No. 23-12796

In the United States Court of Appeals For the Eleventh 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 Southern District of Florida, No. 22-cv-14334-MAYNARD

OPENING BRIEF FOR APPELLANT

BRYAN KONOSKI, ESQ
NY State Bar No: 4095899
KONOSKI & PARTNERS, P.C.
305 Broadway, 7th Floor
New York, NY 10007
(212) 897-5832
Fax: (917) 456-9387
TheFederalAppealsFirm@gmail.com

Counsel for Appellant

CERTIFICATE OF INTERESTED PERSONS

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

1) Plaintiffs-Appellants: [redacted]

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

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

Dated: October 4, 2023
New York, NY

Respectfully Submitted:

/s/Bryan Konoski

By: Bryan Konoski, Esq.
Attorney(s) for the Plaintiff-Appellant
Konoski & Partners, P.C.
305 Broadway, 7th Floor
New York, NY 10007
(212) 897-5832
Fax: (917) 456-9387
TheFederalAppealsFirm@gmail.com

STATEMENT REGARDING ORAL ARGUMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes

Rules

STATEMENT OF JURISDICTION

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

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

(C) The filing dates establishing the timeliness of the appeal: The Court issued a final judgment on August 25, 2023. The Plaintiff filed a notice of appeal on August 28, 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 August 25, 2023, disposing of all issues in the case.

STATEMENT OF ISSUES

DID THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER THE MEDICAL OPINIONS OF DR. MESSING (EXHIBIT 7F) ?

STATEMENT OF THE CASE

(A) Procedural History:

On October 20, 2020, the Plaintiff filed an application for child's Social Security Disability insurance benefits alleging disability beginning on January 12, 1986. The claim was denied initially on June 3, 2020, and upon reconsideration dated October 22, 2020. On June 9, 2021, a hearing was held by telephone. (Doc 15 - pg. 34). The application for benefits were denied in an ALJ decision dated June 22, 2021 (Doc 15 - pg. 31). Plaintiff filed a timely request for review with the Appeals Council, which was denied on March 31, 2022 (Doc 15 - pg. 28). The Plaintiff appealed to the federal district court asking the court to overturn the Commissioner's decision and remand the case for further consideration. On August 25, 2023, the federal district court issued an order denying the Plaintiff's request for relief and affirming the Commissioner's decision.

(B) Facts Relevant for Review: In this case, Dr. Eileen Messing performed a Neuropsychological Evaluation of the Plaintiff. (Doc 15 - pgs. 701-711). Although the ALJ references the Neuropsychological Evaluation report in Step 4 of the analysis, the ALJ

only references the report as providing "objective findings". (Doc 15 - pg. 45). The ALJ did not evaluate any of the medical opinions that were contained in the report. Moreover, the ALJ did not assess a persuasiveness value of the opinions in the report and did not evaluate supportability and consistency as required by the Regulations.

On Page 11 of the Neuropsychological Evaluation report, the doctor provides opinions as to a variety of work-related functional limitations. (Doc 15 - pg. 710). The doctor rendered the following opinions:

> **Work Recommendations for Neurocognitive Disorder and ADHD:**
>
> It is suggested that **the individual** share the results of this report with their Human Resources (H.R.) department representatives to help set accommodations in place to help the person be more effective in the workplace. H.R. **and the client** should both be familiar with the Americans with Disabilities Act (ADA, 1990).
>
> An adult with ADHD and/or Neurocognitive Disorder will likely take a longer time at most tasks, Slow speed in combination with perfectionism will result in few tasks begin completed because they take more the average amount of time. **More time on projects, tests, and work - commitments will be needed for such individuals.**

Individuals with ADHD and neurocognitive disorders are often late for business meetings, appointments, dinner and other scheduled activities. This is postulated that it is because sense of time combined with distractibility often leads to an inability to manage time effectively. **The client needs to be aware of this tendency in order to help fix this problem.**

Regarding the work place, a job with more structure, less stress, a Slower pace, and fewer operating variables would be most appropriate. Short time frames and deadlines in general tend to create a great deal of anxiety in these individuals and should be extended if possible.

