UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

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XXXXX,

Plaintiff,

vs.

ANDREW SAUL, Commissioner of the Social Security Administration,

Defendant.

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Case No.: XXXXX

PLAINTIFF'S BRIEF

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INTRODUCTION

Plaintiff, XXXXX ("Mr. XXXXX"), is an 18-year-old young man from Alabama whose quality of life unexpectedly and drastically changed on February 8, 2018.

Prior to February 8, 2018, Mr. XXXXX was in good general health with no ongoing medical issues. He was living at home with his parents and attending a local college. On February 8, 2018, Mr. XXXXX was in class when he suddenly experienced his first debilitating migraine. Tr. 393. Mr. XXXXX described the pain as lancing, excruciating, and burning. Tr. 399. The pain made it difficult to clench his teeth, chew or speak. Tr. 393.

Since February 8, 2018, Mr. XXXXX experienced migraines on a daily basis and had frequent migraine events throughout the day. Tr. 399. His migraines occurred frequently and could easily be triggered just by touch or chewing. Tr. 399.

Over the course of the next two years, Mr. XXXXX did everything he could to find the cause of this horrible condition and treat it effectively. He underwent a battery of tests, tried multiple migraine medications, and endured various procedures, from injections to physical therapy to alleviate his pain. After many adjustments in doses and changes in medication, Mr. XXXXX was prescribed Gabapentin, which markedly reduced (but did not eliminate) the severity of his pain. However, although the Gabapentin reduced his pain, it caused him to experience prominent fatigue and drowsiness. Tr. 393 and 399. In addition to using Gabapentin, Mr. XXXXX also received Botox injections every three months to help reduce pain.

As a result of this sudden onset of migraine pain, Mr. XXXXX's quality of life declined rapidly. On April 13, 2018, he was advised by his medical doctor to withdraw from college as he could no longer continue his studies due to pain. Tr. 361. As a result of the debilitating headaches, Mr. XXXXX went from a normal young man who was attending college and pursuing his dreams

and aspirations, to someone suffering from a medical condition that is so severe it relegated him to spending his day sitting or laying down in his room, and leaving home only for doctor appointments. Tr. 64.

On April 24, 2018, Mr. XXXXX made a claim for Social Security Disability Benefits. His claim was denied by an Administrative Law Judge (ALJ) on January 15, 2020. Tr. 16.

Pursuant to 42 U.S.C. § 405(g), Mr. Mozing seeks judicial review of the final administrative decision of the Commissioner of Social Security ("Commissioner"). Mr. XXXXX asserts that the Commissioner's decision is not based on substantial evidence as required by 42 U.S.C. §405(g). Mr. XXXXX also specifically contends that the Commissioner erred as a matter of law in denying his claim for Social Security Disability ("SSDI") 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. Mr. XXXXX applied for disability benefits on April 24, 2018 alleging disability commencing on May 1, 2017. His claim was denied on June 24, 2018. Mr. XXXXX filed a written request for a hearing which was subsequently held on December 11, 2019. The ALJ denied the claim on January 15, 2020. Tr. 16. Mr. XXXXX filed a request for review with the Appeals Council on January 21, 2020. Tr. 8. The Appeals Council denied the Request for Review on August 20, 2020. Tr. 5. Accordingly, the ALJ's decision became the Commissioner's final decision.

Statement of Relevant Facts.

Mr. XXXXX's age, education, and work experience.

2. Mr. XXXXX was born on May 29, 1999. Tr. 50. As of April 24, 2018, the alleged onset date, the Mr. XXXXX did not attain age 22. Tr. 21.

3. Mr. XXXXX has at least a high school education. Tr. 33. He has no past relevant work. Tr. 33. He was forced to drop out of college upon medical advice due to his medical conditions. Tr. 361.

Relevant Medical Evidence.

Headaches.

4. The Mr. XXXXX is diagnosed with Cervicogenic Headaches (Tr. 22), Chronic Migraines with and without Aura (Tr. 255, 384), New Daily Persistent Headache (Tr. 408), Trigeminal Neuralgia (Tr. 425), Occipital Neuralgia (Tr. 22), Post-Herpetic Neuralgia (Tr. 22),

Pain in the Occipital Region with Visual Disturbances (Tr. 265), Myofacial Pain (Tr. 22) and Obstructive Sleep Apnea (Tr. 468).

5. The medical records described Mr. XXXXX's condition as follows:

> . . . He is a 19 year old white man with a history of migraine headaches who developed a debilitating pain problem this year. On February 8 he had his 1st attack. These pain attacks started in the left temporal region but have also come to affect the right. He gets a lancinating excruciating burning sharp and dull pain that lasts for a second to five seconds. For the events can be triggered by touching and chewing. He has frequent events throughout the day including several mild events while at the office. He is now on gabapentin 800mg t.i.d. which markedly reduces the severity of the pain but makes him sleepy and groggy. Tr. 399.
>
> The pain made it difficult to clench teeth, chew or speak. In addition he had pain over the ramus of the mandible only when opening his mouth wide. He endorses some ocular photosensitivity, but only because that caused squinting, which then irritated is temporal pain. ... Occasionally he would experience spasms of the muscle in the temporal area. Tr. 393.
>
> He has groups of sharp pains: Each sharp stabbing pain lasts 30 seconds occurring every 5 minutes over an hour. Tr. 403. He would be woken from sleep with temple pain. If he were to roll onto his side he would instantly be woken with sharp stabbing pain. If he bends over it will trigger headache. Tr. 403.
>
> The patient has a history which fits the criteria for the diagnosis of New Daily Persistent Headache (NDPH), which is a daily headache out of the blue typically in individuals without a prior headache history. Tr. 408. Exam: allodynic bilateral temples, bilateral sharp AT pain, cervical hypermobility. Tr. 409.

6. The Mr. XXXXX's pain, symptoms, and side effects were so severe that on April 3, 2018, Dr. Karen Manning advised him to withdraw from college classes at this time secondary to medical issues. Tr. 361.

Treatment.

7. Mr. XXXXX underwent extensive treatment in an effort to manage and control his severe pain and symptoms. He has been to a total of three neurologists, an oral maxillofacial surgeon, dermatologist and an ENT specialist. Tr. 394, 403. Mr. XXXXX was prescribed Tramadol which made him feel bad. Tr. 428. He was then prescribed Norco which didn't last. Tr. 428. He also followed a course of physical therapy which didn't help. Tr. 428. Mr. XXXXX was prescribed the medication, Gabapentin, which helped but caused fatigue and drowsiness. Tr. 428.

