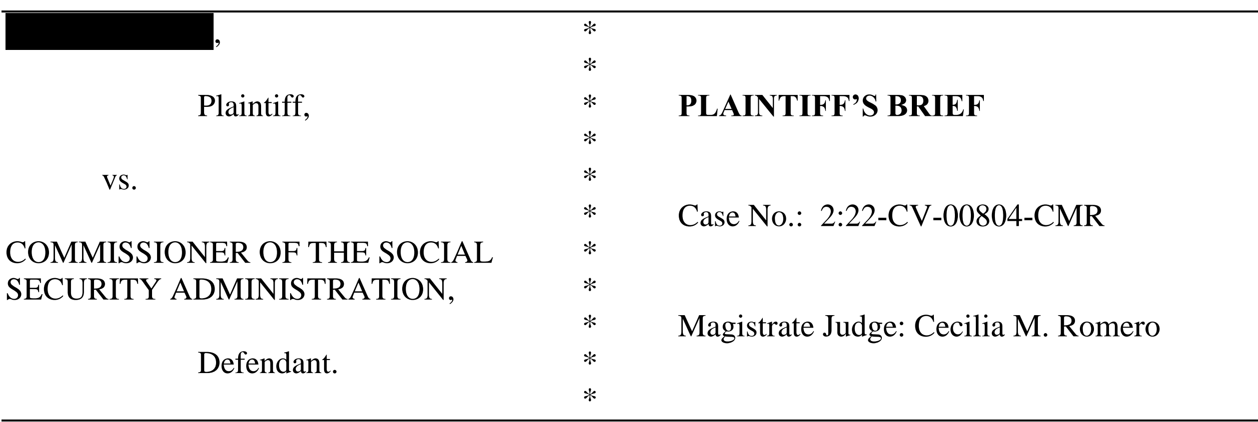
IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH



[redacted],	*	
	*	
Plaintiff,	*	**PLAINTIFF'S BRIEF**
	*	
vs.	*	
	*	Case No.: 2:22-CV-00804-CMR
COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION,	*	
	*	
	*	Magistrate Judge: Cecilia M. Romero
Defendant.	*	
	*	

PLAINTIFF'S BRIEF

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INTRODUCTION

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

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Elements.

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

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

Undisputed Material Facts.

Summary and Course of the Administrative Proceedings.

1. On August 19, 2020, the claimant protectively filed a Title II application for a period of disability and disability insurance benefits, alleging disability beginning May 29, 2019. The claim was denied initially on April 16, 2021, and upon reconsideration on July 13, 2021.Thereafter, the claimant filed a written request for hearing received on September 15, 2021. On July 6, 2022, a video hearing was held. (Tr. 15)

2. Plaintiff filed a timely request for review with the Appeals Council, which was denied on October 26, 2022 (Tr. 1). Accordingly, the ALJ's decision became the Commissioner's final decision.

Statement of Facts.

Plaintiff's age and work experience.

3. The Plaintiff was born on June 4, 1979. (Tr. 27).

4. The Plaintiff has at least a High School education. (Tr. 27).

5. Plaintiff does not have any past relevant work. (Tr. 27).

Severe and Non-Severe Conditions.

6. The ALJ considered the Plaintiff's tatus-post lumbar fusion at L5-S1for spondylolisthesis, spondylosis, and radiculopathy; degenerative disc disease of the cervical spine with herniated discs; intractable migraine without aura and with status migrainosus; obesity; depressive disorder; anxiety disorder; and unspecified neurocognitive disorder, to be medically determinable *severe* impairments. (Tr. 17).

Medical Record entries.

7. The following are some medical record entries regarding the Plaintiff's headache condition:

- Exhibit 11F, On August 14, 2017, the medical record entry states as follows:

> Tho patient is a 38-year-old woman with intractable migraine headaches, neck pain, dizziness, and light sensitivity after a fall at work on 12/11/2016, She fell, on the ice and has had headaches and neck pain since then. She has tried multiple treatments for her neck pain including physical therapy and has seen Dr. James White and has bad injections. He has found trigger points and has been injecting her neck, which has had some improvement, but not enough to reduce her pain significantly. He does have further treatments to do and is going to be following up with her in the next few weeks, She has also tried chiropractic care, with no benefit, and some injections al our office. She also has had pain in the neck and also has had frequent migraine headaches lasting most of the day and she has 30/30 headache days. She was recently admitted for DHE inpatient treatment and she had minimal (improvement with DHE, headache decreasing from 7/10 to 4/10. She has tried multiple abortive medications which seem to help transiently, and has tried preventative medications of multiple types. Currently, she is taking Zonegran and amitriptyline. She has been logging her headaches, but did not bring the log today, and will bring it another day. She does not feel that she is able to return to work. She has severe headaches that are worsened with light. She is unable to work and also has been unable to take care of herself in her home. She does have a farm with many animals and her brother has been taking care of the animals for the last year. She has not been working on the farm as she is unable to do so."

