records from Dr. Barrett showed that Plaintiff continued **to have 3-4 loose bowel movements in the morning and 2-3 at night. Tr. 1468.** On February 24, 2020, Dr. Barrett performed another colonoscopy which revealed extensive Pan colonic Ulcerative Colitis despite Entyvio treatment. Tr. 1462. In August 2020, Plaintiff underwent a subtotal colectomy with end ileostomy with resumption ulcerative colitis. Tr. 3597. Medical records from Baptist Health that the Plaintiff needed to empty her bag about 3-4 times per day. Tr. 3597. On October 12, 2022, Plaintiff was seen by Dr. Shah for evaluation of Crohn's Disease and reported that she could not tolerate Remicade as it caused significant abdominal pain and joint pain.

Similarly, the ALJ stated that Dr. Barrett himself acknowledged that the plaintiff only had loose stool 2 to 3 times per day which is inconsistent with his opinion of needing 2-8 bathroom breaks per day. Tr. 1532. The ALJ appears to have taken this statement out of context. More specifically, the reference to 'loose stool 2 to 3 times per day' does not necessarily mean that the

plaintiff only has bowl movements 2 to 3 times per day. It only means that the bowl movement is 'loose' that many times per day, in addition to other possible bowl movements. Notably, at the second hearing, the plaintiff testified that she had to evacuate her bowels **5 to 6 times a day** and 2-3 times at night, and that along with her frequent bowel movements she also has bladder leakage. Tr. 61. Plaintiff also testified that she wears adult diapers even when she is at home. Tr. 61. And at the last hearing the Plaintiff testified that she still needed frequent breaks for urination.

In Campbell v. Comm'r of Soc. Sec., 2021 WL 215645, (S.D. Ohio Jan. 21, 2021), the court addressed a similar issue and held that the ALJ's "explanation does not satisfy the "good reasons" standard, in part because there appears to be no inconsistency between Plaintiff's IBS diagnosis, the need for frequent and unscheduled bathroom breaks, and the extensively discussed test results. The condition of IBS is diagnosed based on history, subjectively reported symptoms, and exam. […] There is no dispute that Plaintiff's history, symptoms, exams, and test results all confirm his severe and chronic IBS. At the same time, the ALJ did not cite to, and the Court has not found, any evidence in the record to suggest that the need for unscheduled bathroom breaks can be corroborated by test results. With conditions like IBS, a physician must rely in part upon the patient's reports when completing an RFC assessment. That fact alone is not necessarily grounds for disregarding a treating physician's opinions, particularly if the opinions are well-supported by the diagnosis and other substantial evidence in the record."

Just like in Campbell, Dr. Barrett's opinion in this case is supported by two colonoscopy results, elevated fecal calprotectin, elevated IDA, elevated CRP, medical examinations, and plaintiff's reports pertaining to bowl movement frequency and duration. Tr. 1313, 1316, 1333, 1462. Additionally, since the frequency of unscheduled bathroom breaks could not be corroborated by test results, it was reasonable for Dr. Barrett to rely on plaintiff's reports. Thus,

there simply are no inconsistencies in Dr. Barrett's opinions and the ALJ failed to set forth any "*good reason*" for affording Dr. Barrett's opinions less than controlling weight. This is a reversible error.

In this case, there were no justifiable grounds to afford Dr. Barrett's opinions less than controlling weight. In Hensley v. Astrue, 573 F. 3rd 263, (6th Cir., 2009), the court held that "[n]othing in the regulations indicates, or even suggests, that the administrative judge may decline to give the treating physician's medical opinion less than controlling weight simply because another physician has reached a contrary conclusion. […] In most cases such as this, there will be conflicting medical opinions. If the existence of such a conflict is enough to justify denying the treating physician's report controlling weight, it would be a rare case indeed in which such weight would be accorded." The holding in Hensley stresses the significance of the treating physician rule.