Writing things down, tape recording, and **taking frequent breaks** are all things that can increase workplace effectiveness. Additionally, the use of a white noise machine, completing one task at a time **(no multi-tasking) and breaking projects down into manageable parts should also be useful, A separate workspace with a door would be helpful as well.**

Creating flexible work schedules or reducing work to part time schedule may be helpful for client.

Mr. [redacted] should keep a notepad on his desk. If he is interrupted, write down what he is doing. This way, after the interruption he will be able to immediately get back to what they were doing.

(C) Rulings Presented for Review:

1. The ALJ erred by failing to evaluate all medical opinion evidence as required by 20 C.F.R. § 416.920c(a), (c)(1)-(5). Specifically, the ALJ: (1) failed to evaluate the medical opinions issued by Dr. Messing which were contained in the doctor's Neuropsychological report, (2) failed to incorporate any of the doctor's opinions into the RFC or expressly explain why they were not included, and (3) by failing to incorporate any of Dr. Messing's opined limitations in the hypothetical questions posed to the Vocational Expert.

Practically, the second and third issues identified above flow from the first issue, which is that the ALJ failed to evaluate the medical opinions issued by Dr. Messing.

2. The District Court erred by failing to recognize the ALJ's errors and by failing to remand the case for further consideration.

SUMMARY OF THE ARGUMENT

Dr. Messing issued a Neuropsychological report, which contained numerous medical opinions. The opinions issued are medical opinions within the definition of 20 C.F.R. § 404.1513(a)(2).

The opinions relate to the Plaintiff and were not simply generalized suggestions that apply broadly to individuals with ADHD. The fact that the limitations applied to the Plaintiff, personally, was made abundantly clear by the fact that the doctor specified the opinions as "work limitations" that relate to "the client". The client referenced is "Mr. [redacted]".

In the first line of the "work recommendations" section (this section is set forth in the relevant facts section, above, and in the body of the argument below, and will not be reiterated here), which is the section that contains the opined limitations, the doctor provides for a recommendation that "the individual" share the results of this report with Human Resources. "The individual" being referenced is clearly the Plaintiff. Moreover, contained in the doctor's statement, there are 3 separate references to "the client". The references to "the client" can only refer to "the client" that the doctor was evaluating, which is the Plaintiff,

[redacted]. There is no other reasonable view that the reference to "the client" was a statement that was broadly referencing ADHD patients, generally. This reference is sufficiently specific to make it clear that the "work recommendations" are specific to "the doctor's client", meaning the Plaintiff. Moreover, in the last paragraph of the doctor's opinions, Dr. Messing specifically states, "Mr. [redacted] should keep a notepad on his desk". (Doc 15 - pg. 710). The fact that the opinions relate to the Plaintiff is made clear by the doctor's express reference to "Mr. [redacted]" in the last line.

The opinions set forth by Dr. Messing relate to mental limitations, including time off task, absenteeism and excessive lateness, difficulty managing stress and changes in the workplace, need for frequent breaks, need of a flexible work schedule or to work in a part-time job, the inability to multi-task, the need to work in a secluded or quiet space, and the need to utilize memory aids such as notepads. As such, they are opinions within the meaning of the regulations and were required to be evaluated pursuant to 20 C.F.R. §§ 404.1520c, 416.920c.

The ALJ's failure to evaluate the medical opinions of Dr. Messing is legal error that violates 20 C.F.R. §§ 404.1520c, 416.920c, and requires

remand. Furthermore, the District Court also erred by failing to recognize the ALJ's error and remand the case for further proceedings.

STANDARD OF REVIEW

This Court's review of the Commissioner's decision is limited to determining whether the Commissioner's decision, as a whole, is supported by substantial evidence and whether the Commissioner has employed the correct legal standards. 42 U.S.C. § 405(g).