8. In addition to the foregoing, Mr. XXXXX received a battery of other treatments, including: Occipital Nerve Block injection (Tr. 403); Trigger Point injections (Tr. 403); a Bilateral Block of the Auriculotemporal Nerve Under Ultrasound on September 18, 2018 (Tr. 430); a TMJ injection on October 9, 2018 (Tr. 430); a Right Thoracic Sympathetic Block on February 7, 2019 and February 14, 2019 (Tr. 450, 452).

9. Mr. XXXXX was also prescribed Botox injection treatments starting August 1, 2018, which he continues to receive every three months. Tr. 425.

Testing.

10. Mr. XXXXX underwent numerous tests to determine the source of his headaches. On March 11, 2018 a CT of the Cervical Spine and a CT of the Head were performed. Tr. 305, 307. On March 14, 2018 and MRI of the Brain and an MRI of the Cervical Spine were performed. Tr. 309, 311. On July 16, 2018 an MR Face/Neck/Orbit was performed. Tr. 397. On August 21, 2018 a Brainstem Auditory Evoked Response Study was performed. Tr. 426. On August 6, 2019 an obstructive Sleep Apnea Study was performed. Tr. 468.

Drowsiness, Fatigue, and Medication.

11. The medical records document the side-effects Mr. XXXXX experiences from the medication, Gabapentin. One set of medical records indicated that "He is taking Gabapentin 800mg tid he is very fatigued" Tr. 403. Another set of medical records indicated that "[gabapentin] has reduced his symptoms, and made them slightly more bearable. However, he has been experiencing prominent fatigue side effects from gabapentin." Tr. 393.

12. Mr. XXXXX also testified about his drowsiness and fatigue at his hearing. He testified that, "the Gabapentin I take, which really does help a lot. It makes me really sleepy." Tr. 46. In response to a question if medications make him drowsy or sleepy Mr. XXXXX responded that Gabapentin makes his sleepy and drowsy. Tr. 54.

Summary of Relevant Hearing Testimony.

Pain.

13. At the hearing, Mr. XXXXX testified that since his headaches started, he hasn't had even one day without headaches. Tr. 47. At most, Mr. XXXXX is headache free for about an hour immediately after he gets up in the morning before the pain returns. Tr. 47. Mr. XXXXX also testified that before he takes his medications, his pain level (on a pain scale from zero to ten) is a seven or an eight. Tr. 56. After Mr. XXXXX takes his medication, his pain level decreases (on a pain scale from zero to ten) to a five or a six but that the pain never completely goes away. Tr. 56. Mr. XXXXX also testified that once the pain starts in the morning, it does not go away until he goes back to sleep. Tr. 56.

Medication Side Effects (Drowsiness / Fatigue).

14. Mr. XXXXX testified that the medication he takes makes him really sleepy (Tr. 46), and that it affects his memory and focus because it makes him groggy and he gets in a fog. Tr. 66.

Driving.

15. Mr. XXXXX testified that he is no longer able to drive a car. Tr. 52. He stated that "[d]riving is one of the worst things for it, that vibration along with the looking around, moving my neck. That's like the one thing keeping a proper look out, looking in your rearview, moving your eyes around. And being sleepy from the Gabapentin that's just off the table." Tr. 52.

Basic Living Activities.

16. The Mr. XXXXX also testified that he would probably not be able to live independently on his own. When Mr. XXXXX was asked by the judge "could you live, let me ask you this, could you live independently on your own? ... but I'm talking about pay bills, maintain a checking account, a household, cook, clean, take care of everything, take you and pull you out of your home environment and move you across the country and put you in an apartment, could you do that?" Mr. XXXXX responded "[p]robably not". Tr. 56.

17. Mr. XXXXX testified at the hearing that most days he feels so bad that he can't go anywhere. Tr. 64. He also testified that "I go places like this and doctor visits because I have to". Tr. 64.

Frequency of the Headaches.

18. Mr. XXXXX also testified that at least 10 days per month he has headaches that prevent him from doing anything at all on those days. Tr. 65.

Vocational Expert Testimony (Regarding Frequency of Headaches).

19. The Vocational Expert who testified at the hearing testified that a rate of 10 days of absence per month would eliminate all jobs. Tr. 71.

ISSUES PRESENTED

I. Whether the Commissioner erred as a matter of law in failing to evaluate if the Plaintiff's debilitating daily migraine headaches equaled Listing 11.02(B)?

II. Weather the Plaintiff's severe and debilitating headaches equal Listing 11.02(B)?

III. Whether the ALJ's finding that Dr. Rozen's opinion is "persuasive" should have conclusively established that Plaintiff's condition equaled Listing 11.02(B)?

IV. Whether the ALJ's assessment of the Plaintiff's "B criteria" limitations for Listing 11.02(D) and Listing 12.07 is not supported by substantial evidence?

V. Whether the Commissioner erred as a matter of law in formulating the RFC?

VI. Whether the Commissioner erred as a matter of law in failing to pose a complete hypothetical to the Vocational Expert taking into consideration the Plaintiff's absenteeism and time off task?

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. See 20 C.F.R. § 404.1520(b). 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. See 20 C.F.R. § 404.1520(c). If not, the claim is denied. Id.

If a severe impairment is present, 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. See 20 C.F.R. § 404.1520(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). 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. See 20 C.F.R. § 404.1520(f).

STANDARD OF REVIEW

See the Statement of Elements and Undisputed Facts, above. The standard of review in Federal Disability Appeals is set forth in that section.

ARGUMENT

I.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FAILING TO EVALUATE IF THE PLAINTIFF'S DEBILITATING DAILY MIGRANE HEADACHES EQUALED LISTING 11.02B.

Applicable law:

A claimant is "conclusively presumed to be disabled" if he meets or equals the level of severity of a listed impairment. Crayton v. Callahan, 120 F.3d 1217, 1219 (11th Cir. 1997). The claimant has the burden of proving that an impairment meets or equals a listed impairment. See Barron v. Sullivan, 924 F.2d 227, 229 (11th Cir. 1991). In determining whether a claimant meets or equals a Listing, "[t]he ALJ must consider the applicant's medical condition taken as a whole." Jamison v. Bowen, 814 F.2d 585, 588 (11th Cir. 1987).

In cases where a medical condition does not precisely meet a listing criteria, a medical equivalence to a listing may be established by showing that the claimant's impairment(s) "is at least equal in severity and duration to the criteria of any listed impairment." 20 C.F.R. §§ 404.1526(a), 416.926(a). The determination of medical equivalence is made without consideration of vocational factors of age, education, or work experience. 20 C.F.R. §§ 404.1526(c), 416.926(c).

