UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

----------x

[redacted], Dkt#: [redacted]

Plaintiff,

- against –

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

Defendant.

----------x

PLAINTIFF'S BRIEF

KIRA TREYVUS, ESQ.
KONOSKI & PARTNERS, P.C.
Attorney(s) for the Plaintiff
305 Broadway, 7th Floor
New York, NY 10007
(212) 897-5832
Fax: (917) 456-9387
TheFederalAppealsFirm@gmail.com

TABLE OF CONTENTS

INTRODUCTION

Pursuant to 42 U.S.C. § 405(g), the Plaintiff seeks judicial review of the final administrative decision of the Commissioner of Social Security ("Commissioner"). The Plaintiff asserts that the Commissioner's decision is not based on substantial evidence as required by 42 U.S.C. §405(g). The Plaintiff also specifically contends that the Commissioner erred as a matter of law in denying his claim for Social Security Disability benefits for the reasons set forth below.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Elements.

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

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

Undisputed Material Facts.

Summary and Course of the Administrative Proceedings.

1. On October 19, 2021, the claimant filed an application for supplemental security income, alleging disability beginning May 26, 2020. The claim was denied initially on February 24, 2022 and upon reconsideration on September 7, 2022. Thereafter, the claimant filed a written request for hearing received on September 23, 2022. On March 9, 2023, the ALJ held a hearing. (Tr. 23). On May 2, 2023, the ALJ issued an unfavorable decision. (Tr. 20). The Appeals Council denied review on September 29, 2023. (Tr. 9). Accordingly, the ALJ's decision became the Commissioner's final decision.

Statement of Facts.

Plaintiff's age and work experience.

2. Plaintiff was born December 23, 1967. (Tr. 22).

3. The claimant has past relevant work as a cashier checker, which is semi-skilled SVP Level 3 work with a Reasoning Level 3. (Tr. 29, DOT, O*Net).

Severe Conditions.

4. The claimant has the following severe impairments: lumbar degenerative disc disease, coronary artery disease, and obesity. (Tr. 13).

Significant Numbers of Jobs in the National Economy.

5. In this case, the Vocational Expert identified three (3) Occupations (Tr. 33, 65):

Occupation	DOT Code	Jobs in the National Economy
Order clerk, food and beverage	209.567-014	750
Document preparer	249.587-018	15,600
Touch up circuit board assembler	726.684-110	1,000

6. The VE testimony on the issue of significant numbers is as follows (Tr. 65):

> Q: And if I took that same hypothetical and now limit it to the sedentary level, is there any work for this individual?
>
> A: There would still be ***some*** jobs, Judge. […].

(The remainder of this page is intentionally left blank).

ISSUES PRESENTED

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO IDENTIFY JOBS AT STEP 5 OF THE SEQUENTIAL EVALUATION PROCESS THAT EXIST IN SUBSTANTIAL NUMBERS IN THE NATIONAL ECONOMY.

(The remainder of this page is intentionally left blank).

STATUTORY AND REGULATORY FRAMEWORK

The Social Security Act, 42 U.S.C. §423(d)(1)(A), defines disability as the:

> . . . inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; . . . (A)n individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . .

Section 423(d)(3) of the Act defines a "physical or mental impairment" as:

> . . . an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical or laboratory diagnostic techniques.

The Social Security regulations set forth a sequential method of evaluating disability claims. 20 C.F.R. §§ 404.1520(a), 416.920(a). The first step is to determine whether the claimant is engaging in substantial gainful activity. If so, the claim is denied. If not, the second step is to determine whether the claimant has a severe impairment, i.e., an impairment which significantly limits ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claim is denied. Id. If so, the third step is to determine whether it meets or equals one of the impairments listed in 20 C.F.R. Part 404, Subpart P, App. 1. 20 C.F.R. §§ 404.1520(d), 416.920(d). If it does, a finding of disability is directed. Id. If not, the fourth step is to determine whether the claimant has an impairment which precludes the performance of past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e). If

not, the claim is denied. Id. If so, the fifth step is to determine whether the claimant's impairments prevent the performance of any other work, considering residual functional capacity, age, education and work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f).

ARGUMENT

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO IDENTIFY JOBS AT STEP 5 OF THE SEQUENTIAL EVALUATION PROCESS THAT EXIST IN SUBSTANTIAL NUMBERS IN THE NATIONAL ECONOMY.

Applicable Law:

At step five, the ALJ is granted discretion to determine what constitutes a "significant" number of jobs on a case-by-case basis. The Commissioner is "responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); see also Weatherbee v. Astrue, 649 F.3d 565, at 569 (7th Cir. 2011).

