The Mess: Federal Court Appeals

Addressing the disability issues

University of Kentucky at Lexington

9/17/2016

Mary T. Meadows, Esq.
Roose & Ressler,
a Legal Professional Association
3450 W Central Ave, Suite 124
Toledo, OH 43615
(419) 242-1515
(419) 241-6002 (fax)
mtmeadows@rooselaw.com

Social Security Terms of Art

ELIGIBILITY FOR DISABLITY PROGRAMS

Types of disability programs and eligibility: Disability insurance benefits (referred to as DIB, SSD, or Title II benefits) and Supplemental Security Income (referred to as SSI, or Title XVI benefits) are the primary programs administered by Social Security.

ISSUE	Disability Insurance Benefits	Supplemental Security Income (SSI)
Disability standard	Same for both	
Eligibility	Fully insured (based on earnings credits) and currently insured for disability	Based on limited income and resources
Benefits for children	Auxiliary payments may be made to children under 18 or under 19 and still in high school	No payment for children, though a disabled child may also apply for disability under this program (parental income deemed to child). Disability standard for child different than adult
Benefits to spouse	Yes, if child(ren) in spouse's care are under 16 or disabled	None. However, a disabled spouse may also apply for benefits under this program
Earnings requirement	Typically must have worked for at least five of the past 10 years to be eligible	None
Medical coverage	Eligible for Medicare two years after eligibility, and depending on income, may be eligible for Medicaid (and premium assistance)	Eligible for Medicaid

Other types of benefits using the same disability standard include:

- Widow's benefits (eligibility based on deceased wage earner's record)
- Disabled adult child (eligibility based on parent wage earner who is disabled, retired, or deceased)
- Medicare only (eligibility based on payment into Medicare, typically government employee)

DISABILITY DEFINED

The regulations define disability as an inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment(s) that makes you unable to do your past relevant work or any other substantial gainful work that exists in the national economy. 20 C.F.R. § 404.1505(a)

To reach a determination of disability, Social Security employs a five-step sequential evaluation.

Is the claimant working (engaged in substantial gainful activity)? If yes, not disabled. If no, proceed to Step 2

Does the claimant have a severe impairment? If no, not disabled. If yes, proceed to Step 3

Does the claimant have a listed impairment? If yes, disabled. If no, proceed to Step 4

Can the claimant perform past relevant work? If yes, not disabled. If no, proceed to Step 5

Can the claimant, given age, education, and work experience, perform other work? If no, disabled. If yes, not disabled.

In order to understand this process, you will need to understand what Social Security means by some of the terms used in the process.

Step 1: Substantial Gainful Activity or "work"

A claimant will be deemed "working" if he or she is engaged in substantial gainful activity (SGA), "regardless of legality." 20 C.F.R. §§ 404.1571, 416.971.

- "Substantial" involves doing significant physical or mental activities. 20 C.F.R. §§ 404.1572(a), 416.972(a).
- "Gainful" means the kind of work usually done for pay or profit. 20 C.F.R. §§ 404.1572(b), 416.972(b).

In general, as of 2016, Social Security considers work SGA if the claimant earns more than $1130/month. A claimant who is statutorily blind can earn up to $1820/month before he or she will be found engaged in SGA. *See* https://www.ssa.gov/oact/cola/sga.html

Step 2: Severe impairments

Social Security defines severity in the inverse. An impairment is "not severe" only if it does not significantly limit a claimant's physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a).

Basic work activities include

- Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling.
- Mental functions such as: understanding, carrying out, and remembering simple instructions; use of judgment; responding appropriately to supervision, coworkers and usual work situations; and dealing with changes in a routine work setting.

20 C.F.R. §§ 404.1521(b)(1), 416.921(b)(1).

Step 3: Listings

Listing of Impairments, Appendix 1 to Subpart P of Part 404.

- Grouped by body system. "Lists" clinical findings that are per se disabling, regardless of age, education, or work experience
- Physical listings include 11 body systems (including a multiple body systems), cancers, and immune system disorders.
- Mental listings address "A" criteria (diagnostic criteria); "B" criteria (functional limitations); and "C" criteria (need for supportive living)

See https://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm and https://www.ssa.gov/disability/professionals/bluebook/ChildhoodListings.htm

Interlude: Residual Functional Capacity

Before reaching Steps 4 and 5 of the sequential evaluation, an adjudicator/judge must determine a claimant's residual functional capacity.

