

LIST OF AVAILABLE MATERIAL

January 2002 – Dec 2006

Item #'s 1261- 1596

ABILITY TO WORK ON A REGULAR AND CONTINUING BASIS

1424. District Court decision finding that the ALJ failed to cite any evidence in the record contradicting the treating source opinions and provided no explanation why these opinions were rejected. The plaintiff was diagnosed with bi-polar disorder. The court also directs the ALJ to consider the claimant's ability to work on a "regular and continuing basis" in light of SSR 96-8p. The ALJ is also to reconsider his finding that the plaintiff could work in a "low stress environment: in light of SSR 85-15 and court decisions addressing the issue of a claimant's ability to cope with stress. *Shine v. Barnhart*, Case No. 3:02CV11482 JCH (April 5, 2004); 2004 US Dist LEXIS 6588; 95 SSRS 667.

John Spilka, Esq. Connecticut Legal Services, New London, CT – 94 pages, including Judgment, Corrected Recommended Ruling, Plaintiff's Memorandum of Law.

1317. District court grants the plaintiff's motion for remand because the ALJ made several errors. First, the evidence shows that the plaintiff is unable to work on a regular and continuing basis because of the need to pace herself when performing daily activities. Second, the ALJ erroneously found a lack of desire to work, which is unpersuasive in determining whether the plaintiff has the capacity to work. Third, the ALJ failed to make a finding of whether the plaintiff had a good reason for not seeking medical treatment when he found she was not credible, in violation of SSR 96-7p. Also, the ALJ failed to provide good reasons for discounting the opinions of treating physicians regarding the plaintiff's RFC. By rejecting their opinions in the hypotheticals posed to the VE, the VE's answers were legally insufficient. *Miller v. Barnhart*, Civil No. 01-397-M (D.N.H. Sept. 10, 2002).

Raymond J. Kelly, Esq. Manchester, NH – 33 pages

ABSENTEEISM

1524. District court decision find the plaintiff is disabled. This case involved three hearings and seven years of appeals. The treating physicians indicated that the plaintiff would need to lie down at unpredictable intervals and would have to miss at least three days of work per month due to her medical problems. At the third hearing, the VE testified that she could not perform any jobs if she was limited by the restrictions noted by her physicians. The ALJ relied heavily on the testimony of an ME who testified by telephone and rejected the opinions of the treating physicians. The ALJ failed to explain why he gave more weight to the opinion of the ME, a general surgeon, than to the treating orthopedic specialist. *Aldridge v. Barnhart*, Civil Action No. 00-CV-1725JLK (D.Colo. Oct. 13, 2005)

Paul Radosevich, Esq., Denver, CO – 83 pages, including the Memorandum Opinion and Order, Appellants' Opening Brief, Defendant's Response Brief, Appellant's Reply Brief

1491. District Court remand for two reasons. First, the ALJ improperly adopted the opinions and conclusions offered by a medical expert (ME) at the hearing about the plaintiff's rheumatological impairments, including connective tissue disorder and fibromyalgia. The court ruled that his testimony and the ALJ's reliance on it was wrong because the ME's opinions clearly exceeded his field of medical expertise, namely, orthopedics. Second, the ALJ failed to properly address how the plaintiff's extensive treatments would have interfered with her ability to regularly and consistently attend work. ***Mathis v. Barnhart***, Case No. 1:03cv885-SJD (S.D.Ohio Apr. 28, 2005).

R. Gregory Park, Esq., Cincinnati, OH –21 pages

1464. District Court remand because the ALJ failed to expressly factor into the claimant's RFC, pursuant to SR 96-8p, the extent of the plaintiff's medical treatment and its impact on her ability to work. The VE had testified that the extent of medical treatment and its frequency would cause the plaintiff significant problems maintaining work. ***Cooper v. Commissioner***, Case No. C-1-02-252 (S.D.Ohio Mar. 8, 2004).

R. Gregory Park, Esq., Cincinnati, OH – 53 pages, including the Judgment, Order, Magistrate's Report and Recommendation, Statement of Errors, Response Brief by Social Security, Plaintiff's Reply Brief, Defendant's Objections, Plaintiff's Reply to Objections.

AGE

1578. District court remand where the ALJ failed to properly analyze the plaintiff's fibromyalgia and assess her RFC in light of significant evidence of limitations in standing and walking. The court also found other legal errors including the ALJ's mechanical approach to applying the grids when the plaintiff was of borderline age, and the Commissioner's failure to address the plaintiff's specific arguments. ***Zamora v. Barnhart***, Civil Action No. 05-cv-01761-WDM (D.Colo. Sept 26, 2006).

Paul Radosevich, Esq., Denver, CO – 40 pages including the Memorandum and Order, Appellant's Opening Brief, Appellant's Reply Brief

1486. Appeals Council vacated and remanded the ALJ decision. The ALJ found the claimant "not disabled" under rule 201.21. However, the claimant reached age 50 one week before the date of the unfavorable hearing decision. While the claimant's Title II insured status expired before he reached age 50, a finding of "disabled" would be warranted for his SSI claim under rule 201.14. Other issues relating to the Title II claim also warranted further development and consideration, including his work activity and whether his impairments had improved. (February 4, 2005).

John Bowman, Esq., Davenport, IA – 4 pages

1469. District Court decision ordering the immediate payment of benefits. The ALJ had erroneously relied on the VE testimony regarding the existence of "other jobs," for a claimant who had never been competitively employed. After appealing to federal court, the plaintiff objected to the government's Motion to Remand. The government then conceded that the plaintiff was disabled as of age 55, but contended that remand was necessary to determine disability before age 55. In reversing and granting benefits, the court held that the claimant's age as of the ALJ's decision, while usually controlling, was

not in this case. *Wolf v. Barnhart*, Case No. CV 03-5255 (D.Minn. Nov. 23, 2004); 2004 U.S. Dist. LEXIS 24161; 101 SSRs 80.

Victoria Oace, Esq., St. Paul, MN – 59 pages, including Memorandum and Order, Judgment, report and recommendation, Defendant's Objections, Plaintiff's Motion to Adopt, Defendant's Reply, Defendant's Motion for Remand, Plaintiff's Objection.

1391. District Court decision relying on SSR 82-62 to find that the ALJ must explain the weight given to pertinent factors and reconcile any significant inconsistencies. The ALJ had found that the plaintiff's testimony that she was 53 years old at the time of the hearing was the "best evidence" of her age, and did not explain why he discounted the evidence, including her application for a Social Security number, that she was 55 years old. The case is remanded so the ALJ could explain why he discounted or credited certain evidence. *Taylor v. Barnhart*, Civil No. 02-4090 (C.D.Ill. Sept. 4, 2003).

John Bowman, Esq., Davenport, IA – 6 pages

1386. District Court decision finding that a vocationally significant age, even if reached after the ALJ decision, should still be analyzed under the borderline age guidelines if it is reached before the plaintiff's insured status ends. In this case, the plaintiff reached age 50 after the ALJ's decision, but before her insured status ended. This makes Rule 201.14 applicable to her case. At the time the Appeals Council issued its decision, the plaintiff was over 51 years old. The court remanded for consideration of the proper grid rule and for further proceedings on whether the plaintiff had full use of her hands. *Sanchez v. Barnhart*, Civil Action No. 02 N 1278 (PAC) (D. Colo. Sept. 19, 2003)

Paul E. Radosevich, Esq., Denver, CO – 71 pages, including Order and Memorandum of Decision, Plaintiff's Opening Brief, Defendant's Response Brief, Plaintiff's Reply Brief

1336. Appeals Council award of benefits. On the date of the hearing decision the claimant was within 51 days of age 55. The claimant's numerous severe impairments limited her to performing light work. The appropriate grid rule for age 55 would direct a conclusion of "disabled." Noting, "we do not necessarily apply age categories mechanically," the Appeals Council used the date of the hearing decision as the date that "advanced age" was attained. In reaching this conclusion, the Appeals Council considered, but did not adopt, the opinion of the DDS physicians that the claimant could perform medium work, since "the opinions rendered are not consistent with the weight of the current evidence of record." (Feb. 4, 2003)

David L. Best, Esq., Jacksonville, NC – 11 pages including Fully favorable Appeals Council decision, Letter Brief to Appeals Council.

1334. District Court decision citing 20 CFR § 404.1563 (a), which provides that SSA will not apply age categories mechanically in a borderline situation. To use the higher age category, the plaintiff must show progressively more additional vocational adversities. The plaintiff reached age 50 two months after her insured status expired. The court adopted the U.S. Magistrate's finding that the plaintiff had many vocational limitations that would render her disabled at the higher age category. The court awarded benefits,

using the plaintiff's last day of insured status as the onset date. ***Bochenek v. Barnhart***, Case No. 01-CV-71962-DT (E.D.Mich. May 29, 2002).

Jane Ware, Esq. Waterford, MI – 22 pages, including the Memorandum Opinion and Order, Magistrate's Report and Recommendation

1324. District court remand to apply the correct grid rule where the ALJ erroneously failed to believe that the plaintiff was not literate in English after living in the U.S. for more than 20 years. The uncontroverted evidence showed that the plaintiff spoke and understood only a few words of English. At the ALJ hearing, not only was an official translator provided by SSA present, but in addition, a friend who spoke the plaintiff's particular dialect assisted. He had never had any education in the English language, and his job as an assembly line worker, did not require any knowledge of English. The court also found that the ALJ failed to address the claimant's borderline age (he was 44 years and 8 months at the time of the hearing). Finally, the VE's testimony was "far from clear" that the plaintiff had acquired any skills transferable to sedentary semi-skilled work.

Mosleh v. Barnhart, Civil Action No. 01-418-SLR (D.Del. Sept. 26, 2002); 2002 U.S. Dist. LEXIS 18733; 83 SSRS 376

Michael Goodrick, Esq., Wilmington, DE – 25 pages

1319. District court decision discussing what a "borderline" age situation is. The plaintiff was 6 months shy of his 50th birthday on his date last insured. The court relies on ***Roush v. Heckler***, 623 F.Supp.710 (S.D.Ohio 1985) which found a number of factors which lead to consideration of using the older category. Factors include: inability to return to past work that consisted of one job for over 20 years; expiration of insured status; and period of unemployment. On remand, the ALJ should analyze the borderline age issue and explain what evidence was considered in making the age category decision. Finding the ALJ's handling of this case "troubling" (e.g. the ALJ had dismissed the case in 1996 for the claimant's justified failure to appear, failed to properly consider key pieces of evidence), the court ordered that the case be assigned to a different ALJ upon remand.

Freundt v. Massanari, Case No. 00C 4456 (N.D.Ill. Oct. 30, 2001); 2001 U.S. Dist. LEXIS 18063; 76 SSRS 407

John E. Horn, Esq., Tinley Park, IL – 45 pages

1313. Appeals Council partially favorable decision finding the claimant disabled as of the date she attained age 55 in July 2000. Her application for disabled widows benefits, which was filed in 1998, was denied by the ALJ who found that she was limited to light work and had no past relevant work. However, at the time of the ALJ decision, she had attained age 55 and Rule 202.04 directed a finding of "disabled." (July 5, 2002)

John Bowman, Esq., Davenport, IA – 7 pages

AIDS/HIV

1461. Favorable on-the-record ALJ decision after a court remand. Although the claimant's impairments did not meet or equal a listing, the ALJ found that he did not have the RFC to perform sustained work at any exertional level. Hi subjective complaints, i.e. pain, fatigue, weakness, dizziness, were found to be generally credible in light of the documented impairments. The ALJ concluded that his nonexertional

limitations significantly narrowed the range of work he could perform. A finding of “disabled” was reached within the framework of the Medical-Vocational Guidelines. (Oct. 25, 2004).

Arthur W. Stevens III, Esq., Medford, OR – 8 pages

1441. District Court remand where the ALJ erred in evaluating the medical evidence. The plaintiff had severe impairments of depression and HIV. The ALJ found an RFC of light work with no more than simple, routine repetitious tasks. The ALJ discounted complaints of fatigue by finding it was mentioned only one time in the record. In fact, the court found it was mentioned throughout the record. The ALJ also discounted the fatigue complaints based on a statement by the plaintiff to his doctor that he was “doing well.” “This analysis is suspect. A general statement that Black was doing well is not a direct contradiction to Black’s complaints.” The ALJ also mischaracterized a statement from the treating doctor and minimized the plaintiff’s complaints because the doctor stated that he “experienced” a number of symptoms of HIV/AIDS. The ALJ improperly speculated that the word “experienced” was not the same as “suffering” from the symptoms. Relying on the dictionary definition, the court noted that “experienced” could actually be of longer duration than inferred by the ALJ. *Black v. Barnhart*, Civil Action No. 01-0366 (W.D.Pa. June 30, 2004).

Stella L. Smetanka, Esq., Pittsburgh, PA – 12 pages

1327. District Court sentence four remand order for further fact finding and evaluation regarding the ALJ’s credibility determination and the determination that the plaintiff could perform sedentary work. Her treating doctor stated that she has advanced AIDS with a very poor prognosis. He did not report that she as tolerating her medication regimen. At the hearing, she complained of nausea, vomiting daily, fatigue, diarrhea and joint pain, all of which were documented by her doctor. The ALJ failed to consider the side effects of her medication. A medical expert should testify at the supplemental hearing. *Sywanyk v. Barnhart*, Case No. 1:02CV176 (N.D. Ohio Nov. 21, 2002).

Marcia Margolius, Esq., Cleveland Ohio – 18 pages

ALCOHOLISM

See Substance Abuse

ALJ COMPLIANCE WITH APPEALS COUCIL OR COURT REMAND ORDER

1558. District court remand. In the first court case, the court found that the opinions of state agency doctors were “weightless” and that it was “plain error” to give such opinions more weight than opinions from treating doctors. The court also ordered that the ALJ, on remand, consider SSR 83-12 to evaluate the plaintiff’s RFC which was between sedentary and light. On remand, the ALJ ignored the court’s holding and relied on the state agency doctor’s opinion that the claimant could perform light work and thus was not disabled. On the second appeal, the court stated: “Countermanding the explicit findings of this Court is not among the prerogatives of ALJs. . .” The court also found that the ALJ “invented a rationale” that SSR 83-12 was considered at the first ALJ hearing. In fact, it was never mentioned and the VE at the first hearing testified solely because the plaintiff had exertional and nonexertional limitations. At the second hearing, the ALJ did

not call another VE to address SSR 83-12. “This apparent failure to consider SSR 83-12. . . is not subject to reconstitution by *ipse dixit*. . . It simply cannot be assumed that the ALJ and the vocational expert considered SSR 83-12. **Hutt v. Barnhart**, Civil Action No. JKB-05-1079 (D.Md. June 8, 2006)

Paul R. Schlitz, Esq., Baltimore, MD – 4 pages including Order and Letter Order to Counsel

1462. District Court decision finding that the ALJ’s failure to comply with the Appeals Council’s orders that emanated from the court’s remand order constituted legal error. “[P]ursuant to the Agency’s own rules and regulations [20 C.F.R. sec. 416.1477(b),] the ALJ had no discretion to merely reissue his original decision [which was missing one page] but was required to follow the dictates of the Appeals Council’s order.” The court remanded the case for further proceedings. **Kato. Barnhart**, Case. No. 5:03CV 1798 (N.D.Ohio, Sept. 30, 2004).

Marcia W. Margolius, Esq., Cleveland, OH – 10 pages

ALJ’s DUTIES/ LACK OF COUNCIL

1508. District court remand on the issue of the duty of an ALJ to fully and fairly develop the record when a claimant appears *pro se* at a hearing. When the ALJ questioned her about proceeding without representation, she replied that she could not afford legal counsel. The ALJ confirmed her “choice” to continue unrepresentative and then denied her an opportunity to look at her file before the hearing because she had arrived late. The ALJ proceeded with the hearing, which included an ME. The court held that the ALJ failed to fully develop the record of the plaintiff’s physical and mental impairments, which was necessary in reaching fully informed findings at steps 3 and 4. Specifically, the ME acknowledged that he could only address the physical and not the mental impairments. The ALJ also failed to contact the treating doctor. **Staffeldt v. Barnhart**, No. 03 C 2207 (N.D.Ill. July 29, 2005)

Ashley Rose, Esq., Glen Ellyn IL - PAGES

ALJ’s DUTIES/ REMAND TO NEW ALJ

1589. Appeals Council remand because the ALJ failed to include a specific evaluation of the claimant’s long-term morbid obesity, as required by SSR 02-1p, or of her pain complaints, as required by SSR 96-7p, or to discuss the findings of a psychologist who diagnosed significant depression and anxiety. The ALJ found that the claimant could return to past work as a telemarketer “telephone dialer.” His decision rejected reports of the treating physician, submitted after the hearing, which stated that the claimant’s impairments met listing 1.04 and that she had significant limitations sitting and using her upper extremity. The reports were not entered into the record by the ALJ and the claimant’s attorney resubmitted the records to the Appeals Council. On remand, the case will be assigned to a new ALJ because it will be the third hearing. (July 24, 2006)

Lynn M. Stevens, Esq., Atlanta, GA – 5 pages

1583. District court reversal and award of benefits because the ALJ’s reasons for rejecting the report of an examining physician were not supported by substantial evidence. The ALJ had rejected the opinions of an examining neuropsychologist who

performed a consultative examination of the plaintiff and found that a number of work-related limitations were caused by traumatic brain injury. This was the only report from an examining mental health professional, and an opinion of a neuropsychologist is especially relevant in a brain injury case. The CE's indication of marked limitations was consistent with the narrative report. The court chastised the ALJ for second-guessing the mental health professional, noting that it was not the first time he had done this. "These cases suggest that claimants asserting disabilities based upon mental illness do not receive a fair hearing from [this ALJ]." The VE testified that if the CE's opinions were credited, there would be no jobs the plaintiff could perform. *Jiles v. Barnhart*, Civil Action No. 05-G-0861-S (N.D.Ala. Sept. 11, 2006)

R. Michael Booker, Esq., Birmingham, AL – 15 pages

1574. Appeals Council remand to a new ALJ. At the hearing, the ALJ stated that "individuals with affective disorders can be treated and get better and he did not expect them to be incapacitated." The ALJ also offered to pay the disabled widow's portion of the claim, if the claimant returned within 60 days with evidence that she had attained a full time job. The offer to pay this claim equates to an opinion that the claimant was disabled, at least for a close period. Thus, the ALJ's denial "was based solely upon her failure to engage in full time work which is not pertinent to the issue of disability." (May 16, 2006).

John Horn, Esq., Tinley Park, IL – 4 pages

1384. Appeals Council reversal finding that the ALJ was biased and demonstrated prejudice by statements made throughout the hearing. The Appeals Council's review included an audit of the hearing tape and found inappropriate use of words and phrases regarding the claimant's weight and evidence from the treating physician/ The Appeals Council found the claimant's testimony to be credible. A medical consultant reviewed the evidence and found that the claimant's impairments equaled Listing 4.05. (Aug. 15, 2003).

Catherine di Lorenza, Esq., Woodbine, GA – 7 pages including the fully favorable decision and claimant's Letter Brief

1370. Appeals Council remand where the ALJ ignored some nonexertional limitations set forth by the treating physicians without providing substantial reasons. The treating physicians found that the claimant would have to lie down at unpredictable times, change positions when sitting, and be incapacitated from work for three days a month. The case was previously remanded by the district court and for the current remand. The Appeals Council has required that a new ALJ be assigned to the case. (July 7, 2003).

Paul E. Radosevich, Esq., Denver, CO – 8 pages including Appeals Council remand order and the plaintiff's Letter Brief to the Appeals Council

1321. Appeals Council remand due to the ALJ's failure to submit material to the claimant or representative for a pre-decision review and comment and his inadequate explanation for rejecting the treating physician's opinion. The ALJ had referred to The Pill Book as a reason for rejecting the treating physician's opinion about the claimant's limitations

regarding the degree of pain and use of pain medication. However, the ALJ failed to proffer the medical material as required by HALLEX I-2-825 (D). (Oct.25, 2002.

Joseph Marasco, Esq., Providence, RI – 7 pages

1319. District court decision discussing what a “borderline” age situation is. The plaintiff was 6 months shy of his 50th birthday on his date last insured. The court relies on *Roush v. Heckler*, 623 F.Supp.710 (S.D.Ohio 1985) which found a number of factors which lead to consideration of using the older category. Factors include: inability to return to past work that consisted of one job for over 20 years; expiration of insured status; and period of unemployment. On remand, the ALJ should analyze the borderline age issue and explain what evidence was considered in making the age category decision. Finding the ALJ’s handling of this case “troubling” (e.g. the ALJ had dismissed the case in 1996 for the claimant’s justified failure to appear, failed to properly consider key pieces of evidence), the court ordered that the case be assigned to a different ALJ upon remand. *Freundt v. Massanari*, Case No. 00C 4456 (N.D.Ill. Oct. 30, 2001); 2001 U.S. Dist. LEXIS 18063; 76 SSRS 407.

John E. Horn, Esq., Tinley Park, IL – 45 pages

1288. Fully favorable decision from the Appeals Council in an SSI childhood disability claim for a child with attention deficit disorder and learning disabilities. The Appeals Council evaluated the evidence of record and found that the child had a combination of medically determinable mental impairments that resulted in “marked” limitations in two domains: 1) acquiring and using information, and 2) attending and completing tasks. School information, including tests and reports, confirmed persistent learning and concentration problems, requiring placement in a self-contained learning disability class. The Appeals Council also agreed with the claimant’s attorney that the ALJ was biased, noting that “certain lines of questioning directed at the claimant’s mother during the hearing were inappropriate and lacked objectivity. (Feb. 27, 2002).

R. Dillon McCormick, Esq., Lansing, MI – 5 pages

1281. Appeals Council decision, remanding the case to a different ALJ, after finding that the claimant was denied a full and fair hearing because the ALJ was abusive. The ALJ’s decision does not provide a function-by-function assessment of the claimant’s actual work activity and makes no mention of neuropathy that physicians found limited his ability to stand or walk. As a result, the Appeals Council granted the request for review and remanded the case to the ALJ for further proceedings including a more complete analysis of the claimant’s maximum RFC; further evaluation of the subjective complaints; and vocational expert testimony, if warranted. (Oct. 5, 2001).

Thomas Clougherty, Esq., Lowell, MA – 4 pages

1265, 1272. Appeals Council remand for a full re-evaluation of the claimant’s credibility. The ALJ had based his finding that the claimant’s subjective complaints were not credibility on her “wish to become pregnant,” her search for work, and her ability to cook. The Appeals Council noted that there is “no correlation whatsoever between cooking and any reporting of an inability to work,” and that the ALJ’s “characterization of a family or personal decision to attempt to become pregnant as a ‘venture’ that is not

indicative of a disabled individual was inappropriate.” While the Appeals Council found no support for the allegation of an unfair hearing, it nevertheless ordered assignment to a different ALJ on remand “to avoid the appearance of any less than fair treatment.” (July 6, 2001).

James Rinck, Esq. Grand Rapids, MI – 4 pages

ALJ’S DUTY TO DEVELOP THE RECORD

1368. District Court decision, finding that the “ALJ’s failure to request the prior claims files resulted in prejudice and unfairness to the plaintiff” justifying a remand under Eighth Circuit precedent. The court also found that the ALJ failed to accord the treating physician’s opinion about functional limitations adequate weight, failed to pose hypotheticals to the VE based on the treating physician’s opinion, and erroneously discounted the plaintiff’s subjective complaints of pain. The court awards SSI benefits as of the date of the SSI application. The court further held that the ALJ’s failure to request the prior claims files required a remand for further proceedings on the title II claim.

Bradford v. Barnhart, No. 4:01CV3267 (D.Neb. Apr.7, 2003); 2003 U.S. Dist. LEXIS 5698; 86 SSRS 286.

Warren L. Reimer, Esq., Norfolk, NE – 72 pages, including Memorandum and Order, Complaint, Defendant’s Answer, Plaintiff’s Brief, Defendant’s Reply Brief

1343. District Court remand for a “de novo” review because the ALJ did not properly develop the record concerning the demands of the claimant’s past work consistent with the treating psychologist’s records. The ALJ did not properly perform his heightened duty where the claimant was unrepresented. In addition, the court remanded because on new and material evidence because, based on Tenth Circuit case law, the evidence may well have changed the ALJ’s decision. (Note: This case was a prototype case so there was no Appeals Council review and new and material evidence had to be submitted to the district court.) *Medina v. Barnhart*, Civil Action No 02-WM-966 (D. Colo. Mar.4, 2003).

Chris R. Noel, Esq., Boulder, CO – 9 pages.

ALJ’S FAILURE TO ARTICULATE WHY LISTING NOT MET

1369. District Court remand due to the ALJ’s failure to articulate his reasons for finding that the plaintiff’s impairments did not meet or equal Listing 1.05C. This failure prevents the court from providing a meaningful review of the ALJ’s decision and from determining whether the ALJ’s conclusions at steps 4 and 5 are supported by substantial evidence. It is not the court’s role to search out and guess the reasons for the ALJ’s conclusions. *Halvorsen v. Barnhart*, Case No. 02-2123 (C.D.Ill. July 16, 2003)

Ellen C Hanson, Esq., Morris, IL – 7 pages, including Judgment and Order

APPEALS COUNCIL

1563. District court remand under sentence four in two cases. The Commissioner had sought sentence six remands in these cases after the government’s attorney conceded that her recording in one case had been lost and the complete file in the other was missing. The court concluded that a requirement of reviewing a hearing tape is implicit in the

regulation requiring the Appeals Council to determine whether to review a case. “With no hearing transcript, the Appeals Council was precluded from determining whether substantial evidence supported the ALJ’s decision. . .” And, in the case with a missing file, the Appeals Council could not consider all of the available evidence. The Commissioner’s decisions were not supported by substantial evidence because the Appeals Council failed to review the record prior to its denials of the plaintiffs’ requests for review. *Mayon v. Barnhart*, No. 05-0196 (W.D.La. Jan. 12, 2006) and *LaSalle v. Barnhart*, No. 05-0612 (W.D.La. May 19, 2006).

Joseph R. Oelkers, III, Acadiana Legal Services Corporation, Lake Charles, LA – 12 pages

1549. Appeals Council remand for further proceedings. The request for review was granted under the substantial evidence, error of law, and new and material evidence provisions of the regulations. The ALJ’s decision does not : 1) contain a function-by-functional assessment of the ability to do work-related activities or sufficient rationale with references to the evidence of record; or 2) state the total number of hours that the claimant is able to sit, stand, and walk; or 3) provide a rationale as to why there were no mental limitations; or 4) provide a clear discussion of the claimant’s RFC as required in SSR 96-8p; or 5) address the credibility factors in the regulations. Also, in questioning the VE, the ALJ did not define the specific hypothetical physical and mental limitations. Additional evidence was submitted to the Appeals Council that indicates that the claimant is unable to work. This evidence should be entered into the record and considered by the ALJ. (Mar. 31, 2006)

John Bowman, Esq., Davenport, IA – 4 pages

1527. Appeals Council remand based on the receipt of new evidence showing that the schizoaffective and mood disorders may be more severe than previously indicated. The ALJ found mild to moderate limitations. However, the new evidence consisted of a court order, dated two months after the ALJ decision, that involuntarily committed the claimant to a state mental health facility, because she was deemed seriously mentally impaired and likely to injure herself or others. (Nov. 15, 2005)

John Bowman, Esq., Davenport, IA – 5 pages

1453. District Court remand where the ALJ did not properly evaluate and provide rationale as to whether the plaintiff’s impairments meet or equal a listing. Another reason for the remand is that a substantial amount of new and material evidence was considered by the Appeals Council but was not before the ALJ. Under Fourth Circuit caselaw, this evidence was part of the record even though the Appeals Council denied review. The new evidence shed new light on whether the plaintiff had a “severe” mental impairment. *Charuhas v. Barnhart*, Civil Action No. JKB-03-3049 (D.Md. Sept. 3, 2004).

W. Bryan Hall, Esq., Cumberland, MD – 4 pages

1293. Appeals Council decision awarding benefits based on the attorney’s brief and new evidence related to the claimant’s multiple sclerosis. Before associating the brief and new evidence with the file, the Appeals Council had denied the request for review. When the denial was received, the claimant’s attorney requested that the Appeals Council review

the case again, which it agreed to do, and this time awarded benefits. The new evidence consisted of a four page Multiple Sclerosis RFC Questionnaire from the treating physician and a medical journal article. The Appeals Council found that the claimant could not perform even sedentary work and was disabled under Rule 201.14. (May 9, 2002).

Thomas Bush, Esq., Milwaukee, WI – 9 pages

ARTHRITIS

1591. Appeals Council reversal and award of benefits. The claimant was injured in a fall in September 2002 and, despite hip replacement surgery, sustained multiple hip dislocations. It has been recommended that the claimant undergo another total hip replacement. A medical consultant to the Appeals Council stated that the severity of the claimant's status post total right hip replacement and unstable hip joint meet the criteria of listing 1.03 – reconstructive surgery or surgical arthrodesis of a major weight-bearing joint, with inability to ambulate effectively. (Oct. 18, 2006).

John Horn, Esq., Tinley Park, IL – 2 pages

1270. Appeals Council decision that the claimant was entitled to disabled widow's benefits. The ALJ had concluded that the claimant could perform a restricted range of medium work and could return to past work. However, a physician designated by the Appeals Council to review the evidence of record reported that the claimant's impairment was equal in severity to Listing 1.03A, Arthritis of a major weight-bearing joint. (Mar. 22, 2001).

Michael Sullivan, Esq., Louisville, KY – 5 pages

ATTORNEYS' FEES – 406(b)

1325. District court award of \$5,000 fees under section 4006(b), which represented 25% of the past due benefits. The court analyzed the request in light of *Gisbrecht v. Barnhart*, 122 S.Ct. 1817 (2002) and found the amount "reasonable," despite SSA's contention that the hourly fee of \$694.44 for 7.2 hours before the court was excessive and per se unreasonable. The court stressed that "the import of *Gisbrecht* is that contingent-fee arrangements are viable and valid means of securing representation in Social Security benefits cases." If the requested fee is reasonable the agreement must be honored. The court considered the fact that Social Security claimants are generally not able to secure representation via advance payment for services and contingent-fee agreements are the method of rewarding attorneys for representation without guarantee of payment. Finding the requested fee in this case reasonable, the court noted that counsel secured over 6 years' work of past due benefits for plaintiff totaling over \$73,000. *Dodson v. Barnhart*, Case No. 4:00CV00022 (W.D.Va. Oct 22, 2002).

J. William Greer, Esq., South Boston, VA – 5 pages

1323. District Court decision granting 406(b) fees in light of the *Gisbrecht* decision. Plaintiff's attorney first obtained EAJA fees and the requested additional fees under 406(a) and 406(b) to total 25% of the past due benefits. SSA opposed, arguing that the amount was excessive. In awarding the requested fees, the court first noted that the amount requested should not be reduced since it was not above the 25% statutory limit

and there was no evidence of “fraud of overreaching” in the contingency contract with the plaintiff. The court also noted the difficulty of winning disability cases based on a mental impairment, so that the prior court remand was no guarantee that benefits would be awarded, and that the attorney would receive no fee for a substantial amount of work. The court considered the attorney’s skill and experience in handling social security cases. In contrast, the court found that SSA’s arguments failed to show that the fee requested was unreasonable. The fee translated to an hourly rate of \$350.49, which, although high, was “hardly excessive per se.” Second, the plaintiff’s attorney spent the majority of his time before the court working on substantive issues. Finally, with the attorney representing the claimant for nearly 6 years, the court was “simply baffled by the Commissioner’s argument that Movant did not provide ‘any court representation that resulted in additional benefits to the plaintiff.’” *Coppett v. Barnhart*, CV 197-247 (S.D.Ga. Sept. 11, 2002).

Edward Claxton, III, Esq., Dublin, GA – 9 pages

ATTORNEYS’ FEES – EAJA

1557. District Court decision that the plaintiff is a “prevailing party” for EAJA purposes. The plaintiff’s case was initially remanded under sentence six because the file was missing. On remand, the plaintiff amended his onset date, which led to a finding of disability because he was now 54 years old and “closely approaching advanced age.” The ALJ awarded benefits and judgment was then entered for the plaintiff. The government argued that he was not a prevailing party because his success was due to the passage of time and amendment of his claim, rather than the merit of the original claim. The court disagreed and found that SSA’s decision is based on the amendment and that he succeeded on his claim. “Judgment, based on that favorable decision, has been entered here. There is a sufficient basis for finding that [the plaintiff] is a prevailing party under the EAJA.” *Strange v. Barnhart*, Civil No. 03-cv-080-JD (D.N.H. June 14, 2006)

Raymond J. Kelly, Esq., Manchester, NH – 7 pages

1541. The court awarded \$22,500 in attorney’s fees under EAJA. The underlying claim had extended over 7 years before the favorable court decision awarding benefits. SSA argued that the Commissioner’s position was “substantially justified.” The court found that SSA simply reargued the merits of the case. The third ALJ decision was not substantially justified, as determined by the court, and the Appeals Council remanded the two prior ALJ decisions. “It is difficult to understand the basis upon which the Commissioner can now argue that her own reversals of prior denials could make these denials be considered by this Court to have been substantially justified. The court also rejected the government’s position that the fees requested were not reasonable. The plaintiff’s attorney started representing the plaintiff in 2000. The court awarded fees at \$150 per hour, even though rates changed over the years, “because he has steadfastly supported this claimant throughout all of the frustrations of an administrative process which appeared to have been indifferent to the plaintiff’s pain and suffering.” *Aldridge v. Barnhart*, Civil Action Number 00-cv-01725-RPM (D. Colo. Jan. 13, 2006)

Paul Radosevich, Esq., Denver, CO – 24 pages, including Order for Award of Attorneys’ Fees and Costs, Plaintiff’s Reply to Defendant’s Objection to EAJA Petition, Defendant’s Objection to Plaintiff’s Petition, Plaintiff’s Petition for Fees

1482. District Court award of \$7353.11 in EAJA fees. In the underlying case, the ALJ had ignored the VE's testimony, relied on the DOT, failed to resolve the discrepancy as required by SSR 00-4p, and relied on his own opinion regarding the plaintiff's medical condition. Therefore, in the underlying case, there was no reasonable basis in fact for the Commissioner's position and it was not substantially justified. The court also found the hourly rate requested to be reasonable: \$147.73 for 2003; \$156.26 for 2004; and \$75 for non-legal tasks. The court also found quarter hour billing to be reasonable (the Commissioner had asked for one-eighth-hour billing). *Soucy v. Barnhart*, Civil No. 03-437-B (D.N.H. Feb. 3, 2005)

Raymond Kelly, Esq., Manchester, N.H. – 16 pages

1377. The government failed to meet its burden that its position was substantially justified. In the merits case, the District Court Judge did not adopt the Magistrate Judge's Report and Recommendation proposing the government's motion for summary judgment be granted. On the EAJA fees motion, the government argued that, because the Magistrate Judge who issued the proposed decision upholding the ALJ "is a reasonable person," the "substantially justified" test was met automatically. The district court disagreed. The fact that one court agreed or disagreed with the government does not establish whether its position was substantially justified. Fees were awarded in the amount of \$14,273.47 for 94.42 hours at the hourly rate of \$151.17. (*Jamison v. Barnhart*, Civil Action No. 01-3621 (E.D.Pa. July 31, 2003).

Walter (Ted) Walkenhorst, Esq. Disability Benefits Law Center, Jenkintown, PA – 21 pages, including the Memorandum and Order, Plaintiff's Reply Brief in Support of his Motion for Attorney's Fees.

1346. District court award of EAJA fees in the amount of \$4410.61, which includes the attorney's additional time spent responding to SSA's objection. The court found "no merit in defendant's argument" against the attorney's original request of \$1715.24. The government had argued that the attorney's time was excessive, that he was not entitled to fees for time spent prior to filing complaint, and that many of the services could have been performed by a non-attorney. *Christiano v. Barnhart*, Civil No. 3:01CV2206 (TPS) (D.Conn. April 10, 2003).

Charles A. Pirro, III, Esq., Norwalk, CT – 61 pages including the Ruling on Plaintiff's Motion for Attorney's Fees, Motion for EAJA fees, Supporting Affidavit and Memorandum, Defendant's Partial Opposition, Plaintiff's Supplemental Motion for Fees, Second Affidavit, and Memorandum in Response to Defendant's Partial Opposition.

1300. District court decision awarding EAJA fees. Finalization and review of motions and orders are not "purely clerical or secretarial tasks" and are compensable under EAJA. 28.50 hours spent preparing a 37-page memorandum and .95 hours in preparation of a civil action were reasonable. Fees in the amount of \$4,043.75, representing 32.35 hours at the hourly rate of \$125 are awarded. *Shavers v. Barnhart*, Civil Action No.: WMD-01-1350 (D.Md. July 17, 2002).

Frederick Raab, Esq., Baltimore, MD – 5 pages

1298. District court decision on awarding EAJA fees. Because both SSA's litigation position and the underlying agency action must be "substantially justified," the court will not award EAJA fees for services performed in relation to arguments that the court specifically rejected, in this case, whether the ALJ's decision was supported by substantial evidence. EAJA fees are warranted for time spent opposing SSA's motion to amend the judgment. In that motion, the agency took issue with the court's conclusion that the Appeals Council form denial letter constituted a statement of reasons underlying the Appeals Council's decision that was sufficient to trigger judicial review under *Mills v. Apfel*, 244 F.3d 1 (1st Cir, 2001). EAJA fees in the amount of \$1251.25 are awarded. *Orben o/b/o Jaspersen v. SSA*, Civil No. 01-186-M (D.N.H. May 23, 2002); 2002 U.S. Dist. LEXIS 9941; 80 SSRS 498.

Raymond Kelly, Esq., Manchester, N.H. – 17 pages

1278. District court award of \$3,689.45 in EAJA fees. The court rejected the government's argument that it was substantially justified because the Magistrate Judge found in favor of the government in two of the three issues raised in the merits of the case. The issue that was the basis of the remand was the ALJ's finding that the plaintiff could perform medium work. However, when the court reviewed the opinions of the treating physicians, it held that "[a]fter such evidence, the ALJ's conclusion that Smith can perform medium work in a *non sequitur*" and that the ALJ's decision was not substantially justified. The court also rejected the government's attempts to reduce the fee request for some items not traditionally performed by an attorney and for "excessive" time (3 hours) spent on the reply brief. *Nickerson v. Barnhart*, Civil No. 01-156-JD (D.N.H. Jan. 28, 2002).

Dianne R. Newman, Esq., Akron, OH – 9 pages

1274. District court award of \$6,505.27 in EAJA fees. In presenting its position, the government simply referred back to its brief on the merits, which the court found offered "neither evidence, argument nor analysis to support [its] position" and was inadequate to meet its burden of showing substantial justification. The court agreed with plaintiff that the government's actions lacked substantial justification because the ALJ applied the wrong legal standards by failing to comport with the substantive requirements of SSR 83-20 regarding the onset date. Among other objections, the government opposed any fee amounts above the \$125 hourly rate. The court rejected this argument and applied a cost of living increase. *Chamberlain v. Massanari*, Civil No. 00-055-JM (D.N.H. Jan. 14, 2002).

Raymond Kelly, Esq., Manchester, NH – 9 pages

1268. Ninth Circuit decision holding that the government's positioning defending the ALJ's dismissal when the plaintiff appeared without counsel was not substantially justified because it did not have a reasonable basis in the applicable law. See *McNatt v. Apfel*, 201 F.3d 1084 (9th Cir. 2000). Plaintiff's counsel successfully argued that the ALJ was not authorized to dismiss the request for hearing because the regulations and HALLEX preclude dismissal where the attorney was present, even if the claimant does not appeal. *Lubbers v. Apfel*, Civil Action No. 00-D-1726 (D.Colo. May 23, 2001).

David B. Lowry, Esq., Portland, OR – 17 pages, including Ruling and Order, and Appellant’s Reply Brief

1264. The plaintiff argued that the Commissioner’s position was not substantially justified because the ALJ failed to apply proper Fourth Circuit law to evaluate her complaints of pain. The court agreed, noting that “[a] policy of non-acquiescence cannot be substantially justified.” The court found that the Fourth Circuit has “repeatedly admonished “ SSA for failing to follow fourth circuit precedent on evaluating subjective complaints of pain and that the failure is “well documented.” As a result, the government’s position was not substantially justified in law. EAJA fees were awarded to plaintiff’s counsel. *Lyle v. Commissioner of Social Security*, Civil Action No.

5:00CV169 (N.D.W.Va. Dec. 15, 2001)

Timothy F. Cogan, Esq., Wheeling, WV – 15 pages – order awarding attorney’s fees under EAJA

AUXILIARY BENEFITS

1502. Appeals Council favorable decision after reopening on the basis of clear error in the ALJ’s 1998 denial of this claim for child’s insurance benefits. The child was born in 1985 and the wage-earner/father died in 1988 in Ohio. A second application was filed in 2001 with blood testing dated less than one week before showing a 99.7% probability that the claimant was the sibling of the wage-earner’s undisputed biological child. Benefits were awarded effective January 2001. The claimant had filed a prior application in 1996, which was denied by the ALJ in March 1998, and the Appeals Council denied review in May 1999. The Appeals Council noted that the regulations changed, effective in October 1998 while the first application was pending. The regulation provided that SSA, in determining who is a “child” of the wage-earner, could use the standard of proof that the State would use to determine paternity. Benefits were awarded based on the 1996 application. (November 17, 2004).

Marcia Margolius, Esq., Cleveland, OH – 7 pages.

1488. Appeals Council decision on the issue of whether a claimant has the status as a child of the wage earner in New York State when paternity was not established during the father’s lifetime but where DNA blood tests established paternity after his death. The father died three days after the mother filed a petition for paternity. DNA testing from the coroner’s office established paternity and a court order stated the wage earner was the child’s father. The mother filed for Social Security benefits on the child’s behalf. The Appeals Council awarded benefits, finding that the claimant was the biological child of the wage-earner and thus would have inheritance rights, which is sufficient to establish eligibility for child’s insurance benefits. (March 5, 2005).

Lawrence I. Heller, Esq. Rochester, NY –5 pages

1450. District court case involving a claim for surviving step-child’s benefits. The issue is whether the deceased wage earner contributed at least ½ of the plaintiff’s support. The court concluded that a remand to the ALJ for more findings was necessary, because there were “unanswered serious questions” whether agency policy was consistent with the POMS. The POMS provides for a “pooled-fund method” where household income is