The Tenth Circuit held in Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996) that the ALJ is required to discuss the evidence and explain the reasons why the impairment did not meet or equal a listing. In so holding, the court stated:

> In this case, the ALJ did not discuss the evidence or his reasons for determining that appellant was not disabled at step three, or even identify the relevant Listing or Listings; he merely stated a summary conclusion that appellant's impairments did not meet or equal any Listed Impairment. Appellant's App. at 18-19. Such a bare conclusion is beyond meaningful judicial review. Under the Social Security Act, 42 U.S.C. 405(b)(1). Under this statute, the ALJ was required to discuss the evidence and explain why he found that appellant was not disabled at step three. Cook v. Heckler, 783 F.2d 1168, 1172-73 (4th Cir.1986); *see also* Brown v. Bowen, 794 F.2d 703, 708 (D.C.Cir.1986) (*relying* upon 20 C.F.R. 404.953 and 5 U.S.C. 557(c)[(3)(A)] to hold that an ALJ must explain his adverse decisions). Id.

A Kansas district court held that the ALJ must specifically discuss the relevant evidence he relied upon or rejected in finding that a claimant's impairment does not meet or equal a listed impairment. Neinhaus v. Massanari, 153 F. Supp.2d 1274, 1279 (D. Kan. 2001), *citing* Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). A district court in New Mexico agreed that an ALJ's summary conclusion – that the claimant's severe obesity did not equal an impairment found in the listings – was improper and required remand so the ALJ could properly determine whether the claimant's obesity equaled a listed impairment. Roberts v. Callahan, 971 F. Supp. 498, 501 (D.N.M. 1997).

The 9th Circuit held that an ALJ must assess the relevant evidence before deciding that a claimant's impairments do not meet or equal a listed impairment, but "[a] boilerplate finding is insufficient to support a conclusion that a claimant's impairment does not do so." Leis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001), *citing* Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990). A Washington district court held that the ALJ had to actually consider medical equivalency, and that

"simply making a finding that Plaintiff's impairments do not meet or equal a listing is insufficient." James v. Apfel, 174 F. Supp.2d 1130 (W.D. Wash. 2001), *citing* Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990).

Argument:

Mr. XXXXX suffers from a headache disorder. He was diagnosed with Cervicogenic Headaches (Tr. 22), Chronic Migraines with and without Aura (Tr. 255, 384) and New Daily Persistent Headaches (Tr. 408).

SSR 19-4p must be considered by the ALJ when evaluating headache disorders. Pursuant to SSR 19-4p, a primary headache disorder is not a listed impairment. However, SSR 19-4 directs that an the ALJ must still analyze whether headache disorders equal a listing. The SSR states that Epilepsy (Listing 11.02) is the most closely analogous listed impairment for a primary headache disorder. More specifically, SSR 19-4p states that Listing 11.02 (B) and Listing 11.02 (D) are the two pertinent listing sections that an ALJ must consider when evaluating a headache disorder. Consequently, in this case, the ALJ was legally obligated to make a determination whether Mr. XXXXX's condition equaled Listing Section 11.02 (B) and Listing Section 11.02(D). However, in this case, the ALJ only considered Listing 11.02(D) and completely failed to consider and evaluate whether Mr. XXXXX's impairments equaled Listing 11.02(B). The ALJ's failure to consider whether the Plaintiff's headache disorder equaled Listing 11.02(B) is reversible error.

The ALJ, without any discussion or analysis of the pertinent facts or medical evidence, concluded that "the claimant's headaches, migraines and neuralgia conditions do not meet the requirements of any listing-level impairment under listing 11.00, *et seq.*, or combination of impairments." Tr. 23. Notably, this statement is simply a boilerplate conclusory statement without any explanation on how such a determination was reached.

The ALJ then proceeded to provide a recitation of the relevant portions of SSR 19-4p. Tr. 23-24. At the end of this summary, the ALJ concluded that that "[t]he evidence fails to establish **marked limitations** in the areas designated above; therefore, the claimant's headaches, migraines, neuralgia and pain conditions do not satisfy any of the listings." (Emphasis added). Tr. 24. This conclusion is clear error and requires this Court to reverse the decision and remand the case for further consideration.

The reason this analysis is patently erroneous is as follows:

This analysis makes it apparent that the ALJ considered only Listing 11.02(D), but completely failed to consider Listing 11.02(B). This is clear because the ALJ found that the Plaintiff's conditions did not equal any of the listings due to the fact that the evidence failed to establish **marked limitations**. However, only Listing 11.02(D) requires that certain functional areas have marked limitations in order for the Listing to be satisfied. Since the ALJ only considered whether certain functional areas were markedly limited, which is the language specifically set forth under listing 11.02(D), and since the ALJ did not perform any other analysis, it is clear that the ALJ was considering only section 11.02(D) in the analysis. Listing 11.02(B) does not have any requirement related to marked limitations and there is no analysis in the decision that appears to relate to Listing 11.02(B). Thus, it is clear that the ALJ failed to consider Listing 11.02(B). This violates the mandates of SSR 19-4p.

The ALJ's error is not harmless. As discussed under Point II, below, if the ALJ properly evaluated SSR 19-4p, including whether the Plaintiff's condition equaled Listing 11.02(B), there was a strong likelihood that the Plaintiff would have equaled this Listing and have been found disabled.

The ALJ's failure to properly analyze the Plaintiff's headache disorder under SSR 19-4p and Listing 11.02(B) is reversible error.

Conclusion:

The failure of the ALJ to adequately consider SSR 19-4p and Listing 11.02(B) is reversible error. The decision completely failed to discuss, or even mention, whether any of the claimant's multiple impairments, symptoms and limitations met or equaled Listing 11.02(B). The decision is completely devoid of any such discussion. For this reason, the case must be remanded for further consideration.

II.

THE PLAINTIFF'S SEVERE AND DEBILITATING HEADACHES EQUAL LISTING 11.02(B).

As discussed above under Point I, the Plaintiff asserts that his medical conditions equal Listing 11.02(B) and that the court failed to evaluate this Listing as required by SSR 19-4p. Also, as discussed under Point I, the mere failure of the ALJ to analyze Listing 11.02(B) is reversible error requiring remand. However, to further expound upon the arguments in Point I, we will now explain how the Plaintiff's condition does, in fact, equal Listing 11.02(B). In doing so, it will be clear that the ALJ's failure to address Listing 11.02(B) is not harmless error.

Listing 11.02(B) states as follows:

> B. Dyscognitive seizures (see 11.00H1b), occurring at least once a week for at least 3 consecutive months (see 11.00H4) despite adherence to prescribed treatment (see 11.00C).

