

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

-----X
XXX XXXX,

Plaintiff,

Case No.: XXXXX

vs.

ANDREW SAUL, Commissioner of the
Social Security Administration,

Defendant.
-----X

PLAINTIFF'S BRIEF

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INTRODUCTION

Pursuant to 42 U.S.C. § 405(g), Mr. XXXX seeks judicial review of the final administrative decision of the Commissioner of Social Security (“Commissioner”). Mr. XXXX asserts that the Commissioner’s decision is not based on substantial evidence as required by 42 U.S.C. §405(g). Mr. XXXX 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. XXXX applied for disability benefits on May 15, 2018 alleging disability commencing on December 7, 2016. His claim was denied on September 18, 2018. Mr. XXXX filed a written request for a hearing which was subsequently held on October 10, 2018. The ALJ denied the claim on November 17, 2019. Tr. 32. Mr. XXXX filed a request for review with the Appeals Council on January 21, 2020. Tr. 5. The Appeals Council denied the Request for Review on June 23, 2020. Tr. 1. Accordingly, the ALJ's decision became the Commissioner's final decision.

Statement of Relevant Facts.

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

2. Mr. XXXX was born on June 27, 1965. Tr. 62. As of November 27, 2019, the date of the ALJ decision, Mr. XXXX was 54 years old.

3. Mr. XXXX's past relevant work was that of a machine operator. Tr. 38.

Relevant Medical Evidence.

4. The ALJ found that the Plaintiff has the following severe impairments: migraines, gastritis, disease of the esophagus. Tr. 34.

Chronic Abdominal Pain.

5. Mr. XXXX has chronic abdominal pain. Tr. 243.

6. He has chronic epigastric pain, elevated liver enzymes, and history of colon polyps. Tr. 247.

7. On September 22, 2017, medical records state that Mr. XXXX continues to feel unable

to work. He told his doctors that he is unable to sit for more than 20-30 minutes at a time without undergoing a great deal of pain. He is unable to stand for long periods of time because of abdominal pain as well. Tr. 262.

8. On November 27, 2017, medical records note that Mr. XXXX suffers from chronic abdominal pain. Although he was not vomiting as frequently, he continued to have right upper quadrant pain. He had loose bowel movements 3-4 times a day. Tr. 256.

9. On January 15, 2018, medical records note that he continues to have continuous right upper quadrant generalized abdominal discomfort. He eats once a day because it hurts too much to eat more frequently. He continues to have several loose bowel movements a day since he had cholecystectomy a year ago. Mr. XXXX's upper quadrant pain is continuous. He sits leaning forward most of the day with a pillow on his stomach. Sitting up straight in a chair for 20-30 minutes causes an increase in his pain. After 20 minutes he must get up and move around. He can stand for up to 30 minutes but then his pain increases and must sit down. He can only walk for about 10 minutes without having to sit down because for the abdominal pain. Tr. 243.

10. Mr. XXXX's wife sent the doctor multiple photographs of the bloating. Tr. 243.

11. On March 7, 2018, he presented to a clinic for consultation regarding chronic epigastric pain, nausea, vomiting, and dysphagia. He develops the pain, which is accompanied by nausea and intermittent vomiting. He endorses chronic diarrhea secondary to cholecystectomy. He uses the bathroom up to 8 times daily with fecal urgency especially following any oral intake. Tr. 510.

12. On May 10, 2019, Mr. XXXX reported abdominal pain and loose stools 2-3 times a day. Tr. 16.

13. On August 6, 2018, Mr. XXXX reported loose stools 3-4 times a day and that when he eats, he feels poorly for 3-4 days. Tr. 16.

Headaches.

14. Mr. XXXX was diagnosed with chronic migraine without aura. Tr. 10.

15. Medical records dated September 14, 2018, state that Mr. XXXX reports daily headaches, with escalation to debilitating severity 3-4 times weekly. Tr. 534.