Notably, the only other opinions in this record are from the State Agency's consultants who did not personally examine the plaintiff and who issued their opinions on November 23, 2016, and March 21, 2017, respectively. Tr. 125 and 137. Their opinions were issued almost 7 years ago, and they did not review or consider 7 years' worth of medical records submitted after their opinions were issued. Shockingly, the ALJ chose to afford considerable weight to the stale medical opinions of the state agency's consultants while affording little weight to the more recent opinions of the Plaintiff's long standing treating gastrointestinal specialist. This is a reversible error.

The ALJ's failure to afford Dr. Barrett's controlling weight is not harmless. Dr. Barrett opined that the plaintiff cannot lift and carry more than 10 pounds. Tr. 1465. This limitation would place plaintiff into sedentary exertional level work. Since the plaintiff is 50 years old with a high school education and no past relevant work, (Tr. 35, 36, 118), the plaintiff would have been

found disabled pursuant to Grid Rule 201.12. See Programs Operations Manual, DI 25025.035, Grid Rule 201.12. Additionally, this error is not harmless because Dr. Barrett also opined that the plaintiff would need a bathroom break every hour, for 15-20 minutes at a time. Tr. 1465. This results in a significant time off task which would be deemed work preclusive. Consequently, a proper evaluation of Dr. Barrett's opinion would have led to a fully favorable decision.

Conclusion:

In this case, the proof of disability is overwhelming. Plaintiff's gastric conditions have been established by colonoscopies and examinations, her symptoms were thoroughly documented, and her multitude of medications and treatment recorded. Despite trying everything, the plaintiff's gastric symptoms persisted during the relevant period. For the reasons stated above, the Plaintiff requests that this Court award disability benefits and remand this case for calculation of disability benefits. The Plaintiff asserts that there is no need to remand this matter for further proceedings because the record "overwhelmingly supports" a finding of disability. Although the Plaintiff strongly believes that an immediate award of disability benefits is the appropriate remedy considering the facts and circumstances in this case, as an alternative remedy, the Plaintiff requests that the decision be reversed, and the case be remanded for further consideration.

II.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO INCLUDE THE NEED FOR THE ILEOSTOMY/COLOSTOMY BAG IN THE RFC.

Applicable law:

A claimant's RFC is an assessment of the "most [an individual] can still do despite [her] limitations." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The RFC assessment requires a

"narrative discussion describing how the evidence supports each conclusion, citing specific medical facts ... and nonmedical evidence." Mascio v. Colvin, 780 F.3d 632, 636 (4th Cir. 2015).

As a rule, the ALJ must build an accurate and logical bridge between the evidence and his conclusion. Fleischer v. Astrue, 774 F.Supp.2d 875, 877 (N.D.Ohio 2011); see also Wilson v. Comm. of Soc. Sec., 378 F.3d 541, 544–546 (6th Cir.2004) (finding it was not harmless error for the ALJ to fail to make sufficiently clear why he rejected the treating physician's opinion, even if substantial evidence not mentioned by the ALJ may have existed to support the ultimate decision to reject the treating physician's opinion).

Argument:

The ALJ erred in determining the RFC when he failed to account for the Plaintiff's need to use an ileostomy bag. The medical records showed that in August 2020, Plaintiff underwent a subtotal colectomy with **end ileostomy** with resumption ulcerative colitis. Tr. 3597. Medical records from Baptist Health showed that after her colon was removed the Plaintiff needed to use an ileostomy bag daily. Tr. 3597. At the third hearing, Ms. [redacted] testified that since 2020 she has had an ileostomy bag. Tr. 1566. The need for an ileostomy bag is clearly established and undisputed in this case.

However, the ALJ did not account for the ileostomy bag in the RFC and did not explain anywhere in the decision why this potentially work preclusive medical device was excluded. In the absence of explanation, the reviewing court is left to guess as to why this limitation was omitted. This is the exact type of guesswork that requires a reversal under the holding of Mascio v. Colvin, 780 F.3d 632, 636 (4th Cir. 2015). It is the ALJ's responsibility to allow the Court to trace the path of her reasoning without guesswork. Stacey v. Comm'r of Soc. Sec., 451 F. App'x 517, 519 (6th Cir. 2011) (*holding* "the ALJ's decision still must say enough 'to allow the appellate

court to trace the path of his reasoning.'") (*quoting* Diaz v. Chater, 55 F.3d 300, 307 (7th Cir. 1995)). In this case, the ALJ failed to build an accurate and logical bridge from the evidence to his conclusions in his RFC analysis and in his evaluation of the plaintiff's need for an ileostomy bag.