- Exhibit 11F, an entry dated October 4, 2017, notes that the Plaintiff is generally having two migraines per week. (Tr. 784). Migraines are noted to interfere with driving, she has headaches on waking and they get worse in the day, she gets blurry vision with bad migraines, and the migraine condition is diagnosed as "intractable migraine without aura and with status migrainosus." (Tr. 784).

- Exhibit 11F, in March of 2019, the Plaintiff was having 3-5 headaches a week, and was visiting the emergency department for headaches. When she was taking her medications, she was having 6 headaches a month. (Tr. 762).
- Exhibit 11F, an entry on September 17, 2021, states that when the Plaintiff is without her medications she has 3-5 headaches a week. When she takes her medications, she has 6 headaches a month. (Tr. 765). The headaches are characterized as "intractable". (Tr. 770).
- Exhibit 13F notes two Emergency Room visits in 2022, two ER visits in 2021, and two in 2020, for migraine headache treatment. (Tr. 835, *passim*).
- Exhibit 11F, an entry dated October 28, 2021, documents that the Plaintiff experiences light sensitivity with headaches and notes that the headaches are so frequent that the Plaintiff is provided with a home IV infusion for use for headache control. (Tr. 762-763).
- Exhibit 11F, in notes entered on December 2, 2021, states that the Plaintiff "previously she had 20+ headaches a month, now she has 6 a month." (Tr. 764).

<u>The State Agency Psychological Consultant Opinions.</u>

8. The ALJ found the State Agency psychological consultants to be persuasive. (Tr. 25). The ALJ stated that the consultants opined "that the claimant could perform simple instructions that could be learned in one to three months, performed in a low stress setting here expectations regarding pace and productivity are low." (Tr. 25). The exact language used by the State Agency consultants is:

> "Conclusion: The clmt has severe psych impairments that do not meet or equal a listing. She has some limitations for Understanding/Memory and CP&P, but she retains sufficient residual capacity, from a mental health perspective, to perform and persist at simple instructions that can be learned in 1 to 3 months in a low stress environment (i.e., low time and productivity pressure and low cognitive load)." (Tr. 72).

The Mental Portion of the RFC.

9. The ALJ formulated an RFC that stated the Plaintiff "is further able to perform simple job instructions and perform work which does not have fixed high production quotas." (Tr. 21).

The Vocational Expert.

10. Fifth, the hypothetical question to the Vocational Expert shadowed the language in the RFC, not the language provided by the doctor. The question asked the VE about the existence of jobs that do not have fixed *high* production quotas. (Tr. 58). The VE was never asked any questions regarding the need to have "*low* time and productivity pressure and *low* cognitive load". Moreover, the VE was not asked any questions that incorporated a need for a "low stress environment."

11. The jobs provided by the VE, which are a housekeeping cleaner, storage facility rental clerk, and cafeteria attendant, may all have some level of productivity requirements, and those requirements may not be *low* as was required by the medical doctors. (Tr. 27).

ISSUES PRESENTED

I.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO ADEQUATELY EVALUATE LISTING 11.02.

II.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO PROPERLY EVALUATE THE PLAINTIFF'S CREDIBILTY AND BY FAILING TO APPLY THE *HARGIS / HUSTON* PAIN STANDARD WHEN EVALUATING THE PLAINTIFF'S TESTIMONY REGARDING HER CHRONIC HEADACHE PAIN.

III.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO PROPERLY ACCOUNT FOR ALL OF THE PLAINTIFF'S FUNCTIONAL LIMITATIONS IN THE RFC, DESPITE FINDING THE LIMITATIONS PERSUASIVE AS PART OF THE ANALYSIS OF THE MEDICAL OPINION EVIDENCE.

STATUTORY AND REGULATORY FRAMEWORK

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

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

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

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

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

ARGUMENT

I.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO ADEQUATELY EVALUATE LISTING 11.02.