"Work exists in the national economy when there is a significant number of jobs." 20 C.F.R. §§ 404.1566(b), 416.966(b). "Isolated jobs that exist only in very limited numbers in relatively few locations outside of the region where [the claimant] live[s] are not considered 'work which exists in the national economy.' " § 404.1566(b); see also § 416.966(b). Therefore, work that exists "in very limited numbers" cannot be considered "significant." It is within the ALJ's discretion to determine whether jobs exist only in very limited numbers. See Biestek v. Berryhill, 139 S. Ct. 1148, at 1152 (2019)(citing 20 C.F.R. §§ 404.1560(c)(1), 416.960(c)(1), 404.1566, 416.966).

In determining whether there is a "significant" number of jobs in the national economy, the regulatory scheme gives the ALJ discretion to decide, using substantial evidence, when a number of jobs qualifies as significant. Substantial evidence means "evidence a reasonable person would accept as adequate to support the decision." Kastner v. Astrue, 697 F.3d 642, 646 (7th Cir. 2012).

There are several district court opinions in the Seventh Circuit involving national numbers, including one that declares that "14,500 is far below any national number of jobs that the Seventh Circuit Court of Appeals has determined to be significant," James A. v. Saul, 471 F. Supp. 3d 856, 860 (N.D. Ind. 2020), and another that concludes that 120,350 jobs nationally is not a significant number and that "there is no authority stating" otherwise. Sally S. v. Berryhill, No. 2:18cv460, 2019 WL 3335033, at *11 (N.D. Ind. Jul. 23, 2019) ("[I]f SSA is going to deny benefits on the basis that 'a significant number' of jobs exists that this individual could theoretically perform, the agency should actually be held to show by substantial evidence that a true significant number exists."). Other district courts have found numbers above 20,000 to be significant. See Iversen v. Berryhill, No. 16 CV 7337, 2017 WL 1848478, at *5 (N.D. Ill. May 8, 2017) (holding that 30,000 jobs in the national economy were significant); Joseph M. v. Saul, No. 18 C 5182, 2019 WL 6918281, at *17 (N.D. Ill. Dec. 19, 2019) (finding that "positions account[ing] for 40,000 jobs nationally" qualified as a significant number).

There is "just one district court case within this Circuit which determined that a number below 20,000 amounted to a significant number of jobs in the national economy." John C. v. Saul, 2021 WL 794780 (CDIL, March 2, 2021) (citing Dorothy B.

v. Berryhill, No. 18 CV 50017, 2019 WL 2325998, at *7 (N.D. Ill. May 31, 2019)) (determining that 17,700 jobs in the national economy was a significant number)). The Court has not identified any other district court opinions that would be helpful in resolving this issue. Id.

The Court in John C. stated that "It is the Commissioner's burden at step five to provide evidence that John was able to perform jobs existing in significant numbers in the national economy. [The Commissioner] has not pointed this Court to any binding authority holding that 20,000 jobs are significant, and with district courts coming to varying conclusions, the Court is not persuaded that the number is significant nationally. Thus, the Court agrees . . . that 20,000 jobs in the national economy does not qualify as a significant number. Because the Commissioner has not sustained his burden at step five, this case is remanded to the agency for further testimony from the VE addressing the apparent conflicts discussed above or identifying other jobs without such conflicts." Id.

Argument:

In this case, the Vocational Expert identified three (3) Occupations (Tr. 33, 65):

Occupation	DOT Code	Jobs in the National Economy
Order clerk, food and beverage	209.567-014	750
Document preparer	249.587-018	15,600
Touch up circuit board assembler	726.684-110	1,000

I will first address the jobs of Order Clerk and Touch Up Circuit Board Assembler. These jobs clearly do not exist in significant numbers in the national economy under precedent in the Seventh Circuit and in Illinois. The job of Order Clerk only has 750 jobs in the national economy (with no jobs specifically identified in the region) and the job of Touch Up Circuit Board Assembler only has 1,000 jobs in the national economy (with no jobs specifically identified in the region).

Although the ALJ states, in the bold heading on Page 11 of the decision (Tr. 33), that "there are jobs that exist in significant numbers", the ALJ provides for no other explanation or analysis to substantiate the conclusion that the jobs identified at Step 5 truly exist in significant numbers. Moreover, these two jobs certainly do not qualify. The especially do not qualify because the ALJ did not provide any explanation as to why such a small number of jobs were believed to exist in significant numbers.

Turning now to the job of document preparer, according to the DOT, the job of document preparer is as follows:

> "Prepares documents, such as brochures, pamphlets, and catalogs, **for microfilming**, using paper cutter, photocopying machine, rubber stamps, and other work devices: Cuts documents into individual pages of standard microfilming size and format when allowed by margin space, using paper cutter or razor knife. Reproduces document pages as necessary to improve clarity or to reduce one or more pages into single page of standard microfilming size, using photocopying machine. Stamps standard symbols on pages or inserts instruction cards between pages of material to notify [microfilm camera operator] of special handling, such as manual repositioning, during microfilming. Prepares cover sheet and document folder for material and index card for company files indicating

> information, such as firm name and address, product category, and index code, to identify material. Inserts material to be filmed in document folder and files folder for processing according to index code and filming priority schedule." DOT 249.587-018.