SSR 19-4p explains how a primary headache disorder can equal listing 11.02(B). Pursuant to SSR 19-4p, "Paragraph B of listing 11.02 requires dyscognitive seizures occurring at least once a week for at least 3 consecutive months despite adherence to prescribed treatment. To evaluate whether a primary headache disorder is equal in severity and duration to the criteria in 11.02B, we

consider: A detailed description from an AMS[1] of a typical headache event, including all associated phenomena (for example, premonitory symptoms, aura, duration, intensity, and accompanying symptoms); the frequency of headache events; adherence to prescribed treatment; side effects of treatment (for example, many medications used for treating a primary headache disorder can produce drowsiness, confusion, or inattention); and limitations in functioning that may be associated with the primary headache disorder or effects of its treatment, such as interference with activity during the day (for example, the need for a darkened and quiet room, having to lie down without moving, a sleep disturbance that affects daytime activities, or other related needs and limitations)". Each of these considerations will be addressed below.

(1) A detailed description from an AMS of a typical headache event, including all associated phenomena (for example, premonitory symptoms, aura, duration, intensity, and accompanying symptoms):

There is ample evidence in the record from acceptable medical sources that describe Mr. XXXXX's headache events. For instance, medical records from Dr. Rozen showed that Mr. XXXXX "[h]as groups of sharp pains: Each sharp stabbing pain lasts 30 seconds occurring every 5 minutes for over an hour". Tr. 403. Dr. Rozen's records further showed that the peak pain severity of Mr. XXXXX's headaches was rated at an 8 (on a zero to ten pain scale) and occurred 3 times per day lasting up to an hour each time. Tr. 404.

Medical records from an Emergency Room at the Choctaw General Hospital contained a nursing assessment indicating that neurological findings showed that a headache was present and the skin over the temple appeared "exquisitely tender to even light brushing". Tr. 29. Medical records from the Mayo Clinic in Florida indicated that ""[h]e gets a lancinating excruciating

[1] An "AMS" is an "Acceptable Medical Source."

burning sharp and dull pain that lasts for a second to five seconds. For the events can be triggered by touching and chewing. He has frequent events throughout the day including several mild events while at the medical office. Tr. 393. Medical records from Dr. Wang noted that Mr. XXXXX showed severe pain accompanied by a blistering rash and prominent neuropathic characteristics. Tr. 30. Additional records from Dr. Wang further noted the "pain made it difficult to clench teeth, chew or speak".

(2) <u>The frequency of headache events:</u>

The medical records indicated that Mr. XXXXX "[h]as groups of sharp pains: Each sharp stabbing pain lasts 30 seconds occurring every 5 minutes over an hour". Tr. 403. Medical records from the Mayo Clinic in Florida indicated that ""[h]e has frequent events throughout the day including several mild events while at the office. Tr. 393. The headaches occur daily. Tr. 393. Moreover, Mr. XXXXX also testified that at least 10 days per month he has headaches that prevent him from doing anything at all on those days. Tr. 65.

(3) <u>Adherence to prescribed treatment:</u>

Mr. XXXXX underwent extensive treatment in an effort to manage and control his severe pain and symptoms. He has been to a total of three neurologists, an oral maxillofacial surgeon, dermatologist and an ENT specialist. Tr. 394, 403. Mr. XXXXX was prescribed Tramadol which made him feel bad. Tr. 428. He was then prescribed Norco which didn't last. Tr. 428. He also followed a course of physical therapy which didn't help. Tr. 428. Mr. XXXXX was prescribed the medication, Gabapentin, which helped but caused fatigue and drowsiness. Tr. 428.

In addition to the foregoing, Mr. XXXXX received a battery of other treatments, including: Occipital Nerve Block injection (Tr. 403); Trigger Point injections (Tr. 403); a Bilateral Block of the Auriculotemporal Nerve Under Ultrasound on September 18, 2018 (Tr. 430); a TMJ

injection on October 9, 2018 (Tr. 430); a Right Thoracic Sympathetic Block on February 7, 2019 and February 14, 2019 (Tr. 450, 452). Mr. XXXXX was also prescribed Botox injection treatments starting August 1, 2018, which he continues to receive every three months. Tr. 425.

Mr. XXXXX has been in compliance with his prescribed treatment.

(4) Side effects of treatment (for example, many medications used for treating a primary headache disorder can produce drowsiness, confusion, or inattention):

Medical evidence in the record shows that the Plaintiff has severe fatigue, drowsiness and brain fog. Medical records from Dr. Rozen note that Mr. XXXXX is "taking Gabapentin 800 mg tid he is very fatigued. Tr. 403. Another set of medical records note that Mr. XXXXX is on Gabapentin which makes him sleepy and groggy. Tr. 399. Mr. XXXXX testified that the medication he takes makes him really sleepy (Tr. 46), and that it affects his memory and focus because it makes him groggy and he gets in a fog. Tr. 66.

(5) Limitations in functioning that may be associated with the primary headache disorder or effects of its treatment, such as interference with activity during the day (for example, the need for a darkened and quiet room, having to lie down without moving, a sleep disturbance that affects daytime activities, or other related needs and limitations)":

In this case, the debilitating headaches create significant limitations in Mr. XXXXX's activities of daily living. Mr. XXXXX testified that since his headaches started, he has not had even one day without headaches. Tr. 47. Mr. XXXXX also testified that before he takes his medications, his pain level (on a pain scale from zero to ten) is a seven or an eight. Tr. 56. After he takes his medication, his pain level decreases (on a pain scale from zero to ten) to a five or a six, but that the pain never completely goes away. Tr. 56. Mr. XXXXX also testified that once the pain starts in the morning, it does not go away until he goes back to sleep. Tr. 56. He is now on gabapentin 800mg t.i.d. which markedly reduces the severity of the pain but makes him sleepy

and groggy. Tr. 399. The medical records further indicate that during the headache events, Mr. XXXXX has difficulty "chew[ing] or speak[ing]".

He can no longer drive a car. Tr. 52. Mr. XXXXX is unable to live independently and relies on his parents. Tr. 56. He testified at the hearing that most days he feels so bad that he can't go anywhere (Tr. 64), and that "I go places like this (the hearing) and doctor visits because I have to". Tr. 64. Mr. XXXXX also testified that at least 10 days per month he has headaches that prevent him from doing anything at all on those days. Tr. 65. And most significantly, Mr. XXXXX's condition was so severe, that his neurologist, Dr. Manning **advised him to withdraw from college classes secondary to medical issues**. Tr. 361. This demonstrates that his condition is so severe that his own treating doctor advised him to put his college education and a future career on hold indefinitely.

Conclusion:

The substantial evidence in the record supports a finding that Mr. XXXXX's headaches equal the criteria of Listing 11.02(B). The ALJ committed reversible error by failing to properly analyze and consider this Listing. The ALJ also committed error by failing to find that Listing 11.02(b) was satisfied. Thus, the decision is not based upon substantial evidence. For the foregoing reasons, this case must be by remanded for further consideration.

III.

THE ALJ'S FINDING THAT DR. ROZEN'S OPINION IS "PERSUASIVE" SHOULD HAVE CONCLUSIVELY ESTABLISHED THAT THE PLAINTIFF'S CONDITION EQUALED LISTING 11.02(B)

Dr. Rozen performed an examination of the Plaintiff in this case. The ALJ specifically found the medical opinion of Dr. Todd Rozen to be "persuasive". However, upon finding that Dr. Rozen's medical opinion was "persuasive", the ALJ should have been compelled to find that the Plaintiff's condition equaled Listing 11.02(B). Dr. Rozen's opinion, which was found "persuasive" by the ALJ, contains sufficient information and opinions to satisfy each of the criteria set forth in SSR 19-4p and Listing 11.02(B).

The requisite criteria was analyzed above in Point II, demonstrating that the Plaintiff should have been awarded benefits. However, the criteria will be discussed again herein specifically as it relates to Dr. Rozen's evaluations and opinion. As demonstrated below, a finding that Dr. Rozen's opinion was "persuasive" should have conclusively resulted in a finding that SSR 19-4p and Listing 11.02(B) was satisfied and the Plaintiff should have been awarded disability benefits.

(1) A detailed description from an AMS of a typical headache event, including all associated phenomena (for example, premonitory symptoms, aura, duration, intensity, and accompanying symptoms):

The medical opinion of Dr. Rozen, which the ALJ found persuasive, indicated that the patient presented with "severe debilitating left greater than right temporal lancinating pains with onset in February of this year". Tr. 32. Moreover, the notes from the examination indicates that Mr. XXXXX has groups of sharp pains, that each sharp stabbing pain lasts 30 seconds, and that these pains occur every 5 minutes over an hour. Tr. 403.

Dr. Rozen's examination also indicated that the peak pain severity of Mr. XXXXX's headaches were rated at an 8 (on a zero to ten pain scale) and occurred 3 times per day lasting up to an hour each time. Tr. 404. The examination conducted by Dr. Rozen further indicated that Mr. XXXXX received injections and a trigger point injection with no change in the pain. Tr. 403.

(2) The frequency of headache events:

As stated above, Dr. Rozen's examination indicated that the peak pain severity of Mr. XXXXX's headaches were rated at an 8 (on a zero to ten pain scale) and occurred 3 times per day lasting up to an hour each time. Tr. 404.

(3) Adherence to prescribed treatment:

This portion of the criteria, as set forth in Point II, above, is incorporated herein by reference. There is no basis to conclude that the Plaintiff did not adhere to Dr. Rozen's treatment regimen. In fact, as discussed under Point II, the Plaintiff has adhered to a rather strict treatment regimen across all of his medical providers, including Dr. Rozen.

(4) Side effects of treatment (for example, many medications used for treating a primary headache disorder can produce drowsiness, confusion, or inattention):

Additionally, Dr. Rozen noted that the Mr. XXXXX is "taking Gabapentin 800 mg tid he is very fatigued. The pain is improved. The constant pain is dull and with periods of sharp stabbing pain." Tr. 403.

(5) Limitations in functioning that may be associated with the primary headache disorder or effects of its treatment, such as interference with activity during the day (for example, the need for a darkened and quiet room, having to lie down without moving, a sleep disturbance that affects daytime activities, or other related needs and limitations)":

This portion of the criteria, as set forth in Point II, above, is incorporated herein by reference. Although we will not reiterate the entire section again, it is important to note that Mr.

XXXXX's condition was so severe, that his neurologist, Dr. Manning advised him to withdraw from college classes secondary to medical issues. Tr. 361.

Conclusion:

The ALJ's decision fully credited Dr. Rozen's findings and conclusions and explicitly found Dr. Rozen's opinion to be "persuasive". The ALJ accepted Dr. Rozen's findings in their entirety since the decision does not indicate that any of Dr. Rozen's finding or conclusions were not persuasive.

As discussed above, the content of Dr. Rozen's medical records have sufficient facts and opinions to satisfy each of the criteria under SSR 19-4p and Listing 11.02(B). Consequently, when the ALJ found Dr. Rozen's opinions to be "persuasive", the ALJ implicitly found all of the requisite criteria satisfied under SSR 19-4p and Listing 11.02(B).

Although the ALJ found Dr. Rozen to be "persuasive", the ALJ failed to address the fact that Dr. Rozen's findings and opinions effectively satisfied the criteria of Listing 11.02(B).

For the foregoing reasons, the ALJ erred and the case must be remanded for further proceedings.

IV.

THE ALJ'S ASSESSMENT OF THE LIMITATIONS UNDER THE CATEGORY "B CRITERIA" FOR LISTING 11.02(D) IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Paragraph B criteria of Listing 11.02(D) requires a claimant to demonstrate at least one extreme or two marked limitations in a broad area of functioning.[2] The functional areas set forth under Paragraph B are: understanding, remembering, or applying information; interacting with others; concentrating, persisting, or maintaining pace; or adapting or managing themselves. The Plaintiff asserts that his debilitating headaches cause marked limitation in two categories of the Paragraph B criteria. The medical proof demonstrates that he has marked limitations in the categories of concentrating, persisting, or maintaining pace; and also adapting or managing himself.

In this case, the ALJ concluded that that "[t]he evidence fails to establish **marked limitations** in the [category B criteria]; therefore, the claimant's headaches, migraines, neuralgia and pain conditions do not satisfy any of the listings." Tr. 24 (Emphasis added).

The ALJ committed reversible by concluding that Mr. XXXXX had less than marked limitations in the Paragraph B criteria limitations. Mr. XXXXX asserts that the ALJ "cherry-picked" the record and focused selectively on certain portions of evidence while completely dismissing, without explanation, other relevant portions of evidence that showed marked limitations. However, "cherry-picking" facts to support a denial of benefits is legally improper. The law holds that "an ALJ is obligated to consider all relevant medical evidence and may

[2] It should be noted that the ALJ also referenced consideration for Listing 12.07. Tr. 19. Listing 12.07 also has the same Paragraph B criteria. However, for purposes of this brief, we are only addressing Listing 11.02(D).

not cherry-pick facts to support a finding of non-disability while ignoring evidence that points to a disability finding." Dicks v. Colvin, 2016 WL 4927637, (M.D. Fla. Sept. 16, 2016); Goble v. Astrue, 385 Fed.Appx. 588, 593 (7th Cir. 2010)(*citing* Myles v. Astrue, 582 F.3d 672, 678 (7th Cir. 2009)). However, that is exactly what happened in this case.

We will discuss each category of the Paragraph B criteria and show how the ALJ disregarded substantial evidence of marked limitations in each of the categories.

(1) Concentrating, persisting, or maintaining pace:

The ALJ concluded that Mr. XXXXX only had moderate limitations in the category of concentration, persisting and pace. In reaching this conclusion, the ALJ appears to have relied primarily on the adult function report completed one and a half years earlier on May 23, 2018. The ALJ's decision emphasized that "[i]n the function report, [Mr. XXXXX] remarked that he is able to pay attention and perform basic daily activities of living. [Mr. XXXXX] also reported he manages his own finances. Thus, given the reported activities, the claimant has no more than a moderate restriction in this area". Tr. 25. The ALJ used these facts to support a finding of no more than a moderate limitation in this category. However, the ALJ failed to consider the remaining evidence that demonstrated marked limitations in concentrating, persisting and pace.

First, the ALJ did not consider the evidence that Mr. XXXXX's fatigue worsened since the function report the ALJ relied upon was prepared. In fact, after the May 23, 2018 report was prepared, his medication regimen changed causing him substantial side-effects. Mr. XXXXX testified that the medication he takes makes him really sleepy. Tr. 46. He also testified that Gabapentin affects his memory and focus because it makes him groggy and he gets in a fog. Tr. 66. In fact, Mr. XXXXX's testimony at the hearing on January 15, 2020, suggested that his restrictions worsened in the 1 ½ year time period after the function report, which the ALJ relied

upon, was prepared. The medical records also reflect that Mr. XXXXX experiences substantial fatigue.

It is important to note, that back in 2018 there was substantial proof that Mr. XXXXX suffered from marked restrictions. On April 23, 2018, a mere 30 days prior to the completion of the May 23, 2018 report, another Field Office Function Report was prepared. Tr. 200. The April 23, 2018 report states that Mr. XXXXX exhibited difficulty with understanding, concentrating, talking, and answering questions, and the claimant's grandmother had to conduct the interview. Tr. 200.

The ALJ seems to briefly acknowledge the April 23, 2018 report. Tr. 25. Curiously, however, the ALJ selectively focused on the May 23, 2018 report and did not discuss the April 23, 2018 report in assessing Paragraph B criteria, nor did the ALJ explain why these observed difficulties were not persuasive as to the Paragraph B criteria. (Notably, as discussed below in Point V(D), the limitations noted were also not reflected in the RFC).

The ALJ seems to have ignored medical evidence showing significant difficulties with concentrating, persisting and pace. Dr. Rozen noted that the Mr. XXXXX is "taking Gabapentin 800 mg tid he is very fatigued. Fatigue caused by medication side effects was not considered by the ALJ in this category.

The ALJ also did not consider the fact that Mr. XXXXX's pain, symptoms, and side effects were so severe that on April 3, 2018, Dr. Karen Manning advised him to withdraw from college classes. Tr. 361.

Based on the foregoing, there was ample evidence demonstrating that Mr. XXXXX suffered from marked limitations. However, the ALJ ignored this evidence in evaluating the Paragraph B criteria and, instead, "cherry picked" evidence that supported non-disability.

(2) Adopting and Managing oneself.

The ALJ concluded that Mr. XXXXX had no limitations at all in the category of adapting and managing oneself. The ALJ once again relied selectively on the adult function report from May 23, 2018 to substantiate a finding of no limitation. The ALJ noted that "the record reflects that the claimant is mentally able to initiate, sustain and complete activities such as attending to his basic personal care, preparing simple meals, performing light household chores, shopping by phone and mail, and managing his own finances, independent of direction or supervision". Tr. 25.

However, the exact same report from May 23, 2018, supports a finding of marked limitations in this category. More specifically, the May 23, 2018 report indicated that although Mr. XXXXX can perform some light chores, he requires frequent breaks during longer chores because of pain. Tr. 200. The May 23, 2018 report also indicated that Mr. XXXXX could no longer "drive, bathe regularly, **do any task that lasts more than a few minutes** if I can't take periodic breaks." Tr. 199. Accordingly, even the May 23, 2018 report showed marked limitations in various areas of daily function but the ALJ dismissed the portions of the May 23, 2018 report that did not support his findings.

It would only be logical to conclude that any person who is unable to sustain any simple task longer than a "**few minutes**" and who required "frequent breaks" to complete even light simple household chores has **marked limitations** in the area of adopting and managing oneself. However, the ALJ failed to reconcile or explain in any meaningful way why he ignored portions of this evidence showing marked limitations in daily function, while "cherry picking" other portions of the very same report to reach the conclusion that no limitations were present in the adapting and managing oneself category. The ALJ does not explain why he is persuaded by one part of the report, but not the other part of the same report.

The ALJ similarly did not consider the testimony of Mr. XXXXX who testified that he would probably not be able to live independently on his own. More specifically, when Mr. XXXXX was asked by the judge "could you live, let me ask you this, could you live independently on your own? ... but I'm talking about pay bills, maintain a checking account, a household, cook, clean, take care of everything, take you and pull you out of your home environment and move you across the country and put you in an apartment, could you do that?", Mr. XXXXX responded "[p]robably not". Tr. 56. The ALJ selectively used only portions of the evidence that supported his findings. The ALJ did not find Mr. XXXXX's testimony to be incredible. It appears that the ALJ simply ignored his testimony.

The ALJ ignored medical evidence in the case showing that the Plaintiff had marked limitations in adopting and managing of oneself. For instance, medical records showed that during the headache events, Mr. XXXXX has difficulty "chew[ing] or speak[ing]. Medical records from Dr. Rozen (whose opinion the ALJ notably found persuasive) showed that Mr. XXXXX's headaches get worse by bending, straining and lifting. Tr. 403, 404. An ability to lift, strain and bend is clearly important in managing and adopting oneself, since doing so is necessary for basic life activities such as performing household chores, cooking, and daily living in general. Difficulties in bending, lifting and straining, which could trigger severe headaches, would indicate marked limitations in this category.

Conclusion:

The medical records, hearing testimony, and reports, clearly demonstrate that Mr. XXXXX had severe and marked limitations in various areas of functioning which support a finding that the paragraph B criteria of Listing 12.07 and Listing 11.02(D) are both satisfied. The ALJ committed reversible error by selectively "cherry picking" certain portions of the evidence from the May 23,

2018 adult function report, while ignoring other portions of the same report without an explanation. The fact that the ALJ "cherry picked" evidence resulted in a decision that is not based on substantial evidence.

A finding of just two marked limitations in functioning would have resulted in a finding that Mr. XXXXX met or equaled Listing 11.02(D). As demonstrated above, there was ample evidence to support a finding that Mr. XXXXX had marked limitations in two areas of functioning. Therefore, the ALJ erred in finding that the Plaintiff's condition did not meet or equal Listing 11.02(D). For the foregoing reasons, this case must be remanded for further consideration.

V.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FORMULATING THE RFC.

Applicable law:

"A proper RFC analysis has three components: (1) evidence, (2) logical explanation, and (3) conclusion. The second component, the ALJ's logical explanation, is just as important as the other two." Thomas v. Berryhill, 916 F.3d 307, 311 (4th Cir. 2019). The ALJ "must both identify evidence that supports [her] conclusion and 'build an accurate and logical bridge from [that] evidence to [her] conclusion.'" Woods v. Berryhill, 888 F.3d 686, 694 (4th Cir. 2018) (second alteration in original) (*quoting* Monroe, 826 F.3d at 189). An ALJ's failure to do so constitutes reversible error. Lewis v. Berryhill, 858 F.3d 858, 868 (4th Cir. 2017). When "meaningful review is frustrated when an ALJ goes straight from listing evidence to stating a conclusion," the Court will remand for further proceedings. Thomas, 916 F.3d at 311 (*citing* Woods, 888 F.3d at 694).

Argument:

In this case, the RFC states:

> "After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 4041567(a) except the claimant can lift and carry up to 10 pounds occasional and less than 10 pounds frequently. He can occasionally stoop, balance, keel, crouch, and crawl. He can never climb ladders, ropes, or scaffolds. Environmentally, he should avoid concentrated exposure to extreme cold, extreme heat, and pulmonary irritants, such as fumes, odors, dust, and gas. In addition, he should avoid all exposure to hazardous conditions, such as unprotected heights, dangerous machinery, and uneven surfaces. He is expected to have no more than two absences monthly due to his impairments, associated symptoms, and medication side effects. Due to chronic pain, he is limited to performing unskilled work involving no more than simple, short instructions and simple work-related decisions with few workplace changes. In addition, he can occasionally interact with the general public, supervisors, and coworkers." Tr. 21-22.

In this case, the ALJ fails to build a logical bridge between the facts and the RFC.

A. Lifting and Carrying Restrictions:

The RFC limits Mr. XXXXX to sedentary work requiring him to lift and carry 10 pounds occasionally, less than 10 pounds frequently, occasionally stoop, balance, kneel, crouch and crawl. Tr. 22.

As discussed elsewhere, the ALJ found Dr. Rozen's opinion "persuasive". By finding Dr. Rozen's opinion "persuasive", the ALJ credited the fact that Mr. XXXXX suffers from headaches which Dr. Rozen noted get worse with lifting, straining and bending. Dr. Rozen's opinion appears to preclude activities that would result in lifting, straining, and bending since such activities would cause Mr. XXXXX's headaches to worsen. Nevertheless, the ALJ created an RFC effectively stating that Mr. XXXXX can lift, strain and bend.

The ALJ does not explain why he disregarded and dismissed a portion of Dr. Rozen's examination findings after finding him to be persuasive. Moreover, the ALJ does not explain why the amount of lifting, carrying, stooping, balancing, kneeling, crouching, and crawling, as set forth in the RFC, was determined to be an acceptable amount in light of Dr. Rozen's opinion.

B. Absenteeism:

In this case, the RFC also stated that the Mr. XXXXX is expected to have no more than two absences monthly due to his impairments. Tr. 26. However, the decision does not explain how it was determined that Mr. XXXXX would be expected to have no more than two absences per month. It is completely unclear how the ALJ came up with this precise number of exactly 2 days when the evidence presented suggests that the Plaintiff would be absent from work much more often.

The medical records from Dr. Rozen indicated that the claimant experienced daily headaches, lasting up to an hour, up to three times per day. Tr. 403, 404. Such an excessive frequency of headaches would result in either a significant amount of time off task, or excessive absenteeism. The ALJ does not explain why he ignores this evidence and, instead, concludes that two-absences per month is the appropriate number of absences for this ailing young man.

Moreover, Mr. XXXXX testified that at least 10 days per month his headaches are so severe that he would not be able to do anything on those days. Tr. 65. Once again, despite this evidence, the ALJ inexplicably decides that 2-days of absenteeism is sufficient, without pointing to any part of the record to support such a decision.

There is no explanation or discussion in the decision as to how the ALJ determined the Plaintiff would not exceed more than two absences per month. Consequently, is no accurate and

logical bridge built between the evidence, the findings and analysis in the written decision, and the assigned RFC. This is reversible error.

C. Time Off Task.

It is also important to note that the frequency of the Plaintiff's headaches also supports a finding that the Plaintiff will have significant time off task. The amount of time off task does not appear to be addressed in the RFC at all. Nor is there an explanation as to why time off task is not addressed. The VE was also not asked any questions pertaining to time off task. Under the circumstances, this is also reversible error.

D. Difficulties with "understanding, concentrating, talking, and answering questions":

The ALJ notes that "the undersigned recognizes that the Field Office Function Report indicated that the claimant had some difficulties with understanding, concentrating, talking, and answering questions, as the claimant's grandmother had to conduct the interview. Thus, the undersigned provided mental restrictions in the established residual functional capacity to encompass these limitations." Tr. 22.

Although the ALJ states that the RFC provides for mental restrictions to encompass these limitations, the RFC is completely silent on any mental restrictions that encompasses the difficulties the Plaintiff was exhibiting at the time the Field Office Function Report was prepared.

The only portion of the RFC that appears to somewhat relate to mental limitations states, "due to chronic pain, he is limited to performing unskilled work involving no more than simple, short instructions, and simple work related decisions with few work place changes. In addition, he can occasionally interact with the general public, supervisors, and coworkers." However, this portion of the RFC does not relate to the restrictions reflected in the Field Function Report.

First, this does not relate to the restrictions reflected in the Field Office Function Report because the RFC specifically states that the limitation was specifically "due to chronic pain". The Field Office Function report does not specify *why* the Plaintiff was exhibiting difficulties "understanding, concentrating, talking, and answering questions". Was it because of pain? Or, because of fatigue and exhaustion? Or, was it because of medication side effects? Or for some other reason? It is not possible to decipher the cause of the limitations exhibited. Certainly, it is not possible to specifically determine that the limitations exhibited was "due to chronic pain". Because the RFC is specifically related to "chronic pain", the only reasonable conclusion that can be reached is that it is simply not possible to connect that RFC to the limitations the judge found to exist and which were in the Field Office Function report. There is simply no logical bridge built between the facts (the Field Office Function Report) and the RFC. Therefore, we are left to guess as to how the ALJ incorporated the limitations into the RFC. This is sufficient basis for remand.

Additionally, the RFC does not contain any limitations related to "talking" or "answering questions", which the Field Office Function report says were observed. These limitations relate to verbal and auditory communication skills. The RFC has no restrictions whatsoever related to these limitations. Since the ALJ recognized such limitations, but no limitations are reflected in the RFC, it is clear the RFC does not consider all limitations found by the ALJ. This is also sufficient basis for a remand.

Additionally, the Field Office Function Report noted that the claimant could not finish the interview on his own and that his grandmother had to conduct the interview. It is unclear how the ALJ was considering the fact that the Plaintiff needs his grandmother's assistance in answering even basic questions pertaining to his life, his medical condition, and his medical treatment.

Certainly, the Plaintiff's grandmother cannot attend work with him. The ALJ does not explain what type of RFC would be appropriate to consider this limitation. This is sufficient for a remand.

The restrictions reflected in the Field Office Function Report indicate that the claimant had difficulties with "understanding, concentrating, talking, and answering questions". Moreover, the ALJ recognizes that the Plaintiff needed his grandmother to conduct the interview. However, the portion of the RFC addressed above does not appear to relate to these limitations. Moreover, no other portion of the RFC can be said to relate to these limitations. Therefore, even though the ALJ specifically stated, "the undersigned provided mental restrictions in the established residual functional capacity to encompass these limitations", it is clear that the ALJ failed to actually include any restrictions related to these limitations. Effectively, the ALJ said he would include restrictions for these limitations, but did not do so. This is basis for remand.

It is also necessary to note that the ALJ did not ask the VE any questions related to these limitations that are reflected in the Field Office Function Report. Tr. 64-67.

This case must be remanded for further consideration.

VI.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO PROPOSE A COMPLETE HYPOTHETICAL QUESTION TO THE VOCATIONAL EXPERT, TAKING INTO CONSIDERATION THE PLAINTIFF'S ABSENTEEISM AND TIME OFF TASK.

Applicable law:

The hypothetical question posed by the ALJ to the Vocational Expert "must relate all of claimant's impairments with precision." Taylor v. Callahan, 969 F.Supp. 664, 669 (D. Kan. 1997) citing Hargis v. Sullivan, 945 F.2d 1482 (10th Cir. 1991). In Taylor, the court held that the ALJ's hypothetical question did not duplicate the claimant's condition as precisely as possible because

the ALJ failed to refer to the claimant's numerous other impairments besides his diabetes and cardiac arrhythmia. Id. A Colorado district court held that the ALJ posed a flawed hypothetical to the VE when he failed to accurately include all the claimant's established limitations, mental impairments, as well as the claimant's pain. Ricketts v. Apfel, 16 F.Supp.2d 1280, 1293-1295 (D. Colo 1998), *citing* Williams v. Bowen, 844 F.2d 748, 752 (10th Cir. 1988). See also Underwood v. Shalala, 985 F.Supp. 970, 979 (D. Colo. 1997)(*finding* error in the ALJ's failure to include in his hypothetical the claimant's limitations of finger dexterity, abstract reasoning, special perception, verbal reasoning, and writing, as well as all the restrictions set forth by the treating physician).

Argument:

The Vocational Expert testimony is flawed in two ways. First, the ALJ formulates a number of days the Plaintiff will be absent from work per month in the RFC (i.e., 2 days), but never asked the expert whether there would be jobs available that would accept that number of unscheduled absences. Second, the ALJ does not formulate any questions to the expert regarding time off task, despite the substantial proof and evidence that the Plaintiff suffers from prominent fatigue and recurring headaches that occur multiple times per day.

Specifically, with respect to absenteeism, the ALJ asks the VE whether there would be jobs available in the national economy for a hypothetical person who was absent from work at least 10 days per month. Tr. 67. Presumably, this hypothetical question was based on the Plaintiff's testimony that he at least 10 days per month he has headaches that prevent him from doing anything at all on those days. Tr. 65. The ALJ did not ask any other hypothetical questions regarding absenteeism.

The ALJ then formulated an RFC that states, "He is expected to have no more than two absences monthly". Tr. 22. As discussed above, under Point V(B), this RFC is not sufficient and not based on substantial evidence. However, it is also not based on substantial evidence because the ALJ failed to ask the VE a hypothetical question related to whether there would be jobs available if a hypothetical individual had two (2) unscheduled absences per month. The VE may have testified that there would be no jobs available. We simply do not know, especially since the VE was relying on his own professional experience in reaching an opinion as to absenteeism.[3] Tr. 67. Additionally, the VE would have been subject to cross-examination on questioning related to two absences and the VE's testimony would have been tested through cross-examination.[4] Thus, we simply do not know if the RFC providing for two absences per month effectively renders the Plaintiff unemployable. We simply do not know what the VE would have testified to. It is impossible to assume this is an adequate RFC.

Conclusion:

The ALJ failed to provide a complete hypothetical question to the VE regarding absenteeism and time off task. As a result, the RFC is inadequate. The case must be reversed and remanded.

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[3] Absenteeism is not addressed in the Dictionary of Occupational Titles (DOT). Thus, testimony of a Vocational Expert must be relied upon.

[4] It is reasonable for the Plaintiff's attorney at the hearing to not have asked cross-examination questions regarding absenteeism after the ALJ chose to only ask a question about 10 absences per month. It is reasonable to believe that such a question by the ALJ would have left counsel with the impression that the ALJ was going to reach a factual conclusion that Mr. XXXXX would have been absent at least 10 times per month, and no jobs would be available. Thereafter, receiving a decision denying benefits while finding that Mr. XXXXX would be absent only 2 times per month, yet having no questions posed to the VE the hearing regarding 2 absences, effectively deprived Mr. XXXXX's attorney an opportunity to cross-examine the Vocational Expert on this issue.

CONCLUSION

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

Dated: New York, NY
XXXX

Yours, etc.,

SAMPLE

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