The Circuit Court reviews *de novo* a district court's review of the Commissioner's disability determination. Ingram v. Astrue, 496 F.3d 1253, 1260 (11th Cir. 2007). More specifically, the Court reviews *de novo* the Commissioner's legal conclusions but reviews factual findings for substantial evidence. Id.

As to the review of legal conclusions, "[t]he Commissioner's failure to apply the correct law or to provide the reviewing court with sufficient reasoning for determining that the proper legal analysis has been conducted mandates reversal." Id. (*quoting* Cornelius v. Sullivan, 936 F.2d 1143, 1145–46 (11th Cir. 1991)). As to the review of factual findings, the law holds that substantial evidence is "more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate

to support a conclusion." Lewis v. Callahan, 125 F.3d 1436, 1440 (11th Cir. 1997). The Court does not "decide the facts anew, reweigh the evidence, or substitute . . . judgment for that of the Commissioner." Winschel v. Commissioner of Social Sec., 631 F.3d 1176, 1178 (11th Cir. 2011) (*quoting* Phillips v. Barnhart, 357 F.3d 1232, 1240 n.8 (11th Cir. 2004) (alteration omitted)). The Court must, however, "view the entire record and take account of evidence in the record which detracts from the evidence relied on by the [Commissioner]." Parker v. Bowen, 793 F.2d 1177, 1180 (11th Cir. 1986) (per curiam) (*quoting* Tieniber v. Heckler, 720 F.2d 1251, 1253 (11th Cir. 1983) (per curiam) (alteration omitted)).

ARGUMENT

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER THE MEDICAL OPINIONS OF DR. MESSING (EXHIBIT 7F).

Applicable law:

The Social Security Administration has promulgated a new rule for assessing medical opinion evidence, which governs all claims filed on or after March 27, 2017. 20 C.F.R. §§ 404.1520c, 416.920c. The new rule provides that the Commissioner "will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative medical finding(s), including those from [claimant's] medical sources." 20 C.F.R. § 416.920c(a). Rather, the Commissioner shall "evaluate the persuasiveness" of **all** medical opinions and prior administrative medical findings using the factors set forth in the regulations: (1) supportability; (2) consistency; (3) relationship with the claimant, including length of the treatment relationship, frequency of examinations, purpose of the treatment relationship, extent of the treatment relationship, and examining relationship; (4) specialization;

and (5) other factors including but not limited to evidence showing a medical source has familiarity with the other evidence in the claim or an understanding of the agency's disability program's policies and evidentiary requirements. 20 C.F.R. § 416.920c(a), (c)(1)-(5).

An ALJ must assess the persuasiveness of each medical opinion or prior administrative finding by applying five factors: supportability, consistency, relationship with the claimant, specialization, and other factors. Id. 20 C.F.R. § 404.1520c(c).

Because supportability and consistency are the most important factors, the regulations further require that an ALJ specifically explain how he considered those factors when he articulates how he considered a medical opinion in his determination or decision. Id. § 404.1520c(b)(2). Based on that requirement, the regulations do not contemplate a scenario where an ALJ fulfills her legal obligation to consider a medical opinion without also explicitly discussing how she did so.

In O'Neal v. Kijakazi, 2021 WL 4316114 (SD Ala., Sept. 22, 2021), the Court found that the ALJ's failure to consider the supportability and consistency factors was reversible error. The Court stated that, "[t]he undersigned (District Court Judge) initially finds that the ALJ's just-

stated analysis is erroneous because it is contrary to the analysis required by the Commissioner's regulations, the ALJ having failed to hew to the requirement in the regulations that she explain how she considered both the supportability and consistency factors."