- Residual functional capacity (RFC) is a "multidimensional description of the work-related abilities you retain in spite of your medical impairments." § 12.00(A), Appendix 1 to Subpart P, Part 404
- Ordinarily, RFC is the individual's maximum remaining ability to do sustained work activities in an ordinary work setting on a regular and continuing basis, and the RFC assessment must include a discussion of the individual's abilities on that basis. A "regular and continuing basis" means 8 hours a day, for 5 days a week, or an equivalent work schedule. Social Security Ruling 96-8p

A residual functional capacity typically includes both exertional and non-exertional limitations. Exertional limitations are defined by the ability to lift, carry, stand, walk, and sit. 20 C.F.R. §§ 404.1567, 416.967

Exertional level	Lift/carry	Stand/walk	Sit
Sedentary	No more than 10 pounds	Up to two hours a day	At least six hours a day
Light	20 pounds occasionally 10 pounds frequently	At least six hours a day	
Medium	50 pounds occasionally 25 pounds frequently	At least six hours a day	
Heavy	100 pounds occasionally 50 pounds frequently		

Non-exertional limitations represent all other limitations on a person's ability to work. Non-exertional limitations include physical activities such as

- Postural (bend, stoop, kneel, crouch, crawl, balance)
- Manipulative (reaching, handling, fingering, feeling)
- Visual limitations (distance or field of vision)
- Environmental (cleanliness, temperature, exposure to hazards)

Non-exertional limitations also include mental activities such as

- Interacting and relating with others
- Attending and completing tasks
- Understanding, remembering, and carrying out instructions
- Persistence and pace

An RFC determination is based on the record as a whole, including opinion evidence from various sources. Sources may include: acceptable and non-acceptable medical sources, examining and non-examining sources, and treating physician and non-treating physician sources.

Acceptable medical sources include licensed:

- Physicians
- Psychologists
- Optometrists (for purposes of establishing visual disorders)
- Podiatrists (for purposes of establishing foot/ankle disorders)
- Speech pathologists (for purposes of establishing speech or language impairments)

20 C.F.R. §§ 404.1513; 416.913

Other sources(includes non-acceptable medical sources) include

- Other medical sources not listed as acceptable (nurse-practitioners, physicians' assistants, naturopaths, chiropractors, audiologists, and therapists)
- Educational personnel (teachers, counselors, etc)
- Social welfare agency personnel
- Other non-medical sources such as spouses, parents, caregivers, neighbors, etc.

20 C.F.R. §§ 404.1513; 416.913

A treating physician opinion is given deference under the regulations (though this does not guarantee that a treating physician opinion will always be given the most deference). A physician is considered a treating physician when he or she has

- Examined the claimant often enough to obtain a view over time (longitudinal picture) of the claimant's medical problems;
- Has seen the claimant with a frequency that is consistent with accepted medical practice for the claimant's specific impairment.

See generally 20 C.F.R. 404.1527(c), 416.927(c)

Step 4: Past relevant work

At Step 4 of the sequential evaluation, Social Security determines whether the claimant can perform his past relevant work. As a general rule, Social Security states,

> We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity.

20 C.F.R. §§ 404.1565, 416.965. The 15 year window is measured from the date of the decision, unless the person was last insured for benefits at an earlier date, in which case, the measure is the 15 years before the date last insured.

Unfortunately, Social Security does not simply look at the claimant's past relevant work as he or she performed it, but also as generally performed in the national economy.

Further, if the person performed a composite job, that is, a job that involves characteristics of multiple jobs, than the job must be considered as a whole. A claimant must be able to perform all parts of the composite job.

Step 5: Other work

Once a claimant has proved her or she is unable to perform her past relevant work, the burden of coming forward with the proof shifts to the Commissioner to show other work that a claimant can perform given his or her limitations and age, education, and work experience.

Age (*see* 20 C.F.R. §§ 404.1563, 416.963)

Generally refers to chronological age (although there are some "borderline" areas)

- Younger person (under the age of 50)
- Person closely approaching advanced age (age 50-54)
- Person of advanced age (age 55 or older)
- Person closely approaching retirement age (60-full retirement)

Education (*see* 20 C.F.R. §§ 404.1564, 416.964)

Education generally refers to the numerical grade level completed unless there is other evidence to contradict it.

- Illiteracy – inability to read or write
- Marginal education – usually 6th grade or less
- Limited education – usually a 7th grade through the 11th grade
- High school education and above – usually a 12th grade level or above

Work experience *(see* 20 C.F.R. §§ 404.1565, 416.965)
Generally relates not only to exertional levels, but also to skills and abilities acquired through work which a claimant has done in the past.

- Unskilled work – typically learned by short demonstration or up to 30 days (SVP 1-2)
- Semi-skilled work – typically takes more than 30 days to learn and up to six months (SVP 3-4)
- Skilled work – learned in over six months or beyond (SVP 5-9)

Social Security has promulgated rules known as the Medical-Vocational Guidelines, or "Grids," to assist with the determination at Step 5. The "Grids" are literally a rubric of age, education, work experience in tables reflecting various exertional levels. The Grids are most useful in cases where only exertional impairments are involved.
See https://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm

Where there are non-exertional impairments, the Grids are used as a framework for decisionmaking. The framework analysis often requires vocational expert testimony to assess the impact of non-exertional impairments on the claimant's ability to do a range of work.