The ALJs failure to consider the need for the ileostomy bag and its impact on Plaintiff ability to work is not harmless. The vocational expert testified that the majority of the people in the workforce would not be wearing a colostomy bag. Tr. 1573. The vocational expert stated that, "I think it would come down to whether it interferes with the ability to perform the responsibilities of the job functions. Tr. 1573. The vocational expert further testified that "I think it would be a question whether it is visible, whether it would affect, you know, public interaction or the perception, you know, that would come into play, but it just depends on the job and the employer and how they do it." Tr. 1574. When the vocational expert was asked to state which of the three jobs provided previously would still be available if the individual needed to work away from the public as a result of the colostomy bag, the expert replied that **the only job that would remain would be that of a housekeeping cleaner and the job would be substantially reduced to no more than 10,000 nationally**. Tr. 1574. Therefore, with the use of ileostomy/colostomy bag, only one job of 10,000 jobs nationally would remain. Plaintiff asserts that 10,000 jobs is not a significant number, and the Commissioner did not met its burden at step 5 of establishing the existence of significant jobs in the national economy.

Riser v. Comm'r of Soc. Sec., No. 13-11135, 2014 WL 1260127, at *19 (E.D. Mich. Mar. 26, 2014), for the proposition that 8,000 available jobs nationally is not a significant number. In Riser, the court stated that the available job numbers of 1,000 in Michigan and 8,000 nationally "undoubtedly border on insignificant." Id. The court went on to state: "Courts have found that

quantities greater than 8,000 jobs nationally are insignificant. See 2013 WL 1209353, at *18 (N.D. Cal. Mar. 25, 2013) ("114 regional or 14,082 national positions does not constitute a significant number as defined in 42 U.S.C. § 423(d)(2) (A)."); West v. Chater, 1997 WL 764507, at *3 (S.D. Ohio Aug. 21, 1997) ("In this case, the Court finds as a matter of law that 100 jobs locally, 1,200 jobs statewide and 45,000 jobs nationally do not constitute a significant number of jobs under 42 U.S.C. § 423(d)(2)(a)."); Tapp v. Sec'y of Health & Human Servs., 1991 WL 426310, at *1 (N.D. Ohio July 18, 1991) (finding 30,000 jobs nationally insignificant)."

Going out of circuit, Isaac also cites Mize v. Saul, No. 2:18-CV-03202-AC, 2020 WL 528850, at *5 (E.D. Cal. Feb. 3, 2020), a case providing a recent summary of the state of Ninth Circuit case law on this topic. The Mise court noted that while 25,000 jobs nationally has been found to be significant (citing Gutierrez v. Comm'r of Soc. Sec., 740 F.3d 519, 529 (9th Cir. 2014)), this was a "close call," and "[t]he Ninth Circuit has yet to endorse a number below 25,000 as significant within the meaning of the statute." Id. The court noted that the Ninth Circuit had more recently rejected 5,000 jobs, 10,000 jobs, and even 18,500 jobs nationally as "likely insignificant" numbers. Id.

Conclusion:

For the reasons stated above, the Plaintiff requests that this Court award disability benefits and remand this case for calculation of disability benefits. The Plaintiff asserts that there is no need to remand this matter for further proceedings because the record "overwhelmingly supports" a finding of disability. Although the Plaintiff strongly believes that an immediate award of disability benefits is the appropriate remedy considering the facts and circumstances in this case, as an alternative remedy, the Plaintiff requests that the decision be reversed, and the case be remanded for further consideration.

III.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO ADEQUETLY EVALUATE THE MEDICAL OPINION OF THE STATE AGENCY'S CONSULTANTS AND BY RELYING ON THEIR OUTDATED MEDICAL OPINIONS.