Argument:

As set forth below, the Plaintiff will explain, first, how the ALJ erred in this case. The Plaintiff will then explain how the District Court erred. Although the Circuit Court reviews the District Court's judgment *de novo*, the Plaintiff believes that it is important to demonstrate how and why the District Court's decision is also erroneous. Based on the arguments below, the Plaintiff requests that this Court Order that the denial of disability benefits be vacated and the case be remanded for further consideration.

A. The ALJ erred as a matter of law.

In this case, Dr. Eileen Messing performed a Neuropsychological Evaluation of the Plaintiff. (Doc 15 - pgs. 701-711). Although the ALJ references the Neuropsychological Evaluation report in Step 4 of the analysis, the ALJ only references the report as providing "objective findings". (Doc 15 - pg. 45). The ALJ did not evaluate any of the medical

opinions that were contained in the report. Moreover, the ALJ did not assess a persuasiveness value of the opinions in the report and did not evaluate supportability and consistency as required by the Regulations. As such, the ALJ erred.

On Page 11 of the Neuropsychological Evaluation report, the doctor provides opinions as to a variety of work-related functional limitations. (Doc 15 - pg. 710). The doctor rendered the following opinions:

> **Work Recommendations for Neurocognitive Disorder and ADHD:**
>
> It is suggested that **the individual** share the results of this report with their Human Resources (H.R.) department representatives to help set accommodations in place to help the person be more effective in the workplace. H.R. **and the client** should both be familiar with the Americans with Disabilities Act (ADA, 1990).
>
> An adult with ADHD and/or Neurocognitive Disorder will likely take a longer time at most tasks, Slow speed in combination with perfectionism will result in few tasks begin completed because they take more the average amount of time. **More time on projects, tests, and work - commitments will be needed for such individuals.**
>
> **Individuals with ADHD and neurocognitive disorders are often late for business meetings, appointments,**

dinner and other scheduled activities. This is postulated that it is because sense of time combined with distractibility often leads to an inability to manage time effectively. **The client needs to be aware of this tendency in order to help fix this problem.**

Regarding the work place, a job with more structure, less stress, a Slower pace, and fewer operating variables would be most appropriate. Short time frames and deadlines in general tend to create a great deal of anxiety in these individuals and should be extended if possible.

Writing things down, tape recording, and **taking frequent breaks** are all things that can increase workplace effectiveness. Additionally, the use of a white noise machine, completing one task at a time **(no multi-tasking) and breaking projects down into manageable parts should also be useful, A separate workspace with a door would be helpful as well.**

Creating flexible work schedules or reducing work to part time schedule may be helpful for client.

Mr. [redacted] should keep a notepad on his desk. If he is interrupted, write down what he is doing. This way, after the interruption he will be able to immediately get back to what they were doing.

The aforementioned list of "work recommendations" are clearly opinions issued by the doctor that relate to the Plaintiff's mental

functioning, which have direct impact on work performance. To demonstrate the doctor's intent to formulate opinions that were directly related to work performance, the doctor specifically titled this section "work recommendations". None of these functional limitations or accommodations were accounted for in the RFC. (Doc 15 - pg. 39). I will address each opined functional limitation, in turn, below.

"More time on projects, tests, and work - commitments will be needed". The RFC does not account for any additional time accommodations, such as the need for no production rate quotas, or extra time to complete tasks. This is error. The error is not harmless since additional time to perform even simple tasks could result in the Plaintiff working substantially slower than the average employee and could result in the Plaintiff being considered unemployable. Thus, consideration of this limitation could have changed the outcome of the case.

"Individuals with ADHD and neurocognitive disorders are often late for business meetings, appointments, dinner and other scheduled activities." Arriving late to work, or arriving late to attend business meetings or appointments, could result an unreasonable amount of time off task or extra absences from work. 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)(a). In fact, the POMS clearly states that the ability to maintain regular attendance and to be punctual within customary tolerances 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)(e). As such, the fact that the doctor opined that the Plaintiff would be often late to business meetings and appointments and other scheduled activities relates to an ability that is critical to adequately performing a job. Consequently, this opined functional limitation may be work preclusive. This limitation could have changed the outcome of the case. Thus, the ALJ's failure to consider this medical opinion was not harmless and is reversible error.

