

APPEALS COUNCIL
SOCIAL SECURITY ADMINISTRATION

-----x
In the Matter of
[REDACTED]

Case #:
[REDACTED]

-----x
MEMORANDUM

**REQUEST FOR REVIEW OF THE ALJ
DECISION AND ORDER DENYING, EITHER IN
WHOLE OR IN PART, SOCIAL SECURITY
DISABILITY BENEFITS.**

A. SPECIFIC ISSUES APPEALED:

The claimant states that the ALJ erred in evaluating the facts and evidence, and erred in the application of legal principles, including the applicable Rules and Regulations. As such, the claimant appeals the ALJ's decision denying benefits for the following specific reasons addressed below.

**1. THE ALJ ERRED BY FAILING TO FIND THE CLAIMANT
DISABLED AT STEP 5 SINCE THE JOBS SPECIFIED ARE EITHER
NOT CONSISTENT WITH THE RFC OR DO NOT EXIST IN
SUBSTANTIAL NUMBERS.**

The RFC states that the claimant "should have no concentrated exposure to . . . noise levels louder than level 3 moderate noise, as defined by the [SCO]." (P. 9).

The functional requirements of two of the jobs identified at Step 5 are inconsistent with the RFC. Specifically, the jobs of Power-screwdriver operator (DOT 699.685-026) and Bander, hand (DOT 920.687-026) both require exposure to level 4 noise as defined by the SCO. As such, the claimant cannot perform these jobs because the required exposure to noise is greater than the limitations set forth in the RFC.

The remaining job of Bagger, garment (DOT 920.687-018) does not conflict with the noise level requirements set forth in the RFC because this job is consistent with exposure to level 3 noise. However, this remaining job does not exist in substantial numbers and, for that reason, also fails.¹

¹ The job of Bander also arguably does not exist in substantial numbers since it only has 2,400 jobs in the national economy. (P. 21). However, since the job of Bander is clearly not consistent with the DOT, the issue of whether this job exists in substantial numbers is not being directly addressed in this brief.

The job of Bagger only has 1,300 jobs in the national economy. (P. 21). This is the only job identified at Step 5 that is consistent with the RFC. As such, the VE only identified a grand total of 1,300 jobs in the national economy for which the claimant may be functionally capable of performing. However, this is not a substantial number of jobs.

Moreover, the VE did not identify the number of jobs that exist in the region. Case law permits an “averaging” to assist in determining the available number of jobs that could exist in the region. Since only 1,300 jobs exist in the nation, when divided amongst all 50 states plus the District of Columbia (51 regions in total), that leaves a total of 25 jobs in this region.

The case of Karen E. v. Kijakazi, 2022 WL 17548642 (ND Iowa, Sept. 15, 2022)(attached hereto for review) addresses the question of whether a job exists in substantial numbers. Since Karen E. was decided in Iowa and is within the confines of the 8th Circuit, this case is instructive on this issue. Karen E. supports a finding that the job of Bagger, which only has 1,300 jobs in the national economy, and an estimated 25 jobs in this region, does not exist in substantial numbers and, as such, is not a sufficient job to meet the Commissioner’s burden at Step 5.

Since the jobs of Power-screwdriver operator (DOT 699.685-026) and Bander, hand (DOT 920.687-026) are both inconsistent with the RFC, and since the job of Bagger, garment (DOT 920.687-018) does not exist in substantial numbers, all three jobs are insufficient, and the Commissioner has not met its burden at Step 5.

For the aforementioned reasons, the Appeals Counsel must either award the claimant full disability benefits or remand the case for further review.

B. BROAD REQUEST FOR REVIEW:

The Appeals Council has an affirmative duty to review the entire record, including “new and material evidence” before rendering its decision to grant or deny review. See Williams v. Halter, 135 F.Supp.2d 1225, 1231 (M.D.Fla.2001); 20 C.F.R. § 404.970(b).

Although an ALJ's findings of fact may be taken as conclusive, the Appeals Council may review all the evidence of record to decide whether the ALJ's findings are supported by substantial evidence. In Powell v. Heckler, 789 F.2d 176 (3d Cir.1986), the court held that the Appeals Council need not limit its review to the issue appealed, but may review a claimant's entire case. Id. at 179; see also Hale v. Sullivan, 934 F.2d 895, 898 (7th Cir.1991) (once the Appeals Council receives a timely request for review, it is entitled to review the entirety of the case); Gronda v. Secretary of Health & Human Serv., 856 F.2d 36, 38–39 (6th Cir.1988) (Appeals Council had authority to review entire case within 60 days of

ALJ's decision even though claimant only requested review of narrow aspect of case), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989).

In this case, the claimant is asking the Appeals Council to review specific and narrow issues, which are identified in Section A, above. However, in addition to the specific issues identified above, the claimant is also asking the Appeals Council to review all the evidence of record to determine if the ALJ committed any other errors, beyond those errors that have been specifically identified above.

In this case, the claimant asserts that the ALJ erred in evaluating the facts, evidence, and erred in the application of legal principles, including the applicable Rules and Regulations. As such, it is requested that the Appeals Council vacate the decision denying benefits and remand the case for further consideration.

C. CONCLUSION:

The claimant asserts that the ALJ erred in evaluating the facts, evidence, and erred in the application of legal principles, including the applicable Rules and Regulations. Consequently, the claimant asserts that the decision denying benefits is not based upon substantial evidence. The claimant requests that the Appeals Council vacate the decision denying benefits and either issue a fully favorable decision or, in the alternative, remand the case for further consideration.

Dated: December 17, 2023

Respectfully submitted:

/s/

████████████████████

████████████████████