Applicable Law:

Step 3 of the sequential evaluation requires the ALJ to determine whether any of the claimant's severe impairments, alone or in combination, meets or equals an impairment that is listed at 20 C.F.R. Part 404, Subpart P, App. 1 (a "Listing"). See 20 C.F.R. § 404.1520(d). If the claimant has an impairment that is not among the Listings, the Commissioner is instructed to compare the claimant's findings to a "closely analogous" listed impairment. See 20 C.F.R. § 404.1526(b)(2). The non-listed impairment is medically equivalent to a listed impairment if it is equal in severity and duration to a listed impairment. 20 C.F.R. § 404.1526(a).

The law holds that the ALJ must specifically discuss the relevant evidence he or she relied upon or rejected in finding that a claimant's impairment does not meet or equal a listed impairment. See Burnett v. Comm'r of Soc. Sec., 220 F.3d 112, 119-120 (3rd Cir. 2000); *see also* Neinhaus v. Massanari, 153 F. Supp.2d 1274, 1279 (D. Kan. 2001), *citing* Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). Remand is required where the ALJ merely states a summary conclusion that appellant's impairments did not meet or equal any Listed impairment, without identifying the relevant listed impairments, discussing the evidence, or explaining his reasoning. See Burnett v. Comm'r of Soc. Sec., 220 F.3d 112, 119-120 (3rd Cir. 2000), *citing* Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). Where an ALJ simply states a summary conclusion that a listing was not met or equaled is improper and requires remanded for a proper evaluation. See Roberts v. Callahan, 971 F. Supp. 498, 501 (D.N.M. 1997). "A boilerplate finding is insufficient to support

a conclusion that a claimant's impairment does not [meet or equal a listing].” Leis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001), *citing* Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990); see also James v. Apfel, 174 F. Supp.2d 1130 (W.D. Wash. 2001); Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990).

Argument:

In this case, the ALJ found that the Plaintiff’s headache condition is severe. (Tr. XX). The ALJ then proceeded to Step 3 of the sequential evaluation and discussed whether the Plaintiff’s migraine headache condition equaled a listed impairment. In performing this evaluation the ALJ did not discuss any relevant evidence at all and simply provided a boilerplate statement that shadows the content of SSR 19-4p.

SSR 19-4p states as follows:

> “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 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).”

The ALJ’s analysis of listing 11.02 as it applies to the Plaintiff’s headache condition, was as follows:

> "Migraines are not a listed impairment; therefore, they cannot meet a listing. However, pursuant to SSR 19-4p, I considered whether the claimant's migraines medically equals a listing impairment alone, or in combination with at least one other medically determinable impairment. Specifically, I considered the claimant's migraine impairment under Listing 11.02. Epilepsy (listing 11.02) is the most closely analogous listed impairment for an MDI of a primary headache disorder (SSR 19-4P). <u>However, I find here that the claimant's headache disorder does not medically equal a Listing. In making this determination, the undersigned sought and considered evidence, including the lack of: a detailed description from an acceptable medical source of atypical 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).</u>" (Tr. 19).

As demonstrated above, the ALJ's stated analysis (the underlined portion above) is simply a recitation of the requirements set forth in SSR 19-4p. This is not an analysis and does not reference any particular facts that were considered in reaching the conclusion that the listing was not satisfied. This boilerplate recitation of the Rules is insufficient as a matter of law.

Moreover, the ALJ's reference to a "lack of" proof that the listing is satisfied is inaccurate and a material misrepresentation. As such, the ALJ's error is prejudicial and harmful to the Plaintiff.

Some facts and evidence that undermines the ALJ's boilerplate representation that there was a "lack of" proof that the listing is satisfied, includes the following:

- Exhibit 11F, On August 14, 2017, the medical record entry states as follows:

> Tho patient is a 38-year-old woman with intractable migraine headaches, neck pain, dizziness, and light sensitivity after a fall at work on 12/11/2016, She fell, on the ice and has had headaches and neck pain since then. She has tried multiple treatments for her neck pain including physical therapy and has seen Dr. James White and has bad injections. He has found trigger points and has been injecting her neck, which has had some improvement, but not enough to reduce her pain significantly. He does have further treatments to do and is going to be following up with her in the next few weeks, She has also tried chiropractic care, with no benefit, and some injections al our office. She also has had pain in the neck and also has had frequent migraine headaches lasting most of the day and she has 30/30 headache days. She was recently admitted for DHE inpatient treatment and she had minimal (improvement with DHE, headache decreasing from 7/10 to 4/10. She has tried multiple abortive medications which seem to help transiently, and has tried preventative medications of multiple types. Currently, she is taking Zonegran and amitriptyline. She has been logging her headaches, but did not bring the log today, and will bring it another day. She does not feel that she is able to return to work. She has severe headaches that are worsened with light. She is unable to work and also has been unable to take care of herself in her home. She does have a farm with many animals and her brother has been taking care of the animals for the last year. She has not been working on the farm as she is unable to do so."[1]

- Exhibit 11F, an entry dated October 4, 2017, notes that the Plaintiff is generally having two migraines per week. (Tr. 784). Migraines are noted to interfere with driving, she has headaches on waking and they get worse in the day, she gets blurry vision with bad migraines, and the migraine condition is diagnosed as "intractable migraine without aura and with status migrainosus." (Tr. 784).

[1] This entry is prior to the date of onset. However, as demonstrated in the additional entries noted, the Plaintiff's condition is still very severe and has continued in a similar manner through the years. As such, the information contained in this earlier entry is relevant and provides details that can assist with proving that listing 11.02 was satisfied.

- Exhibit 11F, in March of 2019, the Plaintiff was having 3-5 headaches a week, and was visiting the emergency department for headaches. When she was taking her medications, she was having 6 headaches a month. (Tr. 762).
- Exhibit 11F, an entry on September 17, 2021, states that when the Plaintiff is without her medications she has 3-5 headaches a week. When she takes her medications, she has 6 headaches a month. (Tr. 765). The headaches are characterized as "intractable". (Tr. 770).
- Exhibit 13F notes two Emergency Room visits in 2022, two ER visits in 2021, and two in 2020, for migraine headache treatment. (Tr. 835, *passim*).
- Exhibit 11F, an entry dated October 28, 2021, documents that the Plaintiff experiences light sensitivity with headaches and notes that the headaches are so frequent that the Plaintiff is provided with a home IV infusion for use for headache control. (Tr. 762-763).
- Exhibit 11F, in notes entered on December 2, 2021, states that the Plaintiff "previously she had 20+ headaches a month, now she has 6 a month." (Tr. 764).

While there is no single cohesive entry from one acceptable medical source describing the migraine headache condition, its limitations, and its effects, when evaluating the medical proof *in toto*, it is clear that the records provide ample proof to satisfy listing 11.02.

Conclusion:

As set forth above, the ALJ merely provided an insufficient boilerplate summary conclusion that listing 11.02 was not satisfied. The language the ALJ used merely shadowed (in fact, copied and pasted) the language set forth in SSR 19-4p. The ALJ did not provide any references to specific medical proof that was considered to demonstrate that the listing was not

satisfied. The ALJ's boilerplate analysis prevents meaningful judicial review. This is particularly problematic in this case because there are ample facts in the records to demonstrate that listing 11.02 is satisfied and, if the ALJ performed a meaningful analysis as he was required to do, then the Plaintiff may have been found disabled. The ALJ's slipshod approach to the listing analysis certainly prejudiced the Plaintiff and likely impacted the ultimate outcome. Therefore, the decision denying benefits must be vacated and the case must be remanded for further proceedings.

II.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO PROPERLY EVALUATE THE PLAINTIFF'S CREDIBILTY AND BY FAILING TO APPLY THE *HARGIS / HUSTON* PAIN STANDARD WHEN EVALUATING THE PLAINTIFF'S TESTIMONY REGARDING HER CHRONIC HEADACHE PAIN.

Applicable Law:

In evaluating the credibility of a claimant's allegations of pain or other disabling symptoms, the ALJ must follow a two-step process. See SSR 16-3p. First, the ALJ must determine whether the claimant suffers from some underlying medically determinable physical or mental impairment that could reasonably be expected to produce an individual's symptoms, such as pain. If not, the symptoms cannot be found to affect his ability to work. Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce an individual's symptoms is established, the ALJ must evaluate the intensity and persistence of those symptoms to determine the extent to which the symptoms limit an individual's ability to perform work-related activities. SSR 16-3p.