"Regarding the workplace, a job with more structure, less stress, a slower pace, and fewer operating variables would be most appropriate." This opinion is akin to finding a functional limitation in the Paragraph B criteria of "adapting and managing" oneself, since it relates to limitations in the ability to handle structure and stress in the workplace, with fewer operating variables. Here, the ALJ did not consider what vocationally

appropriate limitations would be necessary. The RFC does not account for any limitations related to handling stress (i.e., such as a low stress environment without any production rate demands), or in maintaining pace, nor are there any limitations to one or two step tasks (i.e., to account for "fewer operating variables"). If these additional limitations were considered, and included in the RFC, this may have changed the outcome of the case. Thus, the ALJ's error is not harmless.

"Taking frequent breaks". This limitation relates to the need to take extra breaks, which are not routine. This also relates to the need for extra time off task. The POMS states that the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods are usually "strict". POMS DI 25020.010(B)(2)(i). As such, the need to take frequent breaks could be work preclusive. The ALJ's failure to consider this opined functional limitation is not harmless since the need to take frequent breaks could have changed the outcome of the case. As such, the ALJ's error is reversible.

"Creating flexible work schedules or reducing work to part time schedule may be helpful for client." This limitation could also be work preclusive since a claimant should be approved for social security benefits if their disabling medical conditions prevent the claimant from engaging in full-time employment, defined as 40-hours of work per week. Here, the doctor opined that flexible work schedules, and even part-time work, may be helpful for the Plaintiff. Since the ALJ did not consider the opinion that the Plaintiff was limited to part-time work to manage his mental limitations, the ALJ erred. The error is not harmless since a limitation to only part-time work would be work preclusive. As such, the ALJ's error is reversible. Moreover, even assuming, *arguendo*, that this opinion reducing the Plaintiff to part-time work is potentially an opinion that is on issue reserved for the Commissioner, the ALJ was not permitted to ignore this opinion. The rules clearly state that "opinions from any medical source on issues reserved to the Commissioner must never be ignored." SSR 96-5p, 1996 WL 374183, at *3 (July 2, 1996). Rather, "the ALJ must evaluate all evidence in the case record that may have a bearing on the determination or decision of disability, including opinions from medical sources about issues reserved to

the Commissioner." Lackey v. Barnhart, 127 F.App'x 455, 457-58 (10th Cir. 2005); see also Moon v. Comm'r of Soc. Sec., 2014 WL 548110 (MD Fla, Feb. 11, 2014). The ALJ failed to consider this opinion and the opined functional limitations and accommodations could be work preclusive. As such, the ALJ erred, and remand is warranted.

"[C]ompleting one task at a time (no multi-tasking) and breaking projects down into manageable parts should also be useful." The RFC does not account for any limitation precluding multi-tasking, which could have also changed the outcome of the case.

"A separate workspace with a door would be helpful as well." The RFC does not have any limitation or accommodation to allow for the Plaintiff to work in a more secluded and quiet space, away from other co-workers.

"Mr. [redacted] should keep a notepad on his desk." The RFC does not address the need for Mr. [redacted] to use memory aids, such as the use of a notepad. This demonstrates difficulty with memory and with concentrating, and no memory aid or special accommodation was accounted for in the RFC.

Each of the aforementioned statements amount to a "medical opinion" under the law, and should have been evaluated pursuant to 20 C.F.R. §§ 404.1520c, 416.920c. The Regulations governing the adjudication of social security disability claims defines the parameters of what qualifies as a medical opinion. Under the new regulations, which are codified in 20 C.F.R. § 404.1513(a)(2):

> "A medical opinion is a statement from a medical source about what you can still do despite your impairment(s) and whether you have one or more impairment-related limitations or restrictions in the following abilities:
>
> (i) Your ability to perform physical demands of work activities, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping, or crouching);
>
> **(ii) Your ability to perform mental demands of work activities, such as understanding; remembering; maintaining concentration, persistence, or pace; carrying out instructions; or responding appropriately to supervision, co-workers, or work pressures in a work setting;**
>
> (iii) Your ability to perform other demands of work, such as seeing, hearing, or using other senses; and

> (iv) Your ability to adapt to environmental conditions, such as temperature extremes or fumes."

Each of the opined limitations unquestionably amount to a medical opinion. The opinions relate to mental limitations, including time off task, absenteeism and excessive lateness, difficulty managing stress and changes in the workplace, need for frequent breaks, need of a flexible work schedule or to work in a part-time job, the inability to multi-task, the need to work in a secluded or quiet space, and the need to utilize memory aids such as notepads. Each of these opinions are from a medical source who issued a statement explaining what limitations the Plaintiff has and explains what impairment-related limitations or restrictions the Plaintiff has in his mental functioning. Thus, these statements are medical opinions within the meaning of 20 C.F.R. § 404.1513(a)(2).

The ALJ did not address any of the opined limitations that were contained in the neuropsychological report, did not account for any of these limitations in the RFC, and did not explain why they were not incorporated into the RFC. As such, the ALJ's failure to properly address the medical opinions issued by Dr. Messing is reversible error.

Finally, it must be noted that the hypothetical questions posed by the ALJ to the Vocational Expert must relate all of claimant's impairments with precision. 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 ALJ did not incorporate any of the aforementioned limitations into any questions posed to the VE during the hearing. The ALJ erred for this reason as well.

B. The District Court erred as a matter of law by failing to recognize the ALJ's error and by failing to remand the case for further consideration.

1. The District Court erred by finding that the statements by Dr. Messing are not medical opinions.

The District Court stated, "[n]one of the statements in Dr. Messing's evaluation – including the generalized "work" recommendations – specifically assess the extent to which Plaintiff could perform any particular work function in a work setting, and I thus find that Dr. Messing's evaluation does not constitute a "medical opinion"

under the new regulation framework." (Doc 15 - pg. 15). For the reasons set forth above in Section A, which will not be reiterated here, the District Court's finding that the doctor's statements were not medical opinions is patently wrong.

2. <u>The District Court erred by finding that the doctor's statements are "generalized suggestions" to individuals and adults with ADHD and not the Plaintiff in particular.</u>

The District Court stated, "[n]otwithstanding Plaintiff's arguments to the contrary, Dr. Messing's "work recommendations" section contains generalized suggestions applicable to individuals and adults with ADHD and/or neurocognitive disorders as opposed to specific explanations regarding Plaintiff's ability to work and what Plaintiff could still do despite his noted impairments. As such, the ALJ was not required to assess anything in this evaluation for its persuasiveness or supportability. Rather, the ALJ only needed to consider the evaluation, which the ALJ in this case indisputably did." (Doc 15 - pgs. 15-16).

The Court's finding that the doctor's statements were simply generalized statements that did not apply specifically to the Plaintiff is patently wrong.

First, Dr. Messing performed testing of the Plaintiff and then

issued "work recommendations" for him based on the results of this testing. The doctor's statement of opinion contained numerous references that make it clear that the "work recommendations" were intended to be specific recommendations for the Plaintiff.

In the first line, the doctor provides for a recommendation that "the individual" share the results of this report with Human Resources. "The individual" being referenced is the Plaintiff. Moreover, contained in the doctor's statement, there are 3 references to "the client". The references to "the client" can only refer to "the client" that the doctor was evaluating, which is the Plaintiff, Brooks [redacted]. There is no other reasonable view that the reference to "the client" was a statement that was broadly referencing ADHD patients, generally. This reference is sufficiently specific to make it clear that the "work recommendations" are specific to "the doctor's client", meaning the Plaintiff. Moreover, in the last paragraph of the doctor's opinions, Dr. Messing specifically states, "Mr. [redacted] should keep a notepad on his desk". (Doc 15 - pg. C710). The fact that the opinions relate to the Plaintiff is made abundantly clear by the doctor's express reference to "Mr. [redacted]" in the last line. As

such, the District Court's finding that the opinions are not specific to Mr. [redacted] is inaccurate and the District Court erred.