In order to find "other work," Social Security must show a "significant number" of jobs either in the region where the claimant lives or "in several other regions of the country." 20 C.F.R. §§ 404.1566(a), 416.966(a).

Unfortunately, Social Security's job world is hypothetical. It doesn't matter whether:

- there are jobs in the immediate area where the claimant lives;
- there are job vacancies
- the claimant would be hired, or
- the claimant would want to actually do the work.

THE MESS: FEDERAL COURT APPEAL OF DISABLITY ISSUES

Standard of Review in typical disability cases

- Two lines of inquiry on judicial review: whether substantial evidence in the administrative record supports the administrative law judge's factual findings and whether the administrative law judge "applied the correct legal criteria." *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 745-46 (6th Cir. 2007).
- "Substantial evidence is defined as `such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bowen v. Comm'r*, 478 F.3d at 746 (citing in part *Richardson v. Perales*, 402 U.S. 389, 401 (1977)). It consists of "more than a scintilla of evidence but less than a preponderance." *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 241 (6th Cir. 2007). This standard favors the Agency.
- Where an administrative law judge fails to follow proper legal criteria, it may result in reversal even if the record contains substantial evidence supporting the administrative law judge's factual findings. *See Bowen v. Comm'r*, 478 F.3d at 746. This occurs, for example, when the administrative law judge failed to follow the Commissioner's "own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right." *Bowen v. Comm'r*, 478 F.3d at 746 (citing in part *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 546-47 (6th Cir. 2004)). This standard favors the claimant.

Treating Physician

- Errors in evaluation of treating physician opinion, usually framed as failure to provide "good reason" for the weight given to the opinion of the treating physician.
- The administrative law judge must make and articulate the reasons for rejecting treating physician opinion. 20 C.F.R. § 404.1527(c)(2) ("we will always give good reasons in our . . . decision for the weight we give your treating source's opinion"); *see also Wilson v. Commissioner of Social Security*, 378 F.3d 541 (6th Cir. 2004); *see also Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742 (6th Cir. 200&); *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234 (6th Cir. 2007).
- "[A] failure to follow the procedural requirement of identifying the reasons for discounting the opinions and for explaining precisely how these reasons affected the weight accorded the opinions denotes a lack of substantial evidence, even where the conclusion of the ALJ may be justified based upon the record." *Rogers v. Commissioner*, 486 F.3d at 243 (quoting in part *Wilson v. Commissioner*, 378 F.3d at 544) (internal punctuation omitted).
- The proper standard for evaluating weight to give treating physician involves determining whether the limitations are supported, not whether another

doctor in the record disagrees. *Hensley v. Comm'r of Soc. Sec.*, 573 F.3d 263, 266-67 (6th Cir. 2009).

- "Surely the conflicting substantial evidence must consist of more than the medial opinions of the nontreating and nonexamining doctors. Otherwise the treating-physical rule would have no practical force because the treating source's opinion would have controlling weight only when the other sources agreed with that opinion. Such a rule would turn on its head the regulation's presumption of giving greater weight to treating sources because the weight of such sources would hinge on their consistency with nontreating, nonexaming sources." *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 377 (6th Cir. 2013).
- Where the administrative law judge does not apply the factors specified in the regulations, she has failed to provide good reasons. *Hensley v. Astrue*, 573 F.3d 263, 266-67 (6th Cir. 2009); *see also Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 408 (6th Cir. 2009) ("Treating source medical opinions are still entitled to deference and must be weighed using all of the factors provided in [the regulations]").
- Remandable error. "We have stated that "[w]e do not hesitate to remand when the Commissioner has not provided 'good reasons' for the weight given to a treating physician's opinion and we will continue remanding when we encounter opinions from ALJ's that do not comprehensively set forth the reasons for the weight assigned to a treating physician's opinion." *Hensley v. Astrue*, 573 F.3d 263, 267 (6th Cir. 2009) (citing *Wilson v. Commissioner*, 378 F.3d at 545)

Incomplete hypothetical

- An incomplete or improper hypothetical to the vocational expert. The hypothetical must precisely state the particular and physical and/or mental limitations affecting the claimant. *Varley v. Sec'y of HHS*, 820 F.2d 777, 779 (6th Cir. 1987).
- The hypothetical must also include consideration of age, education and work experience at Step 5. 20 C.F.R. § 404.1520(a)(4)(v); *Webb v. Comm'r of Soc. Sec.*, 368 F.3d 629, 633 (6th Cir. 2004).

Pain and subjective symptoms

- The Commissioner promises that "we will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements." 20 C.F.R. §§ 404.1529(c)(2) 416.929(c)(2).
- However, the Court gives deference to the administrative law judge on credibility. "Upon review, we are to accord the ALJ's determinations of credibility great weight and deference particularly since the ALJ has the opportunity, which we do not, of observing a witness's demeanor while testifying." *Jones v. Commissioner of Social Security*, 336 F.3d 469, 476 (6th

Cir. 2003), citing *Walters V. Commissioner of Social Security,* 127 F.3d 525, 531 (6th Cir. 1997).

- The evaluation of pain requires addressing multiple factors, including daily activities; location, duration, frequency, and intensity of the pain; precipitating and aggravating factors; medications; treatment other than medication; and any measures used to relieve the pain. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3).
- "Although a reviewing court must give deference to the administrative law judge's credibility findings," where the administrative law judge did not apply the full test under 20 C.F.R. § 404.1529(c) and the vast majority of these factors support the Plaintiff's complaints about pain and other symptoms, substantial evidence does not support the administrative law judge's finding. *Felisky v. Bowen,* 35 F.3d 1027, 1040-41 (6th Cir. 1994).
- Social Security recognizes that clinic objective findings such as reduced joint motion, muscle spasm, sensory deficit or motor disruption are useful indicators in the assessment of intensity and persistence of subjective symptoms such as pain. 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).
- "In evaluating an individual's symptoms, it is not sufficient for our adjudicators to make a single, conclusory statement that `the individual's statements about his or her symptoms have been considered' or that `the statements about the individual's symptoms are (or are not) supported or consistent.' It is also not enough for our adjudicators simply to recite the factors described in the regulations for evaluating symptoms. The determination or decision must contain specific reasons for the weight given to the individual's symptoms, be consistent with and supported by the evidence, and be clearly articulated so the individual and any subsequent reviewer can assess how the adjudicator evaluated the individual's symptoms." Social Security Ruling 16-3p, *9 2016 WL 1119029; *see also Rogers v. Comm'r of Soc. Sec.*, 486.
- A long and continuous past work record helps support credibility. Allen v. Califano, 613 F.2d 139,147 (6th Cir. 1980).
- While activities of daily living are considered, they are only relevant to the extent they document an ability to perform activities on a sustained basis. *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 377-78 (6th Cir. 2013).

Failure to consider record as a whole

- Failure to consider the record as a whole undermines the Commissioner's conclusion. *Hurst v. Secretary of Health and Human Services,* 753 F.2d 517, 519 (6th Cir. 1985), *citing, Allen v. Califano,* 613 F.2d 139, 145 (6th Cir. 1973).
- "In the absence of an explicit and reasoned rejection of an entire line of evidence, the remaining evidence is "substantial" only when considered in isolation. It is more than merely "helpful" for the ALJ to articulate reasons ... for crediting or rejecting particular sources of evidence. It is absolutely

essential for meaningful appellate review." *Hurst v. Secretary*, 753 F.2d at 519 (citation omitted).

- An ALJ cannot simply "pick and choose" evidence in the record "relying on some and ignoring others, without offering some rationale for his decision." *Younger v. Comm'r of Soc.Sec.*, 351 F. Supp. 2d 644, 649 (E.D. Mich. 2004).

Defendant cannot mend missing analysis

- The Court reviews the decision of the Commissioner on the rationale and findings provided by the administrative law judge, not on any new rationale that might be provided on appeal. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978); *Sparks v. Bowen*, 807 F.2d 616, 617 (7th Cir. 1968) (Easterbrook, J.).
- "Courts are not at liberty to speculate on the basis of an administrative agency's order . . . The court is not free to accept `appellate counsel's *post hoc* rationalization for agency action in lieu of reasons and findings enunciated by the Board.'" *Hyatt Corporation v. N.L.R.B.*, 929 F.2d 361, 367 (6th Cir. 1991).

Joint Eastern/Western Districts of Kentucky
Local Rules regarding Social Security cases

LR 83.11 Social Security Cases

(a) **Service of Social Security Number on Separate Paper than Complaint.** Any person seeking judicial review of a decision of the Commissioner of Social Security under § 205(g) of the Social Security Act, 42 U.S.C. §405(g), shall provide, on a separate sheet of paper attached to the copies of the complaint served on the Commissioner and the Unites States Attorney, the name and social security number of the worker on whose wage record the application for benefits was filed. The person shall also state in the complaint itself that the name and social security number have been attached to the copies served upon the Commissioner and the United States Attorney. Failure to provide a social security number in this manner is not grounds for dismissal of the complaint. However, in addition to other sanctions that the Court may order, the Commissioner's time for filing an answer and transcript will not begin until the Commissioner has been served in compliance with this subsection. To note for the record any period of tolling of the time to file an answer under this subsection, the United Stated Attorney must file a notice showing the plaintiff's failure to comply.

(b) **Commissioner's Time to Respond.** Within sixty (60) days of service of the complaint, the Commissioner of Social Security must file an answer and transcript of the administrative proceedings. An initial extension of up to sixty (60) days may be granted, for good cause, upon motion of the Commissioner. If the responsible Social Security Administration official files an affidavit detailing the circumstances that require additional time, a second extension of time to respond may be granted. No other extension will be granted.

(c) **Judicial Review.** At the discretion of the judge to whom the case is assigned, judicial review may occur on written motion or oral argument. Unless otherwise ordered motion practice will occur as follows:

(1) Plaintiff must move for summary judgment or judgment on the pleadings within sixty (60) days of the filing of the answer and administrative transcript.

(2) The Commissioner must file a countermotion or a response to the plaintiff's motion within thirty (30) days of service of the Plaintiff's motion

(3) The Clerk must submit the case to the judicial officer immediately following the filing of the Commissioner's countermotion or response.

(4) Extensions of time may be granted only if good cause is shown or there is no objection from any party.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

GENERAL ORDER 13-7

FILED
October 24, 2013

In re: Social Security Actions)
)
) **STANDING SCHEDULING ORDER**
)
)
)
)
)
)

*** *** *** ***

The Court enters this general order for all social security actions. Pursuant to Local Rule 83.11(c), judicial review will be on written motion. It is **ORDERED** as follows:

(1) Once the defendant has filed an answer and a certified copy of the transcript of the administrative record, the plaintiff must move for summary judgment or judgment on the pleadings within sixty (60) days. The plaintiff shall include a supporting memorandum that does not exceed 15 pages in length.

(2) The Commissioner must file a counter-motion or a response to the plaintiff's motion for summary judgment within thirty (30) days of the filing of the plaintiff's motion for summary judgment or judgment on

the pleadings. The Commissioner's counter-motion or response shall not exceed 15 pages in length.

(3) Motion practice shall be governed by Local Rule 7.1 except as otherwise provided in this order.

(a) **The Court shall deem a failure to respond to a motion in a timely fashion as a waiver and/or admission of its contents.** *See Humphrey v. U.S. Attorney Gen. Office*, 279 Fed. App'x. 328, 331 (6th Cir. 2008).

(b) **Issues Presented.** In order to assist the Court in understanding the plaintiff's claims, any motion for summary judgment or judgment on the pleadings **SHALL** include a statement of the legal arguments presented at the beginning of the motion. The statement shall set forth the plaintiff's arguments in a numbered list. [For example: (1) The ALJ improperly discounted the opinion of the treating physician.] The Court will consider only the arguments listed and will not formulate arguments on the parties' behalf. Failure to submit such a statement may constitute grounds for denial of the motion.

(c) **Specific Citations to the Record.** The parties shall provide the Court with specific page citations to the administrative record to

support their arguments. The Court will not undertake an open-ended review of the entirety of the administrative record to find support for the parties' arguments. *See Hollon ex rel. Hollon v. Comm'r of Soc. Sec.*, 447 F.3d 477, 491 (6th Cir. 2006). Failure to provide specific citations to the record may constitute grounds for denial of the motion.

(4) Extensions of time, expansions of page limitations, or permission to file additional briefs may be granted only if good cause is shown.

(5) Nothing in this Order shall preclude the presiding judge from hearing oral argument.

(6) Effective immediately, the Clerk shall file a copy of this Order in all social security actions upon the filing of the answer and administrative transcript.

(7) This General Order supersedes General Order 09-13 filed on November 6, 2009.

Dated this 24th day of October, 2013.

Karen K. Caldwell

KAREN K. CALDWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

G. MCQ	)	CIVIL ACTION NO.: 1:14-cv-5555
	)	
PLAINTIFF,	)	JUDGE A
	)	MAGISTRATE JUDGE Z
v.	)	
	)	
	)	
COMMISSIONER OF SOCIAL SECURITY	)	MOTION FOR SUMMARY JUDGMENT
	)	
DEFENDANT.	)	
	)	

ISSUES PRESENTED

Whether the administrative law judge's finding of residual functional capacity is in error where she gave controlling weight to the opinion of the treating pain specialist concerning Mr. McQ's need to alternate sitting, standing, and walking at will but her finding of residual functional capacity does not reflect this limitations ?

Whether the administrative law judge erred where she failed to consider whether the opinion of the treating specialist concerning Mr. McQ's need to lie down during an eight-hour workday still deserved significant weight even if it did not deserve controlling weight?

NATURE AND STAGE OF THE PROCEEDINGS

This is a civil action for judicial review of administrative action denying disability insurance benefits to Plaintiff. Jurisdiction for this Court's review is based upon 42 U.S.C. § 405(g) and §1383, which provides for United States District Court review for any individual aggrieved by a "final decision" of the Commissioner. The Court entered a procedural order and an extension of time making this brief timely.

16

PRIOR PROCEEDINGS

Plaintiff McQ protectively filed for disability insurance benefits on July 31, 2011.[1] Transcript "Tr." 74, 155. The application was denied initially and on reconsideration. Tr. 92, 102. Mr. McQ timely requested a hearing. Tr. 108. A hearing was held before an administrative law judge (ALJ) on February 13, 2013. Tr. 30-61. The ALJ denied benefits in a decision dated March 12, 2013. Tr. 13-28. She made the following findings:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2016

2. The claimant has not engaged in substantial gainful activity since April 29, 2011, the alleged onset date.

3. The claimant has the following severe impairments: degenerative disc disease and an affective disorder (depressive disorder).

4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in [the Regulations].

5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work as defined in [the Regulations] except able to occasionally lift 20 pounds and frequently lift 10 pounds, is able to stand and walk six hours of an eight-hour workday, is able to sit for six hours of an eight-hour workday, unlimited push/pull other than shown for lift and/or carry; occasionally climb ladders/ropes/scaffolds; occasionally stoop, kneel, crouch and crawl; would be off task 5% of the time; must alternate between sitting and standing every 30 minutes.

6. The claimant is unable to perform any past relevant work.

7. The claimant was born *** and was 51 years old, which is defined as an individual closely approaching advanced age, on the alleged onset date.

---

[1] Mr. McQ also filed an application for Supplemental Security Income.. Tr. 163. This application was apparently denied for non-medical reasons and not pursued.

8. The claimant has at least a high school education and is able to communicate in English.

9. Transferability of job skills is not material to the determination of disability because using the Medical-Vocational Rules as a framework supports a finding that the claimant is "not disabled," whether or not the claimant has transferable job skills.

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform.

11. The claimant has not been under a disability, as defined in the Social Security Act, from April 29, 2011, through the date of this decision.

Tr. 18-24 (citations omitted).

Mr. McQ requested review of this decision to the Appeals Council and filed a supporting memorandum. Tr. 7-12. The Appeals Council denied review in a decision dated July 2, 2014, making the ALJ's decision the final decision of the Commissioner. Tr. 1-6.

STATEMENT OF FACTS

Mr. McQ is a person closely approaching advanced age. Tr. 22 (ALJ Finding 7). He has a high school education. Tr. 23 (Finding 8); Tr. 189. Mr. McQ worked 1988-2011 as an automobile painter ("painter of transportation equipment). Tr. 41-44, 56, 190. His earnings record shows a long, steady work history with progressive increase in earnings. Tr. 172-73. The ALJ found that Mr. McQ could not return to this work. Tr. 22 (Finding 6). The vocational expert testified that there were no skills transferable to sedentary or light work. Tr. 56.

Mr. McQ has a long history of low back pain. *See* Tr. 298, for example. An MRI as early as March 5, 2008, showed narrowing of the L5 nerve root foraminal bilateral and a left paramedian disk extrusion at L3-4. Tr. 296. A lumbar MRI in July 2009 confirmed degenerative disc disease from L3 to S1, most pronounced at L5-S1. There was mild central stenosis at L3-4 secondary to moderate annular bulging and facet arthropathy. Similar findings were seen at L4-5 with moderate bilateral neural foraminal narrowing, but no central stenosis. Anterolisthesis of L5-S1 was again noted. Tr. 293/321-22. X-rays in August 2009 showed unstable anterolisthesis at L4-5. Tr. 292/320.

Mr. McQ underwent pain management with Richard Hurt, M.D., beginning in May 2004 (and continuing) to help him continue to work. Tr. 300-32. He was tried on pain medications (Darvocet, Avinza, Neurontin), non-steroid anti-inflammatories (Daypro), and muscle relaxer (Zanaflex). Tr. 300, for example. He tried lumbar facet injections and transforaminal epidural steroid injections. Tr. 325-32. A neurosurgeon in 2008 recommended epidural blocks again. Tr. 399. A neurosurgeon in 2009 discussed the possibility of a fusion and fixation. Tr. 403.

Even with pain management, Mr. McQ had increasing problems on his job. He would lie down on his break, for example. Tr. 46. He sometimes had to have someone help do the lifting on the job. Tr. 42. His employer started suggesting he go on disability or move to a slower paced shop. Tr. 45. In April 2011 he was laid off. Tr. 43.

Examination by Consultative Examiner Saghafi in November 2011 noted an antalgic gait with a hunched posture. Tr. 354. Range of motion of the lumbar spine was reduced. Tr. 358. An x-ray at the time confirmed anterolisthesis at L5-S1 and other degenerative changes such as spurring. Tr. 361-62. Mr. McQ continued in pain management with Dr. Hurt. Tr. 375-80, 387-96. In December 2011, Mr. McQ reported Tramadol provided only 40% relief. Tr. 379. In March 2012, he had only 25% relief. Tr. 375. Additional medication was pain added. Tr. 376. However, Mr. McQ continued to experience only 40% relief from the pain. Tr. 387-96.

State agency physicians reviewed the file in December 2011 and again in April 2012. The reviewing physicians thought that Mr. McQ could lift 20 pounds occasionally and 10 pounds frequently, as well as walk and/or stand for a total of six hours in an eight-hour workday. Tr. 69. The reviewing physicians noted Mr. McQ could only occasionally climb ladders/ropes/scaffolds, stoop, kneel, crouch, and crawl. Tr. 69-70, 82-83.

On January 15, 2013, Treating Pain Specialist Hurt completed a medical source statement. In this statement, Dr. Hurt indicated that Mr. McQ would need to change positions between sitting, standing, and walking at will. Further, he would need to lie down/recline for more than one hour in an eight-hour workday on a regular and continuing basis. Tr. 385.

In addition to his back pain, Mr. McQ has experienced some depression. A consultative examiner, Thomas M. Evans, M.D., diagnosed a depressive order disorder not otherwise specified and noted that Mr. McQ's depression appeared to

be secondary to his deteriorating physical condition. Tr. 367. Dr. Evans noted some problems on mental status examination with concentration for extended period of time and paying attention to multiple tasks simultaneously. Tr. 367.

At the hearing, Mr. McQ testified that he has pain in his back that limits his mobility. Tr. 47. The pain is helped by lying down, pain medication (including morphine), and using a heating pad. Tr. 47. While he thought he could lift 30-35 pounds, this would increase his pain. Tr. 49. He could pick up groceries without pain but he could not estimate the weight. Tr. 50. Mr. McQ testified he could sit for 30 minutes at a time, stand for 15-20 minutes at a time, and walk for an hour at a time. Tr. 50-51. However, he has to lie down in the course of a day, Tr. 40, 51. He spends most of his day watching television, but he does so lying on his right side on the floor, sometimes for two to three hours. Tr. 39-40. At his last job he laid down, "Every day at lunch and every break I could get away with it and not let anybody see me." Tr. 46.

Mr. McQ testified he is able to do household chores but not for extended periods. For example he might mow the lawn, but when his back starts to bother him he stops, goes into the house, takes some medication and lies down. After that, he can go back out and finish the chore. He estimated that he only does yard work for 30-40 minutes at a time. Tr. 45. He does other chores around the house, such as cooking and laundry. Tr. 39. These chores don't take long because he lives by himself. Tr. 45.

A vocational expert testified at the hearing. Tr. 54-60. He was asked to consider a person of Mr. McQ's age, education, and work experience who was limited in the manner ultimately found by the ALJ. The vocational expert presumed that such a person could perform jobs such as office clerk, information clerk, and counter clerk. Tr. 57-58. If the person needed to lie down for one hour in the course of an eight-hour workday, there would be no jobs. Tr. 58. As to alternating sitting and standing every 30 minutes, the vocational expert testified he presumed that the person could remain on task while switching positions. Tr. 59-60.

STANDARD OF DISABILITY AND SCOPE OF REVIEW

Judicial review of an ALJ's decision proceeds along two lines of inquiry: whether substantial evidence in the administrative record supports the ALJ's factual findings and whether the ALJ "applied the correct legal criteria." *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 745-46 (6th Cir. 2007).

"Substantial evidence is defined as `such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bowen v. Comm'r*, 478 F.3d at 746 (citing in part *Richardson v. Perales*, 402 U.S. 389, 401 (1977)). It consists of "more than a scintilla of evidence but less than a preponderance." *Rogers v. Comm'r of Soc. Sec.*, 486 F.3d 234, 241 (6th Cir. 2007).

The second line of judicial inquiry – reviewing the ALJ's legal criteria – may result in reversal even if the record contains substantial evidence supporting the ALJ's factual findings. *See Bowen v. Comm'r*, 478 F.3d at 746. This occurs, for

example, when the ALJ failed to follow the Commissioner's "own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right." *Bowen v. Comm'r*, 478 F.3d at 746 (citing in part *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 546-47 (6th Cir. 2004)).

The Court reviews the decision of the Commissioner on the rationale and findings provided by the ALJ, not on any new rationale that might be provided on appeal. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978); *Sparks v. Bowen*, 807 F.2d 616, 617 (7th Cir. 1968) (Easterbrook, J.). "Courts are not at liberty to speculate on the basis of an administrative agency's order . . . The court is not free to accept `appellate counsel's *post hoc* rationalization for agency action in lieu of reasons and findings enunciated by the Board.'" *Hyatt Corporation v. N.L.R.B.*, 929 F.2d 361, 367 (6th Cir. 1991).

ARGUMENT

I. **The administrative law judge gave controlling weight to the opinion of the long-term treating pain specialist on the need to alternate walking, sitting and standing but her finding of residual functional capacity does not reflect the limitations identified by the pain specialist.**

It is well established in this Circuit that a treating physician's opinion should be accorded significant weight where it is based on objective evidence. If uncontradicted, the physician's opinion is entitled to complete deference. *Harris v. Heckler*, 756 F.2d 431 (6th Cir. 1985); *King v. Heckler*, 742 F.2d 968 (6th Cir. 1984). The ALJ must articulate a reasonable basis for rejecting the opinion of the treating physician. *Shelman v. Heckler*, 821 F.2d 316 (6th Cir. 1987).

The agency has issued regulations governing the weight that must be given to the opinions of medical source opinions.

> Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on an issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.