The ALJ must consider all of the evidence, including the claimant's daily activities; the location, duration, frequency and intensity of the claimant's pain or other symptoms; precipitating

and aggravating factors; the type, dosage, effectiveness and side effects of any medication the claimant takes to alleviate pain or other symptoms; treatment, other than medication, for relief of pain or other symptoms; any measures the claimant uses to relieve pain or other symptoms; and any other factors concerning the claimant's functional limitations and restrictions due to pain or other symptoms. 20 C.F.R. § 404.1529(c)(3); SSR 16–3p.

In Sitsler v. Astrue, 410 Fed.Appx. 112 (10th Cir. 2011), the court held that "[a]lthough we will not upset an ALJ's credibility determination that is closely and affirmatively linked to substantial evidence, here the ALJ's analysis was flawed both by his reliance on mischaracterizations of the evidence and by his failure to consider the uncontroverted evidence of claimant's prescription pain medications." A Kansas district court held that the ALJ's credibility findings must be "linked" to substantial evidence of record and cannot be "just a conclusion in the guise of findings." Pierce v. Apfel, 21 F.Supp.2d 1274, 1279 (D. Kan 1998). It is reversible error where an ALJ makes a substantial number of illogical or erroneous statements – including an erroneous evaluation of the claimant's testimony – that materially impacted on her conclusion that the claimant is not disabled. Sarchet v. Chater, 78 F.3d 305, 307 (7th Cir. 1996).

Argument:

In this case, the Plaintiff testified that she would have 6-9 headaches a month. (Tr. 45). She testified that ach headache would last approximately 24 hours and would take 8-10 hours to get under control. (Tr. 45). She also testified that in the past she missed approximately 3-4 days of work per week due to her headaches and had to quit her job as a result. (Tr. 46-47). In her function report, she stated she experiences headaches once a week and sometimes more often. (Tr. 281).

Regarding the Plaintiff's testimony about absenteeism, the ALJ found these statements not credible and stated, "[h]however, concerning the attendance issues via the migraines, the claimant's headache questionnaire responses do not report the frequency of headaches reported during the hearing. The claimant further reported relief of her migraine and spine pain symptoms with treatment, including injections and mediation." (Tr. 24).

The basis for rejecting the Plaintiff's testimony contains misrepresentations and is flawed. First, the ALJ's rejection of the testimony because her headache questionnaire does not report the same frequency of headaches as in the hearing is a flawed rationale. While it is true that the Plaintiff testified that she would have 6-9 headaches a month (Tr. 45), and her function report stated she had 4 headaches a month and sometimes more (Tr. 281), medical records actually corroborate her testimony. Medical records dated December 2, 2021, states that "previously she had 20+ headaches a month, now she has 6 a month." (Tr. 764). Entries on September 17, 2021, states that when the Plaintiff is without her medications she has 3-5 headaches a week. When she takes her medications, she has 6 headaches a month. (Tr. 765). Moreover, her headaches are often characterized as "intractable". (Tr. 770).

This is consistent with the Plaintiff's testimony wherein she states she has 6 headaches a month, and sometimes as many as 9. In fact, the medical records demonstrate that there have been times where she has had as many as 20+ a month. (Tr. 764). Even with medication she experiences 6 headaches a month. (Tr. 764). The fact of the matter is that the Plaintiff's migraines tend to wax and wane to some degree and the Plaintiff's testimony is not incredible because it is not perfectly in-line with the statement in the function report that she experiences 4, or more, migraine headaches per month. The fact that the ALJ found this to be such a severe inconsistency is illogical and not based upon substantial evidence when evaluating the entire record as a whole. In fact, her

testimony was completely credible because even the medical records support a conclusion that she experiences a substantial number of headaches each month and that this condition has persisted for many years. The ALJ erred by rejecting the testimony for this reason.

Second, the ALJ rejects the testimony because the Plaintiff reported relief of her migraines as a result of her treatment, which included injections and medication. This, too, is a flawed rationale. While it is true that she did experience relief, she was certainly not cured. The records demonstrate that before treatment she had as many as 20+ headaches per month, and after treatment she has 6 headaches per month. (Tr. 764). Yes, it is true that she has experienced relief from treatment, which brought the frequency of her headaches down to 20+ a month to as "little" as 6 a month. However, she is still not anywhere near being cured and still experiences a very large number of migraine headaches per month. The ALJ's reference that she experienced relief implies that she is effectively cured, which is false. The ALJ's analysis is illogical and amounts to a material misrepresentation. As such, the ALJ also erred by rejecting the testimony for this reason.