3. The District Court erred by finding that the Plaintiff's failure to challenge other medical opinions in the case is persuasive evidence that the decision as a whole is substantially supported.

The District Court stated that "[n]otably, in arguing the ALJ erred in considering Dr. Messing's evaluation, Plaintiff fails to challenge the ALJ's conclusions in assessing other medical opinion evidence of record. Upon independent review of the entire record, it is evident to me that the Commissioner's decision is substantially supported." (Doc 15 - pg. 16). The District Court appears to be saying that the Plaintiff's decision not to challenge other opinion evidence contained in the record is somehow proof that the ALJ's decision is based upon substantial evidence. Such a conclusion is improper.

First, whether the Plaintiff, upon appeal, challenges other medical evidence or other medical opinion evidence is completely irrelevant to the issue being raised here. The law is clear that the Commissioner shall "evaluate the persuasiveness" of **all** medical opinions and prior administrative medical findings using the factors set forth in the regulations. See 20 C.F.R. § 416.920c(a), (c)(1)-(5). The ALJ is not

obviated of the requirement to evaluate all medical opinions because the Plaintiff does not challenge all other opinion evidence contained in the record. There is no such rule of law requiring the Plaintiff to challenge a certain quantum of proof on federal appeal before a remand becomes appropriate. The Plaintiff simply needs to demonstrate that the ALJ committed legal error in the evaluation of the Plaintiff's claim.

Second, another reason why the Court's finding is irrelevant is because if the ALJ properly evaluated Dr. Messing's opinions, and found them persuasive, the ALJ would then need to resolve the inconsistencies between Dr. Messing's opinions and the other opinions contained in the record. Here, Dr. Messing's opinions could have been found persuasive because they were supported by in-depth testing of the Plaintiff. Had the ALJ found the opinions persuasive, the ALJ may have had to find the other opinions contained in the record either less persuasive or would have had to reconcile any inconsistencies that existed between the medical opinions.

The Plaintiff is not required to challenge every medical opinion upon appeal to federal court. The Plaintiff challenged the one clear error that exists here, which is that the ALJ failed to evaluate the medical

opinions issued by Dr. Messing. Remand is appropriate based upon this single issue raised upon federal appeal.

CONCLUSION

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: October 4, 2023
New York, NY

Respectfully Submitted:

/s/Bryan Konoski

By: Bryan Konoski, Esq.
Attorney(s) for the Plaintiff-Appellant
Konoski & Partners, P.C.
305 Broadway, 7th Floor
New York, NY 10007
(212) 897-5832
Fax: (917) 456-9387
TheFederalAppealsFirm@gmail.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(g)(1) because it contains 5,085 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.

The brief is 25 pages in length beginning with the Statement of Issues and ending with the Conclusion.

Dated: October 4, 2023
New York, NY

Respectfully Submitted:

/s/Bryan Konoski

By: Bryan Konoski, Esq.
Attorney(s) for the Plaintiff-Appellant
Konoski & Partners, P.C.
305 Broadway, 7th Floor
New York, NY 10007
(212) 897-5832
Fax: (917) 456-9387
TheFederalAppealsFirm@gmail.com

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 4th day of October 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: October 4, 2023
New York, NY

Respectfully Submitted:

/s/Bryan Konoski

By: Bryan Konoski, Esq.
Attorney(s) for the Plaintiff-Appellant
Konoski & Partners, P.C.
305 Broadway, 7th Floor
New York, NY 10007
(212) 897-5832
Fax: (917) 456-9387
TheFederalAppealsFirm@gmail.com