As for the occupation of Document Preparer, this job should be disregarded in its entirety. The job of Document Preparer is an obsolete occupation and is not viable. See Marie A. v. Comm'r of Soc. Sec., 2024 WL 865824 (SDIL, Feb. 29, 2024)("[t]he job of preparing documents for microfilm preservation is one that seems particularly likely to have changed in the last 37 years given the shift to digital storage and advances in scanning technology); Jaret B. v. Comm'r of Soc. Sec., 2024 WL 1014051 (WDNY, March 8, 2024)(the VE testified that the job of document preparer was obsolete and no longer existed); Corey S. v. Comm'r of Soc. Sec., 2021 WL 2935917, at *12 (NDNY, July 13, 2021)(finding that, [i]n light of the overwhelming evidence that the document preparer position, as defined in the DICOT, is obsolete in the national economy", it was error to rely solely on vocational expert testimony that there were a substantial number of such jobs in the national economy that plaintiff could perform); Cunningham v. Astrue, 360 Fed. App'x 606, 616 (6th Cir. 2010) (remanding a case "for consideration of whether the DOT listings, specifically the document preparer and security monitor descriptions, were reliable in light of the economy as it existed at the time of the hearing before the ALJ"); Zacharopoulos v. Saul, 516 F. Supp. 3d 211, 222 (E.D.N.Y. 2021) (finding that it "strains credibility" to suggest that there are a substantial number of document preparer positions available in the national economy, given that "the technology underlying such a career is rapidly descending into obsolescence"); Kordeck v. Colvin, No. 2:14-cv-432-JEM, 2016 WL

675814, at *9 (N.D. Ind. Feb. 19, 2016) (describing the document preparer position as one of several "jobs that have been reduced significantly in number if not rendered obsolete by the rise of the internet").

Since the job of document preparer is obsolete, it should be excluded from the list of occupations. By excluding this job, there remains a total of 1,750 jobs identified in the national economy between the Order Clerk and Touch Up Circuit Board Assembler occupations. Certainly, a grand total of 1,750 identified jobs is not significant.

However, even if the job of Document Preparer is included in the total numbers, that still only brings the total up to 17,350. Pursuant to precedent in Illinois, less than 20,000 jobs is not a significant number. See John C., *supra*. There is just one case in Illinois that held that less than 20,000 jobs is significant. That case found that 17,700 jobs is significant. See Dorothy B., *supra*. However, in that case, the number of jobs is still more (17,700) than the total amount in this case even when accounting for the obsolete Document Preparer job (17,350). Thus, remand is still necessary even if the obsolete job of Document Preparer is included in the total numbers.

Finally, it is also important to note that the VE did not testify that the three jobs identified above exist in *significant* numbers. The testimony on the issue of significant numbers is as follows (Tr. 65):

> Q: And if I took that same hypothetical and now limit it to the sedentary level, is there any work for this individual?
>
> A: There would still be ***some*** jobs, Judge. […].

The VE then identified the three occupations listed above. At no time did the VE identify the number of jobs as being *significant*, never identified the number of regional jobs, and the ALJ never asked any questions that could shed light into whether the number of jobs identified were somehow considered to be a significant number of jobs. The VE's testimony that "***some*** jobs" exist in the national economy is not the standard at Step 5. At Step 5, the Commissioner must prove that the jobs exist in *significant* numbers, not simply "*some*" numbers. As such, the Commissioner did not meet his burden at Step 5.

CONCLUSION

For the reasons stated above, the Plaintiff asks that the denial of benefits be vacated and that the claim be remanded for further proceedings.

Dated: March 14, 2024
New York, NY

Respectfully Submitted:

/s/ KIRA TREYVUS

KIRA TREYVUS, ESQ.
KONOSKI & PARTNERS, P.C.
Attorney(s) for the Plaintiff
305 Broadway, 7th Floor
New York, NY 10007
(212) 897-5832
Fax: (917) 456-9387
TheFederalAppealsFirm@gmail.com

DECLARATION 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 14th day of March 2024, I served the within **PLAINTIFF'S BRIEF**, 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.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 14, 2024
New York, NY

Respectfully Submitted:

/s/ KIRA TREYVUS

_____

KIRA TREYVUS, ESQ.
KONOSKI & PARTNERS, P.C.
Attorney(s) for the Plaintiff
305 Broadway, 7th Floor
New York, NY 10007
(212) 897-5832
Fax: (917) 456-9387
TheFederalAppealsFirm@gmail.com