The facts demonstrate that the Plaintiff suffered from severe and debilitating pain from her headache condition and that the Plaintiff experienced at least 4-6 headaches per month, and as many as 9 headaches per month. These headaches could last up to 24 hours each and could take as much as 10 hours to control. This would result in 4-9 missed work days per month. Alternatively, this could result in time off task if the Plaintiff had a migraine while working.

Because medical evidence showed that the Plaintiff had a medical condition that produced pain, the ALJ was required to consider her assertions of severe pain and to "decide whether he believe[d them]." Luna v. Bowne, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). "The absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity

cannot justify disregarding those allegations." Luna, 834 F.2d at 165. When determining the credibility of pain testimony, the ALJ should consider such factors as: "the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence." Hargis v. Sullivan, 945 F.2d at 1489 (*quoting* Huston v. Bowen, 838 F.2d at 1132 and n. 7); *accord* Luna, 834 F.2d at 165–66 (*citing* Turner v. Heckler, 754 F.2d 326, 331 (10th Cir.1985)).

In this case, the ALJ did not follow the Hargis / Huston pain standard for evaluating the credibility of the Plaintiff's allegations of pain related to her headaches, which would result in absenteeism or time off task. The ALJ did not evaluate that the Plaintiff's "relief" from symptoms due to her treatment still resulted in at least 4-6 headaches per month, the ALJ did not consider that the Plaintiff's headaches would take time to manage and control and prevented the Plaintiff from being able to drive and would cause photophobia, and the ALJ did not consider that the Plaintiff's testimony that she still experiences a significant number of headaches per month is consistent with the medical evidence. If anything, a reading of the credibility analysis leaves the erroneous impression that the Plaintiff is substantially cured of her severe headaches due to her treatment, which is false, misleading, illogical, and is not a finding that is consistent with the medical proof and evidence. For each of these reasons, the ALJ's credibility analysis is flawed and has resulted in reversible error.

Moreover, the ALJ's credibility analysis, particularly with respect to the reasons given for rejecting the testimony related to "attendance issues", is prejudicial. Although the information

above tends to address the Plaintiff's "attendance issues" as relating to absenteeism, the Plaintiff's headache pain could also result in substantial time off task. These limitations tend to go hand in hand under the circumstances in this case. Regarding time off task, the Program Operations Manual System ("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). The VE testified that time off task greater than 9% of the workday would be unacceptable. (Tr. 63). Regarding absenteeism, the Program Operations Manual System ("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. POMS DI 25020.010(B)(3)(e). Moreover, the Vocational Expert testified that if an employees production was reduced as a result of chronic pain caused by headaches, they would be unemployable. (Tr. 59). Since these limitations are "critical" to the performance of even unskilled work, and since the VE testified that such limitations related to the Plaintiff's headache pain could render her unemployable, the ALJ's error certainly prejudiced the Plaintiff. Had the ALJ properly analyzed the Plaintiff's testimony and given a fair and legally proper credibility analysis, the outcome of this case could have been different, and the Plaintiff may have been awarded disability benefits.

Conclusion:

In light of the aforementioned errors, the decision denying benefits must be vacated and the case must be remanded for further proceedings.

III.

THE COMMISSIONER ERRED AS A MATTER OF LAW BY FAILING TO PROPERLY ACCOUNT FOR ALL OF THE PLAINTIFF'S FUNCTIONAL LIMITATIONS IN THE RFC, DESPITE FINDING THE LIMITATIONS PERSUASIVE AS PART OF THE ANALYSIS OF THE MEDICAL OPINION EVIDENCE.

Applicable Law:

Where the ALJ's RFC determination conflicts with a medical opinion the ALJ found persuasive—and the ALJ failed to explain the inconsistency—the ALJ erred. Where the ALJ's reasons for failing to account for functional limitations that were found persuasive were not articulated with any particularity, the decision must be remanded for further proceedings. That is because the Court cannot engage in meaningful review of the RFC determination. Mark V. v. Kijakazi, 2022 WL 889042 (D. Utah, march 25, 2022).

