

ARGUMENTS IN SUPPORT OF ERRORS AND LAW REQUIRING REMAND FOR FURTHER PROCEEDINGS AS TO CLAIMANT KEVIN FIDLER

- 1. Step 2 While the ALJ found that Claimant’s degenerative disc disease, bipolar disorder, and a personality disorder were severe impairments under Step 2 of the disability analysis, he erred in not finding that Claimant’s bilateral upper extremity Overuse syndrome, carpal tunnel syndrome, and cubital tunnel syndrome were severe impairments under 20 C.F.R. 404.1520(c).**

The medical evidence submitted in this case indicates that the Claimant suffers from Bilateral Upper Extremity Overuse Syndrome, Carpal Tunnel Syndrome, and Cubital Tunnel Syndrome. See Exhibit 1F591. Yet, the ALJ failed to conduct the proper analysis or provide sufficient justification for ignoring the evidence of these syndromes. The ALJ never identified any listing for the syndromes under which he considered whether the Claimant’s upper extremity difficulties constituted a disability. In considering whether a claimant’s condition meets a listed impairment, an ALJ must discuss the listing by name and offer “more than a perfunctory analysis” of the listing. *Barnett v. Barnhart*, 381 F. 3d 664 (7<sup>th</sup> Cir. 2004) as cited in *Taylor v. Barnhart*, 189 Fed. Appx. 557, 2006 U.S. App. LEXIS 18810 (7<sup>th</sup> Cir. 2006).

The ALJ never explained why he rejected the evidence that Claimant’s treating physician diagnosed her with these syndromes and that despite surgery, she could not be expected to perform repetitive job functions. Thus, as in *Taylor, Id.*, no articulate reason for rejecting the medical evidence as to Claimant’s syndromes has been stated. The ALJ failed to conduct the proper analysis or provide sufficient justification for his findings after Step Two regarding Claimant’s syndromes. He never identified any listing by number or by name. Therefore, this case must be remanded for consideration as to whether Claimant’s syndromes constitute severe impairments under the appropriate listings of 20 C.F.R. 404.1520(c).

- 1. The ALJ failed to present a thorough and reasoned analysis of the effect of the combination of all of Claimant’s impairments under 20 C.F.R. Part 404, Subpart P, App. 1 (20 C.F.R. §404.1520(d)).**

An ALJ is charged with the responsibility to determine whether a claimant’s impairment or combination of impairments meets or medically equals the criteria of an impairment listed in 20 C.F.R. §404.1520(d). The evidentiary record shows, and the ALJ found, that Claimant has severe impairments due to Degenerative Joint Disease of the right knee, Obstructive Sleep Apnea, Obesity, and Bipolar Disorder. Nevertheless, at Step Three, without stating any reasons, the ALJ summarily concluded that:

. . . there is no indication that the claimant’s obesity, alone or in combination with any other impairments, has given rise to a condition of listing-level severity. Decision, p.4.

The policy interpretation portion of SSR 02-01p indicates that:

Because there is no listing for obesity, we will find that an individual with obesity “meets” the requirements of a listing if he or she has another impairment that, by itself, meets the requirements of a listing. We will also find that a listing is met if there is an impairment that, in combination with obesity, meets the requirements of a listing. For example, obesity may increase the severity of coexisting or related impairments to the extent that the combination of impairments meets the requirements of a listing. This is especially true of musculoskeletal, respiratory, and cardiovascular impairments. It may also be true for other coexisting or related impairments, including mental disorders. SSR-02-01p.

Obesity may aggravate problems with joints because obesity places additional stress on joints.<sup>1</sup> As 7<sup>th</sup> Circuit Judge Posner cited in *Johnson v. Barnhart*:

The heavier you are, the more stress is placed on your spine, hips, knees and ankles. Also, heavier people tend to resist exercise, resulting in another risk factor – weak muscles, particularly in the thigh. Weakness in the thigh, in turn, places extra stress on the knees. *Johnson v. Barnhart*, 449 F.3<sup>rd</sup> 804, U.S. App. LEXIS 13793 (7<sup>th</sup> Cir. 2006).<sup>2</sup>

Here, the ALJ failed to discuss the evidence of the interaction of Claimant’s multiple conditions. Specifically, she failed to discuss what affect his obesity, in combination with the manifestations of Bipolar disorder, Degenerative joint disease, knee pain, and sleep apnea, would have on his ability to work. Instead, the ALJ determined that none of the impairments, alone or in combination, meet or medically equal the criteria of the listings because he did not find medical evidence of record of any severe impairment. Failure to consider all impairments, singly and in combination with other impairments, is reversible error under SSR 02-01p<sup>3</sup>. The ALJ must consider all of the available medical evidence and assess with a thorough and reasoned analysis the effect of all of claimant’s impairments. *Fleetwood v. Barnhart*, 211 Fed. Appx. 736, 2007 U.S. App. LEXIS 199 (10<sup>th</sup> Cir, 2007). Because the ALJ did not assess this matter with a thorough and reasoned analysis, this decision must be reversed or remanded.

## **2. The ALJ’s denial of disability status must be reversed or remanded because it did not recognize and analyze evidence**

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<sup>1</sup> 1 William J. Koopman & Larry W. Moreland, *Arthritis and Allied Conditions: A Textbook of Rheumatology* 27-28 (15<sup>th</sup> ed. 2005) as cited in *Johnson v. Barnhart*, 449 F.3<sup>rd</sup> 804, U.S. App. LEXIS 13793 (7<sup>th</sup> Cir. 2006).

<sup>2</sup> *Johnson, Id.* citing Jane E. Brody, “Personal Health: Arthritis: Your ‘Reward for Wear and Tear,’” *New York Times*, July 30, 2002, p.F7

<sup>3</sup> See also *Salazar v. Barnhart*, 468 F3d 615, 621, 622 (10<sup>th</sup> Cir. 2006) as cited in *Fleetwood v. Barnhart*, 211 Fed. Appx. 736, 2007 U.S. App. LEXIS 199 (10<sup>th</sup> Cir. 2007).

**submitted by a treating source which shows that the combination of Claimant's multiple conditions rises to a condition that meets or equals listing-level severity.**

In 2006, treating source Dr. Steven Berger stated that: "(Claimant) has been unable to work due to his unstable mood, his poor memory, and physical health." Exhibit D1. This evidence shows that the combination of Claimant's bipolar mood disorder, his poor memory, his degenerative joint disease, and his knee pain does rise to a condition of listing level severity which renders Claimant unable to work.

The regulations provide that the findings of the treating physician as to the severity of an impairment must be accorded controlling weight if they are well supported by medically accepted clinical and laboratory diagnostic techniques and are not inconsistent with the other substantial evidence in the record. See 20 CFR §§ 404.1527(d)(2), 416.927(d)(2). Because evidence from a treating source has controlling authority, Dr. Berger's unopposed statement that the combined effect of all Claimant's impairments rises above the listing level standard necessitates reversal or remand of the ALJ's denial of disability status.

### **SUMMARY**

Therefore, Claimant Kevin Fidler specifically requests that the Appeals Council consider his entire case to determine whether review should be granted pursuant to 20 CFR § 404.970(a). The foregoing list of errors is not exhaustive and only represents the more significant errors upon which the Appeals Council could readily determine that remand or reversal is required. The Appeals Council is required to evaluate the entire case to determine if any other basis for granting review exists as set forth by 20 CFR § 404.970(a). If the Appeals Council does intend to limit its review to only those issues specifically raised herein, Claimant requests specific notice of such intent as well as the opportunity to submit additional arguments within Thirty (30) days of receipt of such notice.

Based on the foregoing, Claimant respectfully requests that the Appeals Council reverse the ALJ's determination and award benefits. Alternatively, the Appeals Council should remand this matter for further proceedings as set forth herein.

Respectfully submitted,

POWER, LITTLE & LITTLE

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By C. David Little