16. Medical records dated March 9, 2020, indicate that onset occurred years ago after a work-related trauma. Tr. 10.

17. Mr. XXXX describes onset of a stabbing, knifelike sensation behind his left eye. The stabbing pain will last for several hours, and if it lasts for over 3 hours it will generally move to the right side of his head as well. Tr. 10.

18. Mr. XXXX describes having headaches on a daily basis, and on some days he will have
2 or 3 headaches per day with waxing and waning symptoms. Mr. XXXX's headaches are so severe that he finds it hard to work, drive, or otherwise perform his daily activities when he is in pain. Tr. 11

Summary of Relevant Hearing Testimony.

19. Mr. XXXX testified that he suffers from constant pain in his stomach. Tr. 53.

20. When he has to use the bathroom, he cannot hold his bowel movement. He testified that he has diarrhea at least 20 days out of the month. He sometimes suffers from nausea, which could last for up to 2-days straight. He experiences nausea at least once a week. Tr. 55.

21. Mr. XXXX testified that he suffers from headaches daily. He suffers from debilitating headaches at least 7-10 days per month. On those days he just lays down in a dark room. Tr. 53.

22. The Vocational Expert testified that more than one absence per month would result in termination. Tr. 60.

ISSUES PRESENTED

- I. Whether the Commissioner erred as a matter of law in formulating the RFC by failing to provide any explanation as to why the Plaintiff would miss one, and not more, days of work per month?

- II. Whether the Commissioner erred as a matter of law in formulating the RFC by failing to provide for any limitations related to the Plaintiff's chronic headaches?

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 FORMULATING THE RFC BY FAILING TO PROVIDE ANY EXPLANATION AS TO WHY THE PLAINTIFF WOULD MISS ONE, AND NOT MORE, DAYS OF WORK PER MONTH.

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).

In the case of Daniel v. Saul, civil action number 6:19-CV-02792-BHH-KFM (Dist. of SC, Dec. 2020), the Court stated that where the ALJ's decision does not provide an explanation for his determination that the Plaintiff would miss one, and not more, days of work per month, the ALJ erred and remand is necessary.

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 light work as defined in 20 CFR 404.1567(b) except that he can occasionally climb ramps or stairs but never climb ladders, ropes, or scaffolds. He cannot work at unprotected heights or around moving mechanical parts. He is expected to be absent from work approximately one day per month on a regular and ongoing basis." Tr. 35.

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

Similar to the case of Daniel v. Saul, *supra*, the ALJ concludes that the Plaintiff will be absent from work approximately one day per month but does not provide any explanation as to why the Plaintiff will miss one, and not more, days of work per month.

In this case, there is ample evidence to demonstrate that the Plaintiff will be absent for more than 1 day of work per month. He suffers from chronic abdominal pain (Tr. 243), he reports he cannot sit for more than 20-30 minutes at a time without undergoing a great deal of pain and he cannot stand for long periods because of abdominal pain as well (Tr. 262), he has loose bowel movements 3-4 times a day (Tr. 16, 256), He sits leaning forward most of the day with a pillow on his stomach (Tr. 243), sitting up straight in a chair for 20-30 minutes causes him pain (Tr. 243),

and there have been times when he needs to use the bathroom up to 8 times daily with fecal urgency. (Tr. 16). Additionally, he suffers from debilitating headaches 3-4 times weekly (Tr. 534), that can last several hours (Tr. 10). He suffers from headaches every day each week and on some days he will have 2 or 3 headaches with waxing and waning symptoms. Tr. 11. The headaches can make it difficult for Mr. XXXX to work, drive, or otherwise perform his daily activities when he has pain. Tr. 11.

With respect to Mr. XXXX's abdominal pain, the outward physical effects are apparent and also confirm the existence of the severe pain. His wife took numerous pictures of Mr. XXXX's abdomen and sent it to his doctors. Tr. 243.

Although there was ample proof and evidence to support a finding that the Plaintiff would have more than one absence per month, the ALJ found that he would be absent from work no more than 1-time per month. Tr. 35. There is no explanation whatsoever in the entire decision as to how the ALJ reaches this conclusion. Moreover, there is no explanation whatsoever as to how the ALJ determines that Mr. XXXX will not be absent more than once per month.