Applicable law:

The Social Security Administration gives the most weight to opinions from a claimant's treating source; accordingly, an ALJ is procedurally required to "give good reasons in [its] notice of determination or decision for the weight [it gives the claimant's] treating source's opinion." See 20 C.F.R. § 404.1502; Smith v. Comm'r of Soc. Sec., 482 F.3d 873, 875 (6th Cir.2007). However, this requirement only applies to treating sources. Id. at 876. With regard to non-treating, but examining, sources, the agency will simply "[g]enerally [ ] give more weight to the opinion of a source who has examined [the claimant] than to the opinion of a source who has not examined" him. 20 C.F.R. § 404.1527(d)(1); see also Smith, 482 F.3d at 875.

In evaluating the opinions of the non-examining state agency's consultants, the ALJ was obligated to consider factors such as the length and nature of the treatment relationship, the evidence that the physician offered in support of her opinion, how supported and consistent the opinion is with the record, and specialization. See 20 C.F.R. 404.1527(d).

Argument:

Here, the assigned considerable weight and adopted the 2016 and 2017 findings of the state agency physicians, in finding that Plaintiff was not disabled. However, in evaluating their opinions, the ALJ simply stated that:

> "The undersigned gives considerable weight to the state agency physical consultants in Exhibits 2A and 4A, who found that claimant could do a limited range of light exertional work. However, the undersigned has added further restrictions

> in the claimant's favor as supported by the record such as wearing protective undergarments and missing one day of work a month for treatment of her conditions. Tr. 1532.

This evaluation falls short of the requirements set forth under 20 CFR 1527 which requires an ALJ to consider and articulate how he considered factors such as the length and nature of the treatment relationship, supportability of the opinion, consistency of the opinion with the record, specialization of the doctor and other factors. See 20 C.F.R. 404.1527(d). Here, the ALJ simply assigned considerable weight without providing any justification for his conclusion.

In appropriate circumstances, opinions from State agency's medical consultants may be entitled to greater weight than the opinions of treating or examining sources. See Soc. Sec. Rul. 96–6p, 1996 WL 374180, at *3 (July 2, 1996). One such circumstance may occur, for example, when the "State agency medical ... consultant's opinion is based on a review of a complete case record that ... provides more detailed and comprehensive information than what was available to the individual's treating source." Id.

Here, however, the Agency's non-examining sources offered their opinions, upon which the ALJ relied, on November 23, 2016, and March 21, 2017, respectively. Tr. 125 and 137. Their opinions were issued almost 7 years prior to the date the last hearing in this case took place. Consequently, those non-examining sources did not have the opportunity to review, at minimum, Dr. Barrett's 2019 and 2020 assessments, or any of the 2000 pages of medical evidence submitted after these opinions were issued. The opinions of the State agency's medical consultants did not reflect any of the ongoing treatment, notes by treating sources or subsequent colonoscopy and surgical results. Here, there is no indication whatsoever that the ALJ even considered these facts before giving considerable weight to an opinion that was not 'based on a review of a complete case

record. See Fisk v. Astrue, 253 Fed.Appx. 580, 585 (6th Cir.2007) (*quoting* Soc. Sec. Rul. 96–6p, 1996 WL 374180, at *3).

Without any explanation, the ALJ chose to afford considerable weight to the outdated medical opinions of the state agency's consultants while affording little weight to the more recent opinions of the Plaintiff's long standing treating gastrointestinal specialist. Consequently, the ALJ's RFC is supported by an outdated medical opinion which did not consider the complete record. This is a reversible error.

Conclusion:

For the reasons stated above, the Plaintiff requests that this Court award disability benefits and remand this case for calculation of disability benefits. Alternatively, Plaintiff requests that the decision be reversed, and the case be remanded for further consideration.

CONCLUSION

For the reasons stated above, the Plaintiff requests that this Court award disability benefits and remand this case for calculation of disability benefits. The Plaintiff asserts that there is no need to remand this matter for further proceedings because the record "overwhelmingly supports" a finding of disability. Alternatively, the Plaintiff requests that the decision be reversed, and the case be remanded for further consideration.

Dated: February 29, 2024

Respectfully submitted,

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