Argument:

The ALJ found the State Agency psychological consultants to be persuasive. (Tr. 25). The ALJ stated that the consultants opined "that the claimant could perform simple instructions that could be learned in one to three months, performed in a low stress setting here expectations regarding pace and productivity are low." (Tr. 25). The exact language used by the State Agency consultants is:

> "Conclusion: The clmt has severe psych impairments that do not meet or equal a listing. She has some limitations for Understanding/Memory and CP&P, but she retains sufficient residual capacity, from a mental health perspective, to perform and persist at simple instructions that can be learned in 1 to 3 months in a low stress environment (i.e., low time and productivity pressure and low cognitive load)." (Tr. 72).

The ALJ formulated an RFC that addressed the Plaintiff's mental limitations by stating the Plaintiff "is further able to perform simple job instructions and perform work which does not have fixed high production quotas." (Tr. 21). The ALJ erred in formulating this portion of the RFC.

First, the ALJ stated that the Plaintiff can perform work that does not have "*high* production quotas". Nowhere in the decision, or in the RFC, and nowhere in the questions posed to the Vocational Expert, does the ALJ define what is meant by "*high*" production quotas. This undefined term makes it impossible to determine if the jobs provided are in line with the medical expert's opinion requiring "*low* time and productivity pressure and *low* cognitive load". The fact that the ALJ utilizes an undefined term in the RFC, and in the questions posed to the VE, renders the decision unreviewable and not based upon substantial evidence.

Second, the RFC is inconsistent with the medical opinion in that the RFC provides for work that does not have "*high* production quotas". However, the medical doctors opined to the need to have "*low*" productivity pressure and low cognitive load. The restriction from "*high*" production quotas does not necessarily mean that the "*low*" productivity requirement is now satisfied. In fact, as stated above, we do not know what is meant by "*high*" productivity as it is stated in the RFC. But, moreover, we also do not know how many degrees of productivity there are between "*low*" productivity – which was the limitation found persuasive – and the restriction from "*high*" productivity. Meaning, there could be varying degrees in between. There could be *very high, high, medium high, medium, medium low*, and then *low*. And, as the decision is written, we have absolutely no idea whether the RFC is fully in line with the medical opinion that was found persuasive. The jobs provided by the VE, which are a housekeeping cleaner, storage facility rental clerk, and cafeteria attendant, may all have some level of productivity requirements, and those requirements may not be *low* as was required by the medical doctors. (Tr. 27).

Third, the medical opinion requires the Plaintiff to work in "a low stress environment". Despite finding this limitation to be persuasive, the RFC provides for no limitations related to the need to work in a "low stress environment". Limitations that may have been appropriate to account for a low stress environment could have been limitations to: the need for gradual and infrequent changes in the workplace, the need for repetitive and routine tasks, and/or restrictions to judgment and decision making. Although these are only examples, the RFC does not account for any limitations whatsoever related to the Plaintiff's need to work in "a low stress environment" despite finding this limitation to be persuasive. This is reversible error. See Mark V., *supra*.

Fourth, the hypothetical question to the Vocational Expert shadowed the language in the RFC, not the language provided by the doctor. The question asked the VE about the existence of jobs that do not have fixed *high* production quotas. (Tr. 58). The VE was never asked any questions regarding the need to have "*low* time and productivity pressure and *low* cognitive load". Moreover, the VE was not asked any questions that incorporated a need for a "low stress environment." The law holds that hypothetical questions should be crafted carefully to reflect a claimant's RFC, because "[t]estimony elicited by hypothetical questions that do not relate *with precision* all of a claimant's impairments cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d at 1492 (10th Cir. 1991); Smith v. Barnhart, 172 Fed.Appx. 795 (10th Cir. 2006). Since they hypothetical questions posed to the VE did not account for all of the Plaintiff's functional limitations *with precision*, the ALJ erred.

Finally, in the case of Summers v. Astrue, the Court held that the ALJ's hypothetical question to the VE did not include the need to identify work which could be performed in a "low stress atmosphere." The Court found that this was reversible error. Summers v. Astrue, 2011 WL 1085980 (WD Oklahoma, Feb. 22, 2011). This case was on-point to the issue here where the

ALJ did not pose any questions to the VE that incorporated the need for the Plaintiff to work in a "low stress environment". As such, following the holding in Summers, this Court must also reverse and remand the case for further consideration.

Conclusion:

In light of the aforementioned errors, the decision denying benefits must be vacated and the case must be remanded for further proceedings.

CONCLUSION

The Plaintiff asks that the denial of benefits be vacated and that the claim be remanded for further proceedings.

Dated: March 20, 2023 Respectfully Submitted: