NO. 09-2413

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

James M. Hardesty,
Plaintiff-Appellant

V.

Michael Astrue,
Commissioner of Social Security,
Defendant-Appellee

Appeal From The United States District Court
For the Southern District of Indiana
Case No. 1:07-CV-1396-LJM-WTL
The Honorable Judge Larry J. McKinney

BRIEF AND REQUIRED APPENDIX OF PLAINTIFF-APPELLANT JAMES M. HARDESTY

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Certificate of Interest

Appellate Court No.: 09-2413

Short Caption: Hardesty v. Astrue

The undersigned counsel of record for James M. Hardesty, Plaintiff-Appellant, furnishes the following list in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1:

(1) The full name of every party or amicus the attorney represents in the case:

James M. Hardesty

(2) If such party or amicus is a corporation:

(i) Its parent corporation: N/A

(ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus: N/A

(iii) N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

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BRIEF OF PLAINTIFF-APPELLANT JAMES M. HARDESTY

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291, as an appeal from a final decision of a U.S. District Court in a civil action. On April 23, 2007, the Plaintiff-Appellant James M. Hardesty ("Plaintiff") filed a Request for Review of Hearing Decision because Administrative Law Judge (ALJ) Robert E. Hanson, by Stephen S. Davis, HOCALJ, denied Plaintiff's application for Disability Insurance

Benefits. On August 30, 2007, the Appeals Council denied Plaintiff's Request, making the ALJ's decision the final decision of the Commissioner.

On October 7, 2007, Plaintiff filed a timely Complaint, requesting judicial review of the final determination. The jurisdiction of the District Court was founded upon 42 U.S.C. § 405(g), which provides for judicial review of the decision of the Commissioner under the Social Security Act. On March 31, 2009, U.S. District Court Judge Larry J. McKinney affirmed the Commissioner's decision.

Plaintiff filed a timely Notice of Appeal on May 27, 2009. This Court has jurisdiction over the District Court's May 31, 2009 final decision pursuant to 42 U.S.C. § 405(g) and 28 U.S.C. § 1291.

II. ISSUES FOR REVIEW

The following issues will be presented for review:

1) whether the ALJ erred in failing to accord any evidentiary weight at all to Plaintiff's Veteran's Administration disability rating, which was premised on objective military medical evidence and opinions of Plaintiff's treating physicians and examining sources at the time of his war injury;

2) whether the ALJ's credibility assessment of Plaintiff's testimony was proper and sufficient in that the ALJ did not set forth explicit, specific, and cogent reasons or build a logical bridge between the evidence and his decision to show this Court why he chose not to believe Plaintiff's testimony at hearing;

3) whether the ALJ's RFC determination, finding that Plaintiff was able to work in spite of limitations to which he testified, and were supported by objective military medical evidence, treating physician opinions, examining source opinions, and the VA's disability rating, was invalid and contrary to law;

4) whether the ALJ misapplied the SSA Disability Grid to determine that Plaintiff was not disabled because objective medical evidence, treating physician opinions, examining source opinions, and Plaintiff's testimony showed that Plaintiff suffered from both exertional and nonexertional limitations, therefore making consideration of the testimony of a VE mandatory even though the ALJ omitted it in this matter;

5) whether the ALJ erred because he did not consider evidence from a Vocational Expert as to whether jobs exist for Plaintiff in the national economy pursuant to 42 U.S.C. § 423(d)(2)(A) and 20 CFR 404.1512(g) and 404.1560(c), and

6) whether Plaintiff was prejudiced by the fact that one ALJ heard the testimony at hearing, but another ALJ (HOCALJ) signed the decision without any apparent authorization to do so, the HOCALJ omitted required vocational evidence, and refused to hold a second hearing to determine Plaintiff's credibility based on testimony as to the newly acquired military medical evidence, including treating physician opinions and examining sources, of his permanently disabling condition, and VA disability rating in violation of HALLEX I-2-840.

III. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff brought suit in the United States District Court under 42 U.S.C. § 405(g) to challenge the final decision of the Commissioner finding him not disabled and denying his application for Disability Insurance Benefits (DIB) under Title II of the Social Security Act, 42 U.S.C §§ 216(I), 223 (d).

B. Course of Proceedings

On July 22, 2003, Plaintiff applied for DIB, stating that he was disabled and unable to work because of severe, disfiguring, and totally disabling injuries inflicted while he served as a rifleman in the Vietnam Conflict in 1969. (R. 54-56). Plaintiff had previously been receiving DIB, but they were discontinued in September 1971. (R. 39). On October 14, 2003, Plaintiff's DIB application was denied at the initial level of agency review. (R. 41). Plaintiff then filed a timely request for a hearing before an ALJ.

C. ALJ's comments and Plaintiff's testimony at hearing

On August 10, 2005, Plaintiff appeared with representation and testified briefly at a hearing before ALJ Robert Hanson. VE Stephanie Archer also appeared, although she never testified. (R. 26-31, 341-362). ALJ Hanson noted that:

- he would be deciding this appeal (R. 341);
- the case lacked medical evidence as to the relevant time period, which he found to be September 1, 1971 through March 31, 1973 (R. 342);
- Plaintiff had orthopedic injuries from combat that were lifelong injuries (R. 342) and that Plaintiff had lost a limb that will never grow back (R. 343);
- Social Security files as to Plaintiff from 1971 to 1973 had been destroyed (R. 342), and
- the relevant inquiry in this matter focused on how this particular claimant's wounds affected him between September 1971 and March 1973 (R. 343).

While ALJ Hanson said that Plaintiff could testify as to how those wounds affected him during the relevant period, the ALJ needed "to have papers to show that" (R. 344) and "medical records to plug that gap" (R. 347).

Plaintiff testified that:

▪ He couldn't walk very far for 2-3 years after his injury (R. 347, 349, 355) nor stand for more than one half an hour (R. 355, 361);

▪ While his injuries limited his ability to sit or stand, his low stamina and energy level from multiple surgeries, pain, low body weight, and prescribed narcotic medications prevented him from working during the relevant time period (R. 347, 349, 350-351, 356);

▪ He gets uncomfortable after sitting for one half an hour and has to move around to alleviate pain (R. 347, 353-354, 361), and

▪ During the relevant time period, he underwent 20-24 major surgeries (R. 349) and visited the VA hospital "a couple of times a week" (R. 352, 357).

ALJ Hanson left the record open for receipt of military medical records from the date of Plaintiff's accident in 1969 to 1973 even though Plaintiff was honorably discharged as totally and permanently disabled in 1969. (R. 362). On September 9, 2005, Plaintiff requested his military medical records. (R. 283). On October 25, 2005, Plaintiff sent all of his military medical records from 1967 to 1969 to the ALJ. (R. 281). Those records (R. 281-323) included details of his injury, the Medical Examination Board (MEB) report (R. 290-293, 309[1]), the Physical Examination Board (PEB) disability determination and honorable discharge (R. 58[2], 300[3]), and his VA disability

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[1] "It is the opinion of this Board that the patient has received maximum benefits of hospitalization, and the Board, therefore, recommended that the patient be referred to the Physical Evaluation Board." MEB report dated March 21, 1969.

[2] On May 1, 1969, Plaintiff was placed on PermDsabl Ret'd List Part 10001, MCSM & CMC Mag1444Z Jun69 &VA codes 5165 5317, 5320, 5319 effective June 16, 1969. He was honorably discharged and decorated with a National Service Medal, Vietnamese Service Medal, Vietnamese Campaign Medal, a Purple Heart, and a Good Conduct Medal. The VA code numbers refer to the Schedule of Disability Ratings from the Code of Federal Regulations, which can be found at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&rgn=div5&view=text&node=38:1.0.1.1.5&idno=38. Thus, the VA codes from 1969 translate as follows:
5165: Amputation of the thigh, lower, permitting prosthesis, rated 40
5317: Group XVII. *Function:* Extension of hip (1); abduction of thigh; elevation of opposite side of pelvis (2, 3); tension of fascia lata and iliotibial (Maissiat's) band, acting with XIV (6) in postural support of body steadying pelvis upon head of femur and condyles of femur on tibia (1). *Pelvic girdle group 2:* (1) Gluteus maximus; (2) gluteus medius; (3) gluteus minimus, severe, rated 50

rating, which has been augmented by a subsequent Supplemental Filing with the District Court detailing the VA's disability rating from October 1969, and continuing affirmation of Plaintiff's total disability rating in 2005. Although Plaintiff asked for his VA records from 1969 to the present, the VA only tendered records for 1993 to the present, presumably because VA records from 1969 to 1993 have been lost or destroyed.

C. Disposition Below

On March 30, 2007, HOCALJ Stephen Davis issued an unfavorable decision, denying Plaintiff's DIB application. (R. 18-23). On April 23, 2007, Plaintiff filed his Request for Review of the ALJ's unfavorable decision with the Appeals Council. (R. 12-13). Plaintiff's Request was denied on August 30, 2007, making the ALJ's decision the final decision of the Commissioner. (R. 5). On October 7, 2007, Plaintiff filed a timely Complaint requesting judicial review of this final determination in the United States District Court for the Southern District of Indiana, Indianapolis Division. On March 31, 2009, U.S. District Court Judge Larry J. McKinney affirmed the Commissioner's decision. Plaintiff filed a timely Notice of Appeal on May 27, 2009 with the United States Court of Appeals for the Seventh Circuit.

5320: Group XX. *Function:* Postural support of body; extension and lateral movements of spine. *Spinal muscles:* Sacrospinalis (erector spinae and its prolongations in thoracic and cervical regions), severe, rated 60
5319: Group XIX. *Function:* Support and compression of abdominal wall and lower thorax; flexion and lateral motions of spine; synergists in strong downward movements of arm (1). *Muscles of the abdominal wall:* (1) Rectus abdominis; (2) external oblique; (3) internal oblique; (4) transversalis; (5) quadratus lumborum, rated 50
The combined rating table is found at this website and is identified as 41 FR 11293, Mar. 18, 1976, as amended at 54 FR 27161, June 28, 1989; 54 FR 36029, Aug. 31, 1989. Applying these codes and their disability rating numbers (50, 50, 60, and 40) to the combined table as per the instructions, it appears that Plaintiff's VA disability rating is 94.

[3] Appeared before Physical Evaluation Board this date (April 10, 1969). PEB-ltr-unfit-AOELA. Discharged this date to Marine Barricks, Naval Base, PA. AOELA. Chronological record of medical care.

STATEMENT OF FACTS

Having been married recently, Plaintiff was a strong, 160 lbs. high school graduate who enlisted in the Marine Corp and completed basic training as a rifleman in San Diego, California in November 1967. (R. 58, 296). Six months later, Plaintiff was a corporal, but also a weakened, sickly, 87 lbs. invalid with a stump for a left leg, enduring more than 20 major surgeries to repair heinous wounds inflicted in Vietnam. (R. 58, 300). Plaintiff suffered massive injuries in combat from friendly short mortar fire in Vietnam in May 1968. He received emergency care at his battalion aid station and was subsequently transferred to a hospital ship, USS REPOSE.

As a result of his injuries, his left leg was amputated below his knee, he had fractured fragmentation to the right ileum, lacerations traumatic to the rectum, liver, diaphragm, fistula, arterial-venous, left with aneurysms, superficial femoral artery, fragmentation to the left buttock, bone and muscle loss, with shrapnel metal in both kidneys, his liver, and his right shoulder. (R. 287, 292, 345). On the third post injury day, an exploratory laparotomy with a diverting colostomy was performed. He was transferred to Guam on the twenty seventh post injury day, where he convalesced for two weeks. Plaintiff was admitted to the Great Lakes Naval Hospital on July 18, 1968. His treatment included:

1. Repair of left arterial-venous fistula, with resection of a false aneurysm of the left superficial femoral artery;
2. Revision of the left below-knee stump;
3. Sequestrectomy- right ileum, with wound debridement, and
4. Colostomy closure with excision of a muco-cutaneous fistula. (R. 292).

According to the Medical Examination Board (MEB) Report, Plaintiff's final diagnoses in 1969 were:

1. Absence acquired, left leg, below knee #7490-804;
2. Fitting of prosthesis #Y130;
3. Weakness, abductor, right hip, secondary to partial loss #7380-843;
4. Scars:
    a. 3 x 4 inch scar, posterior aspect of ileum, right #7339-719
    b. Unsightly scar, abdomen, 12 inches in length #7160-615
5. Nerve problem: laceration, saphenous nerve, left thigh #9560-875. (R. 293).

Thereafter, the Physical Evaluation Board (PEB) of the Department of Defense (DOD) examined all of Plaintiff's medical reports. Thus, in 1969, the PEB found Plaintiff to be totally and permanently disabled, awarded him the Military Order of the Purple Heart, and honorably discharged him, making him eligible for VA disability benefits for the duration of his lifetime. (R. 300, 343, and see Supplemental Record submitted to District Court, specifically VA records as to Plaintiff's disability rating).

Thus, by May of 1968, Plaintiff had survived short mortar fire wounds, but lost his left leg below the knee, sustained serious injuries to his kidneys, liver, rectum, colon, hip, shoulder, and stomach, some of which still contain shrapnel. Just short of his 20th birthday, Plaintiff's life was permanently altered by errant mortar fire from U.S. forces. As a severely injured young man in late 1969, he returned to his Indiana home to face the reality, physically and psychologically, that his body, given in defense of the United States, would be drastically changed, dashing his dreams for his future, his wife, and potential children.

While technology has improved, and Plaintiff has utilized VA services to obtain new prosthesis since his injury occurred, medicine has not advanced enough in the last 40 years to restore Plaintiff's body to him. Technology today still does not regenerate limbs, nerves, and organs. Therefore, Plaintiff has the same capabilities that he had since that May 1968 injury. He still depends on others for help with daily tasks of living,

can only walk two blocks, and stand or sit for only one half an hour before needing to move around to stop discomfort and relieve his pain. (R. 347-348, 353-55).

Thus, Plaintiff's condition has not improved in the ensuing 40 years; he has just learned to live with his disabilities. He testified that he could not work in 1968, 1969, or the early 1970s because of his injuries, the effect of the medications used to treat them, the inherent weakness, weight loss, and lack of stamina which follows major injury and multiple surgeries, and the 2-3 trips per week he took to the VA hospital for treatment.

Plaintiff received DIB benefits prior to September 1971, when they were discontinued. Since SSA records from that time were lost or destroyed long ago, there is no way to know exactly why the disability benefits were curtailed. At that time, Plaintiff was still trying to regain his strength and acclimate to life as a disabled veteran, so he did not understand why his benefits stopped coming. Unfortunately, he also did not understand that he had the right to appeal that decision, simply accepting the denial of further disability benefits. (R. 18, 65, 349, 339-362).

D. The ALJ's Decision

While ALJ Hanson heard Plaintiff's testimony, HOCALJ Stephen Davis signed the March 30, 2007 decision to deny benefits. (R. 15-23). The ALJ found that the medical evidence established that Plaintiff has severe impairments of below the knee amputation of the left leg, loss of abdominal musculature, and neuropathy of the left saphenous nerve. (R. 20). Yet, HOCALJ Davis found that none of Plaintiff's severe impairments met or medically equaled one of the listed impairments of Appendix 1, Subpart P, Regs. No. 4. (R. 20-21). In fact, the HOCALJ wrote that: "It appears from the foregoing that the difficulties the claimant experienced in 1969 (from friendly fire in Vietnam) were successfully overcome . . . (R. 21).

In turn, the HOCALJ found that Plaintiff had the residual functional capacity (RFC) to lift up to 10 pounds occasionally, stand and/or walk up to 2 hours in an 8 hour workday with normal breaks and to sit about 6 hours in an 8 hour day with normal breaks. (R. 21). Beyond that, the HOCALJ determined (without having seen Plaintiff's testimony) that Plaintiff's statements concerning the intensity, persistence and limiting effects of these symptoms were not entirely credible. Most notably, the HOCALJ did not mention, discuss, or accord any weight to the fact that Plaintiff was found to be totally and permanently disabled by his Vietnam wounds in 1969 by the PEB/MEB and VA.

Therefore, the HOCALJ found that Plaintiff had no transferable skills nor past relevant work and applied the Medical-Vocational Guidelines, 20 C.F.R. 404, Subpart P, Appendix 2, to find that that there were jobs that existed in significant numbers in the national economy that the Plaintiff could have performed pursuant to 209 C.F.R. 404.1560(c) and 404.1566.

SUMMARY OF ARGUMENT

Plaintiff is a veteran of the Vietnam War who was so severely injured in May of 1968 from friendly short mortar fire that he has been unable to maintain substantial, gainful activity since that time. In 1969, the PEB determined that he was totally and permanently disabled and honorably discharged him, awarding the Purple Heart to him for his service. The VA adopted the PEB holding, finding Plaintiff unemployable and permanently disabled, for which full 100% disabled veteran benefits have been paid to him on a continuing basis since 1969.

Given the nature of the amputation, nerve damage, embedded shrapnel, loss of muscle and motion along with severe scaring to his body, Plaintiff's condition remains

much the same as it was in 1969 when he was determined to be disabled, augmented only by the usual passage of time on a human body. He still has pain, cannot walk or sit for more than one half an hour, cannot lift much weight, and needs help with daily activities. He was unable to maintain gainful employment in 1969, and he remains unable to work today as well.

In this matter, the ALJ heard Plaintiff's testimony, but the HOCALJ signed the decision denying benefits to Plaintiff, as the HOCALJ wrote, because there was no objective medical evidence from 1971 to 1973 to convince the ALJ or HOCALJ that Plaintiff suffered then and suffers now from a severe impairment or combination of impairments that meets or medically equals the listings. Further, although Plaintiff testified as to his disabilities, pain, and discomfort, the HOCALJ chose not to find Plaintiff's testimony credible. Rather, the HOCALJ determined that Plaintiff successfully overcame his war wounds in 1969. Hence, the HOCALJ found that Plaintiff had/has sufficient RFC to work. He applied the Grid, refused to consider Vocational Expert testimony as to Plaintiff's exertional and nonexertional limitations, and concluded that a sufficient number of jobs exist in the national economy which Plaintiff can perform.

In light of this decision, Plaintiff contends that sufficient case law exists to require an ALJ to give the PEB/MEB/VA's total and permanent disability rating some evidentiary weight, particularly because it was premised upon the objective medical reports/opinions of treating physicians and examining sources. Yet, the HOCALJ chose to overlook this disability rating, declining to mention it at all. Plaintiff respectfully asserts that case law requires that his VA disability rating, derived from MEB/PEB records, receive some weight in determining this matter. Thus, the HOCALJ's omission

to accord any weight to his VA disability rating merits reversal and remand with instructions to accord the disability rating some evidentiary weight.

Further, Plaintiff believes that his testimony was erroneously excluded by the HOCALJ as not credible, but that the HOCALJ did not meet the requisite standard in that he did not build a logical bridge, crafted with explicit, cogent and specific reasons, explaining why Plaintiff's testimony was not credible. Rather, the HOCALJ made that conclusion without stating supporting evidence for it. Since case law requires such a logical bridge with explicit, cogent, and specific reasoning, this decision must fail because it cannot meet that standard.

Next, Plaintiff contends that where the ALJ heard the testimony, but inexplicably, the HOCALJ signed the decision, it is possible that this decision was not accorded the customary SSA procedures under HALLEX requiring a second hearing or some notice of record as to why the HOCALJ rendered the decision. Plaintiff's concerns center around the fact that ALJ Hanson's comments at hearing indicate an understanding of this veteran's plight and the need to examine relevant military medical records to determine his condition in 1969 through 1973 while HOCALJ Davis' cursory statement that Plaintiff had successfully overcome his war injuries in 1969 do not reflect a meaningful continuity as to the reality of Plaintiff's situation.

Finally, Plaintiff maintains that case law required the testimony of a VE in this situation. Specifically, while VE Archer was present at hearing, she was not consulted as to whether a person with Plaintiff's limitations could be employed or whether there were a sufficient number of jobs in the national economy for him as case law requires. In short, the HOCALJ applied the Grid to Plaintiff when it was inapplicable to him because of his exertional and nonexertional limitations. Rather, it was imperative in this case

that the VE, who was summoned by ALJ Hanson, testify as to vocational realities as they apply to Plaintiff because of those limitation.

For all of these reasons, Plaintiff respectfully submits that this matter must be reversed and remanded for a proper determination under relevant case law.

VI. ARGUMENT

A. Standard of Review is De Novo, tested by substantial evidence

The Standard of Review is de novo. *Groves v. Apfel*, 148 F.3d 809 (7th Cir. 1998). Under 42 U.S.C. § 405(g), a court reviews whether substantial evidence supports the ALJ's final decision and whether the ALJ applied the proper legal criteria in reaching the decision. 42 U.S.C. § 405(g); *Eberhart v. Sec'y of Health and Human Serv.,* 969 F.2d 534 (7th Cir. 1992). Appellate review of District Court final decisions in Social Security disability cases follows the "substantial evidence" standard of review. "Substantial evidence" (1) may be less than a preponderance of the evidence; (2) must be more than a scintilla of evidence; and (3) is such relevant evidence as a reasonable mind might accept to support a conclusion. *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 618-19 (1966).

To determine whether substantial evidence supports the ALJ's decision, a court reviews the whole record, *Ark. v. Okla.*, 503 U.S. 91, 113 (1992), including evidence that detracts from the ALJ's findings and decision. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487-88 (1951). A court should adopt the findings suggested by the claimant if the record requires those findings. *Campbell v. Shalala*, 988 F.2d 741, 744 (7th Cir.

1993). An error of law warrants reversal "irrespective of the volume of evidence supporting the factual findings." *Schmoll v. Harris*, 636 F.2d 1146, 1150 (7th Cir. 1980).

B. The Sequential Analysis is the Regulatory Framework

When a claimant applies for benefits, he has the initial burden to prove that a severe impairment prevents him from performing past relevant work. If claimant can show this, the burden shifts to the ALJ to show that the claimant was able to perform other work in the national economy despite the severe impairment. The ALJ must follow the five-step process for determining whether the claimant was disabled, considering whether:

> 1) claimant was presently employed or engaged insubstantial gainful activity,
>
> 2) claimant's impairment or combination of impairments are severe,
>
> 3) the individual met any of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, which the ALJ regards as conclusively disabling,
>
> 4) claimant was able to perform his past relevant work, and
>
> 5) claimant was able to perform any other work within the economy. 20 C.F.R. § 416.920; *Stevenson v. Chater*, 105 F.3d 1151, 1154 (7th Cir. 1997); *Brewer v. Chater*, 103 F.3d 1384, 1391 (7th Cir. 1997).

If a claimant satisfies Steps One and Two and has an impairment listed in Appendix 1 (Step Three), claimant is considered disabled automatically. *Id.* However, if the claimant's severe impairment is not listed in the Appendix, the ALJ requires an evaluation of the claimant's residual functional capacity ("RFC") and the physical and mental demands of his past work (Step Four). *Id.* RFC is defined as:

> A medical assessment of what an individual can do in a work setting in spite of the functional limitations and environmental restrictions imposed by all of his or her medically determinable impairment(s)." *Shields v. Sullivan*, 801 F. Supp. 151, 155 (N.D. III.1992) (*citing Marcus v. Sullivan*, 926 F.2d 604, 608 (7th Cir. 1991)); 20 C.F.R. § 404.1526.

RFC is expressed in terms of a claimant's maximum sustained work capability for either "sedentary," "light," "medium," "heavy" or "very heavy" work as those terms are defined in 20 C.F.R. § 404.1536. If the claimant is unable to perform past work, the ALJ must determine if there is other work in the economy which claimant can perform (Step Five). *See* 20 C.F.R. § 404.1526. At Step Five, the ALJ has the burden of proving that "the claimant - in light of [his] age, education, job experience and functional capacity to work - is capable of performing other work and that work exists in the national economy." *Brewer*, 103 F.3d at 1391.

C. The ALJ erred when he failed to give any evidentiary weight to Plaintiff's Veteran's Administration disability rating.

Since 1969, the VA has considered Plaintiff to be totally disabled due to wounds from friendly fire sustained during the Vietnam War. (R. 58 and see Supplemental filing, VA disability rating.). Because a PEB determined that his disabilities were long term and completely debilitating, they declared him unfit for duty and permanently unemployable in June 1969, thereby honorably discharging him. (R. 58, 305). Since that time, the VA accordingly has considered Plaintiff to be 100 percent unemployable[4] because he is

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[4] What Is Individual Unemployability?

Individual Unemployability is a part of VA's disability compensation program that allows VA to pay certain veterans compensation at the 100% rate, even though VA has not rated their service-connected disabilities at the total level.

What Is the Eligibility Criteria for Individual Unemployability?
A veteran must be unable to maintain substantially gainful employment as a result of his/her service-connected disabilities. Additionally, a veteran must have:

- One service-connected disability ratable at *60* percent or more, *OR*
- Two or more service-connected disabilities, at least one disability ratable at *40* percent or more with a combined rating of *70* percent or more. Department of Veteran Affairs, Individual Unemployability Fact Sheet at Disability Compensation for Individual Unemployability Word link at www.vba.va.gov/VBA/benefits/factsheets/#BM2

totally and permanently disabled. Therefore, Plaintiff has received disabled veteran benefits at the 100% level from 1969 to the present day.

Yet, the ALJ ignored the VA disability rating, finding to the contrary that Plaintiff is not disabled. Nevertheless, case law in this Circuit disagrees with the ALJ's complete rejection of the VA's disability rating. In *Allord v. Barnhart*, 455 F.3d 818 (7th Cir. 2006) (citing serious flaws in the ALJ's reasoning as the basis for reversal), a decorated Vietnam combat veteran suffering from severe post-traumatic stress disorder won reversal of the SSA's denial of benefits in part because the Seventh Circuit held that the VA's disability rating was entitled to "some weight"[5].

Specifically, Circuit Judge Richard Posner wrote in *Allord*:

> We have said that SSA should give the VA's determination of disability "some weight." *Davel v. Sullivan, 902 F.2d 559, 560-61 n. 1 (7th Cir. 1990). Allord, Id.*

Yet, the ALJ in this case did not even mention the VA's disability rating. This failure to comply with the *Allord* and *Davel* decisions (cited herein) negatively affected Claimant's disability analysis as a whole. Yet the fact is that the VA disability rating, established in 1969, declared that Plaintiff was permanently and totally disabled, and

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[5] Other circuits afford differing degrees of weight to a VA disability rating in a SSA disability context. For example, a VA rating is certainly not binding on the Secretary, but it is evidence that should be considered and is entitled to "great weight". *Rodriguez v. Schweiker*, 640 F.2d 682, 686 (5th Cir. 1981) as *cited in Kemp v. Astrue*, 308 Fed. Appx. 423 (11th Cir. 2009). Also, an ALJ must ordinarily give great weight to a VA determination of disability. *McCartey v. Massanari,* 298 F.3d 1072, 1076 (9th Cir. 2002) *as cited in Valentine v. Comm'r SSA*, 2009 U.S. App LEXIS 15923 (9th Cir. 2009) *and Cushman v. Astrue*, 175 Fed. Appx. 861 (9th Cir. 2006). Although findings by other agencies are not binding on the [Commissioner], they are entitled to weight and must be considered. *Baca v. Dep't of Health & Human Servs.*, 5 F.3d 476, 480 (10th Cir. 1993) (further quotation omitted); *see also* 20 C.F.R. § 404.1512(b)(5) (stating agency will consider "[d]ecisions by any governmental or nongovernmental agency" concerning disability) *as cited in Breneiser v. Astrue*, 231 Fed. Appx. 840 (10th Cir. 2007).

that disability rating continues to the present day. If the ALJ had considered this VA evidence of total, permanent disability in any measure, which was based on objective military medical evidence[6], then the weight of that evidence would have shown that

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[6] The MEB and PEB based their disability decision on reports from Plaintiff's treating physicans and examining sources. For example, the Report of Medical Examination for Disability Evaluation gives extensive details about Plaintiff's physical condition from an examining source, Dr. Robert J.W. Kinzel, M.D., at the VAOP Clinic in Indianapolis. (R. 284). Further, the MEB report was based on hospital records from the Philadelphia Naval Hospital (January 1969), and Great Lakes Naval Hospital (July 1968)(R. 292-293). Details about the surgery, losses, and scarring came from doctors who operated on, treated, and assessed Plaintiff. If, in their opinion, Plaintiff had not merited disability consideration, then they would not have recommended referral to the MEB. Likewise, the MEB would not have recommended that Plaintiff's case be considered by the PEB unless its members felt that Plaintiff's condition qualified for disability consideration. (R. 293).

While there is no specific opinion statement from one of Plaintiff's treating physicians or examining source as to Plaintiff's ability to work, it follows logically that if Plaintiff's doctors and examiners had not believed that he was totally and permanently disabled, they would not have referred his case to the PEB for discharge. If the opinion of a treating physician is supported by acceptable medical evidence and is not inconsistent with other substantial evidence in the record, it must be given controlling weight. 20 C.F.R.§ 404.1527(d)(2); *Schmidt v. Astrue*, 496 F. 3d 833 (7th Cir. 2007) *as cited in Oakes v. Astrue,* 258 Fed. Appx. 38 (7th Cir. 2007). SSA regulations advise claimants that:

> . . . a treating source's opinion on the issue(s) of the *nature and severity of your impairment(s)* will be given "controlling weight if the opinion is "well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record. 20 C.F.R. § 404.1527(d)(2) (emphasis added). *Green-Younger v. Barnhart*, 335 F.3d 99 (2nd Cir. 2003). *See Shramek v. Apfel*, 226 F.3d 809 (7th Cir. 2000), *Moss v. Astrue*, 555 F.3d 556 (7th Cir. 2009), *Bauer v. Astrue*, 532 F.3d 606 (7th Cir. 2008), *Collins v. Astrue*, 2009 U.S. App. LEXIS 9950 (7th Cir. 2009), and *Day v. Astrue*, 2009 U.S. App. 9227 (7th Cir. 2009).

Therefore, there is a presumption that the opinion of a treating physician is entitled to great deference. If an ALJ does not give the treating physicians' opinion controlling weight, he must offer "good reasons" for explaining how much weight he has given the physician's medical opinion. 20 C.F.R. § 404.157(d)(2) and *Schmidt v. Astrue*, 496 F. 3d 833 (7th Cir. 2007) *as cited in Day v. Astrue*, 2009 U.S. App. LEXIS 9227 (7th Cir. 2009).

While not totally on point, it is possible to accord controlling weight to the inherent opinions of the treating physicians that formed the basis of the MEB/PEB determination which found Plaintiff totally and permanently disabled. From this view, the ALJ should have given controlling weight to the treating physicians' recommendation that the Plaintiff be evaluated for total and permanent disability, or he should have set forth good reasons for ignoring them. Thus, it is possible to conclude that the ALJ erred in disregarding any treating physician

Plaintiff is and was totally and permanently disabled. Therefore, this case must be remanded for further proceedings consistent with the *Allord* and *Davel* opinions, including directions on remand to the ALJ to consider the VA's disability rating, culled from treating physician and examining source opinions, as well as all other supporting medical evidence to properly accord weight to the relevant evidence in this matter.

E. The ALJ's decision that Plaintiff's testimony was not credible was in error where the ALJ did not set forth explicit, specific, and cogent reasons for his disbelief in Plaintiff's credibility.

As to Plaintiff's credibility, the ALJ wrote:

> After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could have been reasonably expected to produce the alleged symptoms, but that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible. (R. 21).

Specifically, the Plaintiff testified that he has been treated by the VA since 1969. (R. 342). His stamina continues to be low due to his injury level. He is limited as to how long he can stand and sit, becoming uncomfortable after one half hour and must move around to alleviate pain. Further, he cannot walk more than two blocks. (R. 348, 354). He was never able to walk very far in the early '70s because the 20 or more major surgeries he underwent took a toll on his body, zapping his strength and causing him to lose nearly half his body weight (from 160 lbs. to 87 lbs.). (R. 349). He was on multiple medications for shrapnel poisoning and pain, taking 40 to 60 pills a day, including narcotics, specifically Demerol. (R. 351). In addition to pain and weakness, Plaintiff came to the VA hospital in Indianapolis a couple times per week for treatment. (R. 352, 357). For that reason, Plaintiff could not have maintained any sustained activity, such as

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evidence as to the foundation for the VA disability rating, as well as in disregarding the rating itself.

gainful employment, for 8 hours every day of every week in 1971-1973.[7] His condition has not improved, but has continued to deteriorate as his body takes the natural course of aging. Plaintiff's testimony showed that instead of improving, he has simply learned to live with his pain and limitations. (R. 360). Yet, the ALJ chose not to believe Plaintiff's testimony, finding it not credible.

While an ALJ is not required to discuss every piece of evidence, he must build a logical bridge from evidence to conclusion. *Steele v Barnhart*, 290 F.3d 936 (7th Cir. 2002) *as cited in Villano v. Astrue*, 556 F.3d 558 (7th Cir. 2009); *see Indoranto v. Barnhart*, 374 F. 3d 470 (7th Cir. 2004); *Zurawski v. Halter,* 245 F. 3d 881 (7th Cir. 2001). Nevertheless, with Plaintiff's testimony as background, augmented by objective military medical evidence in support of the VA's disability rating, the ALJ's decision did not build a logical bridge from Plaintiff's statements to the ALJ's decision that Plaintiff's testimony was not credible.

Why was Plaintiff's testimony not credible? The decision does not say, and yet, in order for this Court to affirm that decision, the ALJ's opinion must contain specific reasons for the finding on credibility, supported by evidence in the case record. To determine credibility, an ALJ must consider several factors, including the claimant's daily activities, his level of pain or symptoms, aggravating factors, medication, treatment, and limitations, *see* 20 C.F.R. § 404.1529(c); S.S.R. 96-7p, 1996 SSR LEXIS 4, and justify the finding with specific reasons, *see Steele v Barnhart*, 290 F.3d 936 (7th Cir. 2002) as cited in *Villano v. Astrue*, 556 F.3d 558 (7th Cir. 2009). The ALJ's decision

[7] In *Haynes v. Barnhart*, 416 F.3d 621 (7th Cir. 2005), the VE testified that if a claimant must miss more than two workdays a month, the claimant would unemployable. Since Plaintiff's testimony shows that he was at the VA hospital as much as 8 days per month, he would have missed 8 workdays per month, rendering him unemployable for that reason alone.

must be sufficiently specific to make clear to the individual, and to any subsequent reviewers, the weight the adjudicator gave to the claimant's statements and the reasons for that weight. *Rogers v. Comm'n of Social Security,* 486 F.3d 234 (6th Cir. 2007).

Social Security Ruling 96-7p affirms that the ALJ's determination or decision regarding claimant credibility must:

> contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight. In this regard, it is not sufficient for the adjudicator to make a single, conclusory statement that "the individual's allegations have been considered" or that "the allegations are (or are not) credible." It is also not enough for the adjudicator simply to recite the factors that are described in the regulations for evaluating symptoms. SSR 96-7p *in Zurawski v. Apfel*, 245 F.3d 881, 887 (7th Cir. 2001).

Yet the ALJ made only the following conclusory statement as to why he discredited Plaintiff's testimony:

> In making this finding, the undersigned considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and SSRs 96-4p and 96-7p. (R. 21).

Continuing, the ALJ referred to VA notes from 2002 and 2003 (R. 21-22) even though the relevant period in question is limited to 1971-1973, missing the point entirely.[8] As to the relevant time period, and the more than Forty (40) pages of military

[8] The issue before this court, as ALJ Hanson made very clear at hearing, is whether Plaintiff was disabled between his September 1971 onset of disability and the March 1973 expiration of his insured status. In order to be entitled to disability insurance benefits, Plaintiff must prove that he became disabled prior to the expiration of his insured status on March 1973. (Defendant's Memorandum in Support of Commissioner's Decision, p. 5.) Therefore, both the ALJ, as well as the members of this Court, are called upon to take a trip back in time, as in Doctor Who's blue police box aka time travel machine (TARIS) of

medical evidence bearing on Plaintiff's injuries and VA disability rating in 1969, the ALJ seemingly ignored this evidence when he wrote:

> There is no objective medical evidence to support the claimant's allegations between September 1971 and the date last insured (September 1973). (R. 22).

In writing that sentence, the ALJ ignored the fact that, as shown by a letter in response to one of Indiana's representative's in the United States House of Representatives[9], Plaintiff's VA medical records and SSA records from 1970 through 1993 are missing, were destroyed, or the electronic records which do exist are incomplete. Here, it is not that Plaintiff was not treated or did not suffer pain and disability from 1970 to 1993. Rather, it is that the actions of others in losing, destroying, or incompetently transferring information to electronic media make it impossible for Plaintiff to prove his disabilities during those years objectively via VA and SSA records. Rather, the ALJ, as well as this Court, must use the 1969 records as a spring board to reasonably extrapolate as to whether Plaintiff, as a totally and permanently disabled young man, was capable of working full time in 1971-1973.

Alternatively, in *Allord v. Barnhart*, *supra.*, the plaintiff was allowed to submit an affidavit about his condition and abilities from an friend who knew him during the relevant time period, the same time period in which medical records were missing. Yet, that avenue is virtually closed to Plaintiff because almost everyone who was acquainted with him during 1971-1973 is deceased or estranged from him. Plaintiff's brother, Troy Hardesty, did submit a letter explaining that during the relevant time period, Plaintiff

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BBC fame (http://en.wikipedia.org/wiki/Doctor_Who) or perhaps like Ebenezer Scrooge from Charles Dicken's classic, *A Christmas Carol*, to travel with The Ghost of Christmas Past (http://en.wikipedia.org/wiki/A_Christmas_Carol) to determine whether Plaintiff, as a 21-23 year old man, was capable of gainful employment.

[9] Letter to U.S. Representative Steven Buyer from SSA.(R. 65).

suffered pain with his stump and had trouble getting around with his prosthesis. (See Supplemental Filing, Letter of Troy Hardesty). He recalled that Plaintiff was constantly having problems with his right side hip area, referring to skin grafts from plastic surgery that drained and swelled, making him very uncomfortable while sitting or walking. Troy recalls that Plaintiff could walk, but he was in pain. Yet, Troy has not seen Plaintiff since 2001, so he cannot comment as to Plaintiff's current disabilities. Nevertheless, Troy's letter does substantiate Plaintiff's testimony at hearing as to his pain and difficulties in ambulating in 1970.

Outside of Troy's letter, Plaintiff's testimony, and the objective military medical evidence, drawn from treating physicians and examining sources, which corroborate each other, Plaintiff has no way to evidence objectively the gravity of his condition in 1971-1973. Thus, the supplemental record evidence of his brother's letter, the VA disability rating (based on logical extrapolations to be taken from military medical evidence, treating physician opinions, and examining source opinion, in support of a total and permanent disability rating), Plaintiff's testimony, and the logical conclusions and extensions to be drawn from the nature and extent of his injuries should have been sufficient evidence to establish Plaintiff's credibility as to the nature and extent of his disability.

Furthermore, military medical evidence, the PEB/MEB/VA disability rating, and details about the severity of Plaintiff's injuries, are all in perfect accord with Plaintiff's testimony that he could not work, he did not have sufficient stamina, he could not sit or stand more than one half hour, and he had to rely on others to do everything for him. Thus, there was no discrepancy between the military medical evidence and Plaintiff's

testimony about his condition. The PEB/MEB decision that his condition was permanent and total comports with Plaintiff's testimony that in effect, his limitations are the same now as they were in 1969 through 1973. Against this background, it is clear that no logical bridge was constructed between the firm foundation of Plaintiff's testimony and the military medical evidence on one side and the ALJ's unsupported, and conclusory decision to find Plaintiff's testimony incredulous on the other side.

Nevertheless, case law requires that a credibility determination can be upheld only where the ALJ gave specific reasons for the finding that are supported by substantial evidence. *Moss, Id., citing Arnold v. Barnhart*, 473 F.3d 816 (7th Cir. 2007). As in *Villano*, the ALJ failed to build a logical bridge between the evidence and his conclusion that Villano's testimony was not credible, but he gave no specific reasons for that decision[10]. To the contrary, an ALJ has the duty to set forth and discuss specific reasons or continue to develop the record. As this Court stated in *Zurawski v. Apfel*, 245 F.3d 881 (7th Cir. 2001):

> [t]he ALJ found Zurawski's complaints of disabling pain 'not entirely credible due to the inconsistencies with the objective medical evidence, and inconsistencies with daily activities." Unfortunately, we are left to ponder what exactly these "inconsistencies" are because the ALJ provided no further explanation. *Zurawski, Id.*

Here, as in both *Zurawski* and *Villano*, the ALJ shed no light on the discrepancies he perceived between the medical evidence and Plaintiff's testimony. Stated differently, the

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[10] First, the ALJ did not analyze the factors required under SSR 96-7p, 1996 SSR LEXIS 4: although he briefly described Villano's testimony about her daily activities, he did not, for example, explain whether Villano's daily activities were consistent or inconsistent with the pain and limitations she claimed. The ALJ said he disbelieved Villano's testimony about her inability to sit (albeit in the course of his RFC analysis) because no medical evidence supported such a limitation, but as the court noted, a lack of medical evidence alone is an insufficient reason to discredit testimony. *See* SSR 96-7p, 1996 SSR LEXIS 4; *Clifford,* 227 F.3d at 871-72 *as cited in Villano, Id.*

ALJ has not detailed why Plaintiff is or is not credible, partially credible, or not credible at all. Plaintiff's testimony clearly shows that during the time period in question (1971 through 1973), he did not have enough stamina to work, he could not sit or stand for more than half an hour, and most of the time, he wasn't well enough to do much of anything. Further, he testified that in "the early years", particularly 1971, he was at the VA Hospital in Indianapolis 2 or 3 days a week, meaning that he couldn't possibly have worked 5 days a week for 40 hours every week during that time.

Yet while an ALJ is required to state which of the plaintiff's complaints he rejected and why such complaints were unsupported by the record, *Clifford v. Apfel*, 227 F.3d 863, 872 (7th Cir. 2000), *Brennan-Kenyon v. Barnhart*, 2003 U.S. Dist. LEXIS 4286, *40-41 (N.D. Ill. 2003), the ALJ in this matter simply found that Plaintiff's testimony was not credible without explaining why. While case law shows that the ALJ has the duty to connect the dots and press on until a case is fully developed, the ALJ did not sufficiently question Plaintiff about his daily activities. He asked only how long Plaintiff could sit or stand, omitting to inquire whether Plaintiff could dress himself, cook, clean, drive, shop, bathe, how well he could walk, kneel, stoop, or crawl with his prosthesis, etc. Without that evidence in the record, how could the ALJ have any valid basis from which to set forth specific reasons as to why he did not believe the Plaintiff's testimony?

Because he failed to ask, the ALJ could not explain whether Plaintiff's daily activities and abilities were consistent or inconsistent with the pain and limitations to which Plaintiff testified. Nevertheless, the ALJ wrote, without supporting evidence or reasoning, that the Plaintiff's statements concerning the intensity, persistence, and limiting effects of his symptoms were not entirely credible. This is not true. There was

no contradiction between Plaintiff's testimony and the military medical evidence of record. The Plaintiff's testimony and the military medical evidence mirror each other, showing how and why Plaintiff was totally and permanently disabled in 1969, and logically, for the remainder of his life. The very definition of the word "permanent"[11] establishes that Plaintiff's condition was/is not going to improve. The evidence shows that qualified military, medical personnel looked at the medical evidence from Plaintiff's treating and examining physicians in 1969, determining that, just as Plaintiff testified, he was permanently and totally disabled by his war injuries, rendering him unable to work in the ensuing years. Those medical personnel were in the best position to assess Plaintiff's injuries, as well as their impact on Plaintiff's abilities, and should have been accorded the weight given to treating physician opinions, or at least examining sources, by the SSA. In failing to recognize and accord such evidentiary weight, the ALJ violated the legal standards promulgated by SSA and this Court.

In light of all this evidence, and overlooking the superior position of those military medical personnel to make the disability determination, the ALJ left the reader of this decision in a quandary, unable to decipher how or why the ALJ found that this evidence did not support or substantiate Plaintiff's testimony. Without a recitation of the ALJ's specific reasoning, there is no adequate discussion of the issues with specificity as required by law. *Villano, Ibid*. Because of this deficiency, the ALJ's finding that Plaintiff was not credible must be reversed and remanded. The ALJ did not follow the required legal standards, explain how he reached his conclusions, set forth specific discrepancies,

[11] Permanent: continuing or enduring without fundamental or marked change. http://www.merriam-webster.com/dictionary/permanent.

give cogent reasons, or erect a logical bridge between the evidence and his conclusion that Plaintiff's testimony was not credible. Simply stated, the ALJ did not give the reader of this opinion any reason for his decision to find Plaintiff's testimony not credible. Thus, the ALJ's credibility determination is not premised on substantial evidence of record in accord with prevailing legal standards. Hence, this decision must be reversed and remanded.

F. If this Court determines that the ALJ's credibility determination was defective, then the RFC determination was erroneous, necessitating reversal and remand for reconsideration in light of Plaintiff's limitations and required VE testimony.

The ALJ determined that:

> . . . the claimant has the residual functional capacity to lift up to 10 pounds occasionally; stand and/or walk up to 2 hours in an 8 hour workday with normal breaks; and sit about 6 hours in an 8 hour day with normal breaks. (R.21).

He continued, noting that Plaintiff testified to his inability to work due to lack of stamina and energy, to walk only 2 blocks, stand for half an hour needing to change positions, can only sit for half an hour and can lift 15-20 pounds. (R. 21). Nevertheless, the ALJ found that Plaintiff was able to work with normal breaks in spite of these limitations, discrediting and ignoring Plaintiff's testimony even though it was supported by military medical evidence, based on opinions of treating and examining doctors, and the VA's disability rating. Therefore, if it is found that the ALJ erred in discrediting Plaintiff's testimony about limitations, then that error also renders this RFC determination invalid and contrary to law, necessitating reversal.

Accordingly, where medical evidence did not support an ALJ's determination that a claimant could perform the full range of unskilled light labor, but instead showed that

he could perform light work, indicating that he could not remain either sitting or standing for extended periods of time during the workday, the claimant's employment opportunities were limited to those light jobs where he would have the option to change his position between sitting and standing at will--i.e., light work with a sit/stand option. *Books v. Chater*, 91 F.3d 972 (7th Cir. 1996). Social Security Ruling 83-12 provides in relevant part:

> In some disability claims, the medical facts lead to an assessment of [residual functional capacity] which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for awhile before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work.... SSR 83-12, 1983 WL 31253, at * 4 (SSA) *as cited in Books, Id.*

Continuing, SSR 83-12 says:

> ... [M]ost jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a V[ocational] S[pecialist] should be consulted to clarify the implications for the occupational base. *Books, Ibid.*

The Appeals Council in *Books, supra.* vacated the ALJ's decision and remanded the case for consideration of whether, in spite of his ability to perform light work, Books was disabled because he could only work in a situation where he had the ability to sit or stand at will. Consistent with the mandate of SSR 83-12, the Appeals Council instructed the ALJ to obtain expert testimony from a Vocational Specialist concerning whether a substantial number of potential unskilled employment opportunities exist for an individual who is restricted to performing light work with a sit/stand option. *Books, Id.*

Just as in *Books*, *Ibid.,* Plaintiff testified that he could not remain either sitting or standing for more than half an hour during the workday. Similarly, it follows that Plaintiff's employment opportunities are likewise limited to those light jobs where he would have the option to change his position between sitting and standing at will--i.e., light work with a sit/stand option. Therefore, Plaintiff, just like Books, is disabled in spite of his alleged ability to perform light work because he can only work in a situation where he has the ability to sit or stand at will. Consistent with the mandate of SSR 83-12, this Court should reverse and remand with instructions to the ALJ to obtain expert testimony from a VE concerning whether a substantial number of potential unskilled employment opportunities exist for an individual who is restricted to performing light work with a sit/stand option.

G. The ALJ's use of the SSA Disability grid to determine that Plaintiff was not disabled was in error where evidence shows that Claimant suffered from both exertional and nonexertional limitations, making consideration of the testimony of a VE mandatory.

In determining that Plaintiff was not disabled, the ALJ wrote:

> Based on a residual functional capacity for the full range of sedentary work, the undersigned concluded that, through the date last insured, considering the claimant's age, education, and work experience, a finding of "not disabled" is directed by Medical-Vocational Rule 201.27. (R. 22).[12]

At Step Five, the ALJ bears the burden of proving that there are sufficient jobs in the national economy for a hypothetical person with the same impairments that the claimant has. *Knight v. Chater*, 55 F.3d 309, 313 (7th Cir. 1995); *Haddock v. Apfel*, 196 F.3d 1084, 1088 (10th Cir. 1999) *as cited in Borski v. Barnhart*, 33 Fed. Appx. 220 (7th

[12] Remember that, contrary to what the average person would assume, the ALJ made this determination by applying the Grid based on Plaintiff as a 21-23 year old man (focusing solely on 1971-1973), not as a 61 year old man in 2009. The focus of the inquiry was not what Plaintiff can do today. Rather, it is on what Plaintiff was capable of doing in 1971-1973. Even though Plaintiff asserts that application of the Grid is erroneous for the reasons discussed above, if the Grid was applied to Plaintiff as a 61 year old man, it would render him disabled.

Cir. 2002). There are two ways to do so. First, the regulations provide a "Grid," which the ALJ is permitted to use if the applicant's exertional capacity, age, education, and past work experience fit the requirements of a rule within the Grid. *See Haddock,* 196 F.3d *at* 1088. Yet the Grid may be used only if the claimant's individual characteristics fit precisely within the criteria of the Grid. In those cases, the Grid offers a convenient short-cut for the ALJ. But if the claimant does not meet that specific criteria, the ALJ must use the second method: the ALJ is required to hear more particularized evidence about the jobs that would be available for the applicant. Without such vocational evidence, the record is incomplete, and it is impossible for this Court to know one way or the other if the ALJ's decision on Step Five was supported by substantial evidence. *Borski, Id.*

Plaintiff contends that the ALJ's use of the Grid was erroneous because Plaintiff's limitations were not reflected in the Grid: 1) his need for frequent positional changes, and 2) his pain. First, both the ability to stoop and to change position is required for both sedentary and light work positions, which speak of "occasional" stooping (meaning stooping for less than one-third of the workday). See SSR 83-10; *Lauer v. Apfel*, 169 F.3d 489, 492 (7th Cir. 1999) *as cited in Borski, Ibid.* In that case, the court remarked that it was very hard to find any affirmative evidence in the record that Borski could stoop "occasionally." He himself testified that he could not stoop at all. Likewise, there is no evidence that Plaintiff can stoop because the ALJ did not ask, but logically, it seems unlikely that a totally and permanently disabled amputee could stoop, even occasionally. Further evidence is needed in order to know definitively if Plaintiff can stoop.

Secondly, as in *Borski,* there was a total lack of evidence to support the proposition that Plaintiff could remain in a sitting or a standing position long enough to perform either sedentary or light work.[13] SSA has recognized that someone who needs to go regularly from one position to the other cannot do either kind of work unless the need to change positions can be "accommodated by scheduled breaks and a lunch period." SSR 96-9p *as cited in Borski, Id.* Where scheduled breaks are not enough, the applicant needs a so-called "sit/stand option". That takes the case out of the Grid, requiring the use of the second method: the input of a Vocational Expert. *Id.*; *see* SSR 83-12; see also *Peterson v. Chater*, 96 F.3d 1015, 1016 (7th Cir. 1996); *Jesurum v. Sec'y of Health & Human Servs.*, 48 F.3d 114, 120 (3d Cir. 1995) (collecting cases) *as cited in Borski, Ibid.*

Thirdly, Plaintiff testified that pain limited his abilities. In *Zurawski v. Halter*, 245 F.3d 881 (7th Cir. 2001), pain was considered a nonexertional limitation that might substantially reduce a range of work an individual can perform. In that situation, the use of the Grid was inappropriate, and the ALJ must consult a VE. *Zurawski, Id.* As in this case, the ALJ improperly discredited Zurawski's complaints of disabling pain. Zurawski testified that he suffered from debilitating pain that restricted his ability to sit, walk, stand, lift, carry, or bend on a prolonged basis. Where there was some evidence bolstering that claim, the *Zurawski* court reversed and remanded. *Zurawski, Ibid.*

In short, where there is some evidence bolstering a claimant's testimony as to pain restricting his ability to sit, walk, stand, lift, carry or bend, these are nonexertional

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[13] Sedentary work requires more or less the same exertional level as light work. The difference between the two relates to position: sedentary work requires "frequent" (*i.e.* up to two-thirds of the workday) sitting and "occasional" standing, while light work requires "occasional" sitting and "frequent" standing. *Borski, Id.*

limitations which the Grid does not consider. Where a claimant suffers from both exertional and nonexertional limitations, the ALJ must use the second method: consult a VE to establish whether a significant number of jobs exist allowing for both types of limitations. *See* 20 C.F.R. pt. 404, supbt. P, App. 2 § 200.00(e); *Villano v. Astrue*, 556 F.3d 558, 564 (7th Cir. 2009); *Haynes v. Barnhart*, 416 F.3d 621, 628-29 (7th Cir. 2005); *Luna v. Shalala*, 22 F.3d 687, 691-92 (7th Cir. 1994) *as cited in Lawrence v. Astrue*, 2009 U.S. 16354 (7th Cir. 2009).

Plaintiff testified to his inability to stand for more than half an hour or walk more than 2 blocks, how he has to change position to alleviate his pain, and how his lack of energy and stamina prevent him from working. Had he been asked about his ability to stoop or crawl, it is likely that he would have answered that he was unable to do so. All of these assertions are bolstered by the PEB/VA disability rating, and all of them are nonexertional limitations. As such, the weight of the evidence shows that Plaintiff suffers from both exertional and nonexertional limitations, entitling him not to a Grid determination of disability, but to a determination that requires a VE's testimony to establish whether a significant number of jobs exist allowing for both types of limitations.

At Step Five, the burden to show that the limitations on sitting, standing, and stooping are not significant rests not on Plaintiff's shoulders, but on the ALJ. *See* 20 C.F.R. § 404.1520(a)(4)(i)-(iv); *Schmidt v. Astrue*, 496 F.3d 833, 841 (7th Cir. 2007) *as cited in Lawrence, Id.* To meet this burden, the ALJ has to solicit testimony from a VE or otherwise consult vocational materials to establish that as in *Lawrence, supra.,* claimant's limitations (in *Lawrence*, the limitation was the inability to reach more than

just occasionally) bore no significant burden on his ability to perform sedentary jobs. *See Villano*, 556 F.3d at 564 (7th Cir. 2009); *Peterson v. Chater*, 96 F.3d 1015, 1016 (7th Cir. 1996) *as cited in Lawrence, Ibid*. Because the ALJ did not solicit such VE evidence in *Lawrence*, his reliance on the Grid at Step five was not supported by substantial evidence, necessitating reversal.

Likewise, the ALJ's reliance on the Grid to determine that Plaintiff was disabled is unsupported by substantial evidence in that Plaintiff is limited in his ability to sit and stand as well as by the disabling pain he suffers. The ALJ had the burden to show that Plaintiff's limitations were not significant (which he omitted to do), but further, he failed to solicit VE testimony to establish that these inabilities bore no significant burden on Plaintiff's ability to perform sedentary jobs. Because the ALJ did not solicit such VE evidence where it was required, the ALJ's reliance on the Grid was not supported by substantial evidence. Without substantial evidentiary support, this ruling must be reversed and remanded.

H. The ALJ erred by failing to require evidence from a Vocational Expert as to whether jobs exist for Plaintiff in the national economy pursuant to 42 U.S.C. § 423(d)(2)(A) and 20 CFR 404.1512(g) and 404.1560(c).

The ALJ bears the burden of proving that there are jobs in the national economy that the plaintiff can perform. *Herron v. Shalala*, 19 F.3d 329, 333 n.18 (7th Cir. 1994). Typically, an ALJ uses a VE to assess whether there are a significant number of jobs in the national economy that the claimant can do. *Lee v. Sullivan*, 988 F.2d 789, 793 (7th Cir. 1993).).

In the ALJ's decision, he wrote:

> . . . there are jobs that existed in significant numbers in the national economy that the claimant could have performed (20 C.F.R. 404.1560(c) and 404.1566. (R. 22).

Although VE Stephanie Archer was present at the hearing, she never gave any testimony in this matter at all. (Tr. 32-34, 53, 341). Thus, it is impossible for the ALJ to have met this burden of proof where no vocational testimony was presented at hearing or exists in the record.

Clearly, an ALJ's decision must be based upon consideration of all the relevant evidence, *Smith v. Apfel*, 231 F.3d 433, 438 (7th Cir. 2000) (citations omitted), but logically, an ALJ cannot create evidence that is not in the record and then purport to rely upon it in making his decision. Such conclusions, completely unsupported by the evidence of record, cannot possibly satisfy the ALJ's burden at Step Five. Because the ALJ purportedly relied upon vocational information that simply does not exist in the record, remand is necessary. *Steele v. Barnhart*, 290 F.3d 936 (7th Cir. 2002).

Perhaps because of the handoff of this case from one ALJ to another, the HOCALJ, this case fell through the cracks, and the ALJ failed to hear any VE evidence as to Plaintiff's situation. In any event, as a matter of simple logic and law, the ALJ did not meet his burden to prove this point by substantial evidence as required by 20 C.F.R. § 404.1560(c)(2). Hence, this matter must be reversed and remanded because the ALJ failed to show substantial evidence in support of this essential point.

I. The ALJ erred in rendering a decision where one ALJ heard the testimony at hearing, but another ALJ (HOCALJ) signed the decision without any apparent authorization to do so. Alternatively, if the case was reassigned, but no subsequent hearing was held under HALLEX requirements, Claimant was prejudiced by omission of required vocational evidence, and the refusal to determine his credibility based on testimony as to the newly acquired military medical evidence of his permanently disabling condition and VA disability rating in violation of HALLEX I-2-840.

At Plaintiff's hearing on August 10, 2005, the transcript shows the following introduction:

> "My name is Robert Hansen. I'll be deciding your appeal." (R. 341).

The transcript reflects that Hansen, as the presiding ALJ, continued the August 10, 2005 hearing and left the record open for the receipt of more military medical records to establish the Plaintiff's disability during the relevant period of 1971-1973. (R. 362). VE Stephanie Archer had been summoned to provide vocational testimony and was present at that hearing, but did not testify. (R. 32-34, 53, 341).

On October 25, 2005, Plaintiff's counsel obtained, and sent to ALJ Hanson (R. 281), Plaintiff's military medical and service records from 1967-1969, which included his PEB medical examination for disability from September 17, 1969 (R. 284), reports from treating doctors and examining sources about his physical capabilities and the cause, nature, and severity of his injuries (R. 285-287), the MEB report (R. 292-293), and a PEB report, stating that Plaintiff was unfit for duty and honorably discharging him, transferring Plaintiff to the permanently disabled retired list. (R. 58, 327).

Sixteen months after the hearing date, on March 30, 2007, Plaintiff and his counsel received copies of the ALJ's Decision, but it was signed by Stephen E. David, HOCALJ, rather than by the ALJ who heard the evidence at hearing, namely, ALJ Hanson. (R. 23). There was no reason given as to why ALJ Hanson had not signed the decision, and it was impossible to determine who actually authored it.

The SSA's internal procedures are defined in the Hearings, Appeals and Litigation Law Manual (HALLEX), which provides that:

> When an Administrative Law Judge (ALJ) who conducted a hearing in a case is not available to issue the decision because of death, retirement, resignation, prolonged leave of 30 or more days, etc., the Hearing Office Chief ALJ will reassign the case to another ALJ. The ALJ to whom the case is reassigned will review the record and determine whether or not another hearing is required to issue a decision. The ALJ's review will include all of the evidence of record, including the cassette recording of the hearing.
>
> 1. If the ALJ is prepared to issue a fully favorable decision, another hearing would not be necessary.
>
> 2. If the ALJ is prepared to issue a less than favorable decision, another hearing may be necessary. For example, another hearing would be necessary if . . . the claimant alleges disabling pain, and the ALJ believes that the claimant's credibility and demeanor could be a significant factor in deciding the case. HALLEX I-2-840 as cited in *Shave v. Apfel*, 230 F.3d 592(5th Cir. 2001).

Thus, under this HALLEX standard, if ALJ Hanson was unavailable to issue a decision in Plaintiff's case, then the case should have been reassigned, perhaps to HOCALJ Davis. Then, HOCALJ Davis or another ALJ should have reviewed the record to determine whether or not another hearing was required to issue a decision. Since HOCALJ Davis clearly wanted to (and did) issue a less than favorable decision, another hearing should have been ordered under Point 2 of HALLEX I-2-840 to assess the credibility of Plaintiff's testimony vis a vis the newly acquired military medical evidence. Further, HOCALJ Davis should have seen the necessity of hearing some VE evidence as well.

Yet HALLEX I-2-840 also says:

> When an ALJ has approved a final decision draft, but is unavailable to sign the final decision, the HOCALJ will have authority to sign the final decision/order on behalf of the ALJ who is temporarily unavailable to sign the final decision/order if the ALJ gave the HOCALJ prior affirmative written authorization to sign the decision/order for the ALJ. . . . The final decision/order signed by the HOCALJ, the draft decision/order approved

> by the ALJ and the ALJ's written authorization for the HOCALJ to sign the final decision/order on his/her behalf will be retained in the claims folder. HALLEX I-2-840.

Curiously, while Plaintiff possesses a certified, complete record of this matter, it does not contain the draft decision/order approved by the ALJ and the ALJ's written authorization for the HOCALJ to sign the final decision/order on his/her behalf as HALLEX I-2-840 requires. Therefore, Plaintiff has no way to know whether ALJ Hanson duly authorized HOCALJ Davis to sign this decision as per HALLEX I-2-840 or whether his case was reassigned to HOCALJ Davis, who thereafter should have seen that two deficiencies necessitated a new hearing under HALLEX I-2-840: 1) new military medical evidence bearing on the relevant time period had been received, and the assessment of Plaintiff's claims in testifying about it, and 2) the VE had not testified. Thus, under either portion of HALLEX I-2-840 in this case, SSA has not followed its own internal procedures because of HOCALJ Davis' oversight or failure to follow SSA internal procedures.

While a diligent search of published opinions from the Seventh Circuit did not render any relevant cases considering the enforcement of Social Security internal procedures as set forth in HALLEX[14], the *Shave* case from the Fifth Circuit does. In that case, Shave pointed out that the ALJ expressly found that his credibility was diminished to the extent not supported by the objective medical evidence. Thus, Shave argued that the ALJ who was reassigned to his case had an imperative and unavoidable obligation to hold a second hearing prior to rendering a decision. Specifically, the *Shave* Court said:

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[14] Yet, the Seventh Circuit has indicated that violations of Social Security Rulings (SSRs) constitute reversible error. *Lauer v. Bowen*, 818 F.2d 636 (7th Cir. 1987) (*per curium*); *United Fire Ins. Co. v. Commissioner of Internal Revenue*, 768 F.2d 164, 169 (7th Cir. 1985) *as cited in Liskowitz v. Astrue*, 559 F.3d 736 (7th Cir. 2009). If SSRs are analogous to HALLEX rules, then apparently the Seventh Circuit would view violations of HALLEX rules as reversible error as well.

> This Circuit has expressed a strong preference for requiring the Social Security Administration to follow its own internal procedures. *See Newton*, 209 F.3d at 459 ("While HALLEX does not carry the authority of law, this court has held that where the rights of individuals are affected, an agency must follow its own procedures, even where the internal procedures are more rigorous than would otherwise be required."). This Court requires, however, a showing that the claimant was prejudiced by the agency's failure to follow a particular rule before such a failure will be permitted to serve as the basis for relief from an ALJ's decision. *Shave*, *Id*, *citing Newton v. Apfel*, 209 F.3d 448, 456 (5th Cir. 2000).

Plaintiff asserts that there were three significant and deciding factors in this matter: 1) the failure to hear vocational expert testimony about his case (as discussed above), 2) HOCALJ Davis' incomplete corpus of knowledge as to the impact of the wounds suffered by Plaintiff on his ability to work, and 3) denial of Claimant's right to testify about his military medical records, bearing on his credibility. Thus, a second hearing not only would have added to the administrative record in a meaningful way, but as to the VE testimony, was necessary and required in order for this decision to be supported by substantial evidence.

Since there is no explanation as to why ALJ Hanson heard the case, but HOCALJ Davis signed the decision, it is likely that procedural or prejudicial mistakes were made, and there cannot have been any meaningful continuity here. Testimony from a VE and an assessment of the Plaintiff's credibility in response to questions about the military medical evidence of his war wounds, as well as their impact on his ability to work in 1971-1973, were both significant and deciding factors bearing upon his employability, credibility, and disability. Both the vocational and credibility elements were crucial to Plaintiff's disability determination, but were denied by virtue of the fact that HOCALJ Davis failed to hold a second hearing in which Plaintiff's testimony about the military

medical evidence or the VE's testimony could be heard. This errant result prejudiced Plaintiff, necessitating reversal and remand.

VII. CONCLUSION

For the reasons stated herein, the unfavorable decision rendered by the ALJ should be reversed and a full award of benefits ordered. Alternatively, the case should be remanded with directions consistent with the errors noted herein.

Dated: August 27,2009

Respectfully Submitted,

_____

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UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

James M. Hardesty,
Plaintiff-Appellant

V.

Michael Astrue,
Commissioner of Social Security,
Defendant-Appellee

Appeal From The United States District Court
For the Southern District of Indiana
Case No. 1:07-CV-1396-LJM-WTL
The Honorable Judge Larry J. McKinney

BRIEF OF PLAINTIFF-APPELLANT JAMES M. HARDESTY
APPENDIX

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APPENDIX

Circuit Rule 30(c) Statement

C. David Little, attorney for appellant, certifies, pursuant to Circuit Rule 30, that all of the materials required by parts (a) and (b) of Rule 30 are included in the Appendix.

_____

C. David Little

Circuit Rule 32(d)(2) Statement

C. David Little, attorney for appellant, certifies, pursuant to Circuit Rule 32, that appellant's brief contains no more than 14,000 words. According to the Microsoft Office Word 2007 application, this brief contains 11,954 (by Anne's count) words.

_____

C. David Little

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 39(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format.

_____

C. David Little

Certificate of Service

To: Thomas E. Kieper via CM/ECF delivery system as well as First Class Mail, postage prepaid.

The undersigned attorney for the Plaintiff-Appellant, James M. Hardesty, hereby certifies that he
caused two paper copies of the foregoing and one copy of the preceding brief on disk to be
served on the attorney named above by First Class U.S. Mail at the above addresses, on this 27th
day of August, 2009.

_____

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