Notably, the Vocational Expert testified that more than one absence per month would result in termination. Tr. 60. Therefore, a finding of more than one absence per month would have resulted in a finding of disability. Consequently, a thorough analysis on this issue is critical to the determination of whether the Plaintiff is disabled and entitled to disability benefits. Unfortunately, however, the ALJ decision is devoid of any such analysis.

Conclusion:

The ALJ erred in failing to provide an explanation for his determination that the Plaintiff would miss one, and not more, days of work per month. Therefore, this Court should remand the case for further consideration.

II.

THE COMMISSIONER ERRED AS A MATTER OF LAW IN FORMULATING THE RFC BY FAILING TO PROVIDE FOR ANY LIMITATIONS RELATED TO THE PLAINTIFF'S CHRONIC HEADACHES.

Applicable law:

A determination that the Claimant's migraines are a severe impairment means the ALJ found the migraines significantly limited the Claimant's physical and/or mental ability to do basic work activities. See 20 C.F.R. § 404.1520(c); Raduc v. Comm'r of Soc. Sec., 380 F. App'x 896, 898 (11th Cir. 2010) (“By definition, a severe impairment limits significantly a claimant's ability to do basic work activities.”).

Given the import of this determination, several courts in this district have determined that the ALJ must either include functional limitations in the RFC determination that account for the claimant's migraines/headaches or explain why no such limitations were included. Hill v. Saul, No. 8:19-cv-121-T-TGW, 2020 WL 1430917, at *4 (M.D. Fla. Mar. 24, 2020); See Gurske v. Comm'r of Soc. Sec., No. 6:17-cv-2050-Orl-DNF, 2019 WL 643722, at *3 (M.D. Fla. Feb. 15, 2019); Battles, 2016 WL 3360428 at *3; Reis, 2012 WL 3231092, at *4. Where the ALJ fails to do either, courts reverse and remand the ALJ's decision for further proceedings. Id.

In Dial v. Soc. Sec., 2020 WL 551338 (MDFL Sept. 14, 2020), the Court held that despite having found the Claimant's migraines to be severe, the ALJ did not appear to account for the Claimant's migraines in the RFC determination. The Court found this was error and reversed and remanded the case for further consideration.

Argument:

In this case, the ALJ found that the Plaintiff's headaches are a severe condition. Tr. 34. As indicated above in Paragraphs 14-18, and 21, and as discussed under Point I, the Plaintiff suffered from debilitating headaches. Even though the Plaintiff's headaches are a severe condition, the ALJ did not discuss the frequency, duration, and intensity of his migraines, nor whether the chronic headaches and pain impact his concentration, persistence and pace. The ALJ found that the claimant has a "mild limitation" in concentration, persistence, and pace, without addressing whether the Plaintiff's headaches have any impact on this area of mental functioning. Tr. 35.

The ALJ finds that the Plaintiff's statements about the intensity, persistence, and limiting effects of his symptoms are inconsistent. Tr. 36. However, although the ALJ seems to allude to a finding that the Plaintiff's statements are not completely credible, the ALJ clearly did not find the Plaintiff's statements wholly incredible. If the ALJ had found the Plaintiff's statements wholly incredible, then a finding the headaches to be a severe condition would be inconsistent. By finding the headaches to be a medically determinable severe impairment, the ALJ has credited the existence of the headaches. However, the ALJ then fails to explain what impact, if any, the headaches will have on the Plaintiff's RFC. The decision appears to recite factual allegations with respect to the headaches, but then fails to discuss what impact, if any, this severe condition has on the Plaintiff's functional capacity. The ALJ also fails to explain why no such limitations are included in the RFC.

Conclusion:

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

CONCLUSION

For the reasons stated above, the ALJ's decision is not based upon substantial evidence. Therefore, Mr. XXXX 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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