20 C.F.R. § 404.1527(c)(2).

In this case, long-term treating pain specialist, Dr. Hurt, offered an opinion on two aspects of Mr. McQ's ability to work. Dr. Hurt noted that Mr. McQ would need to change positions between sitting, standing, and walking at will. Further, he would need to lie down/recline for more than one hour in an eight-hour workday on a regular and continuing basis. Tr. 385.

The ALJ acknowledged this opinion and appropriately accorded "controlling weight" to Dr. Hurt's opinion that Mr. McQ would need to change positions between sitting, standing and walking at will. Tr. 21. However, the ALJ's finding of residual functional capacity only notes that Mr. McQ would need a job that allowed him to alternate between sitting and standing every 30 minutes. Tr. 20 (Finding 5).

The finding of residual functional capacity reached by the ALJ and the limitation expressed by Dr. Hurt do not match in at least two ways. One, "at will" means a person may need to alternate more frequently than every 30 minutes.

Two, Dr. Hurt indicated Mr. McQ needs to alternate sitting, standing, and *walking* at will.

There is no evidence that Mr. McQ can perform the jobs identified by the vocational expert if he needs to sit, stand, and walk at will. The vocational expert was not asked to consider such a limitation. He was only asked to consider whether a person who needed to alternate between sitting and standing every 30 minutes. Tr. 57-58. The vocational expert's testimony is evidence of non-disability only if the hypothetical question to which he responds is an accurate summation of the claimant's medical limitations and vocational factors. *Myers v. Weinberger*, 514 F.2d 293, 294 (6th Cir. 1975); *Noe v. Weinberger*, 512 F.2d 588, 596 (6th Cir. 1975). The hypothetical question must precisely state the particular physical and mental impairments affecting the claimant. *Varley v. Secretary of Health & Human Services,* 820 F.2d 777, 779 (6th Cir. 1987).

In this case, the ALJ gave controlling weight to the opinion of the treating physician on Mr. McQ's ability to alternate sitting, standing, and walking. Tr. 21. Yet neither her finding of residual functional capacity nor the hypothetical question to which the vocational expert responded considered such a restriction. This was error.

Given this error, the Commissioner failed to meet the burden of coming forward with the proof at Step 5 of the sequential evaluation. There is no evidence that there are a significant number of jobs that allow a person to alternate sitting, standing, and walking at will. Indeed, the vocational expert testified that he

presumed that the person could remain on task while switching positions. Tr. 59-60. A need to walk at will would not allow a person to remain on task.

Reversal is appropriate. At minimum, remand is required to correct this error.

II. The administrative law judge failed to consider whether the remainder of Dr. Hurt's opinion concerning Mr. McQ's need to lie down during the workday deserved significant weight even if it did not deserve controlling weight.

As noted above, Dr. Hurt also noted that Mr. McQ would need to lie down/recline for more than one hour in an eight-hour workday on a regular and continuing basis. Tr. 385. The vocational expert testified that if a person needed to lie down during the workday there would be no work. Tr. 58.

The ALJ acknowledged this aspect of Dr. Hurt's opinion but declined to give it weight. "The undersigned does not credit Dr. Hurt's opinion that the claimant would need to lie down/recline for more than one hour total, as this appears to be based on the claimant's statements that his pain improves when in the prone position (Exh.9F), and not observations by Dr. Hurt." Tr. 22.

Even if arguably the ALJ's one sentence analysis could be construed to satisfy an analysis of controlling weight, the decision does not even attempt to analyze whether the opinion of Dr. Hurt still deserves significant weight under Social Security's own rules and regulations. This was remandable error.

Social Security's regulations specifically state that even if an opinion can't be given controlling weight, it may still be given significant weight. "Unless we give a

treating source's opinion controlling weight under paragraph (c)(2) of this section,[2] we consider all of the following factors in deciding the weight we give to any medical opinion" including: Examining relationship, treatment relationship (including length, nature and extent of the treatment relationships), supportability, consistency, and specialization. 20 C.F.R.§404.1527(c).

In fact, Social Security's own rulings emphasize the likelihood that treating physician opinion will still be entitled to the greatest weight.

> Adjudicators must remember that a finding that a treating source medical opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the case record means only that the opinion is not entitled to 'controlling weight,' not that the opinion should be rejected. Treating source medical opinions are still entitled to deference and must be weighed using all of the factors provided in 20 CFR 404.1527 and 416.927. In many cases, a treating source's medical opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight.

Social Security Ruling 96-2p.

The ALJ never considered the factors spelled out in the regulations. For example, the ALJ did not consider the examining relationship or the nature and extent of the relationship. Dr. Hurt had treated Mr. McQ since May 2004, while Mr. McQ was still working. Tr. 317-19. Dr. Hurt used various modalities to treat Mr. McQ including medications for pain (Darvocet, Avinza, Neurontin), inflammation (Daypro), and muscle relaxer (Zanaflex). Tr. 300, for example. Dr. Hurt also tried lumbar facet injections and transforaminal epidural steroid

---

[2] Social Security states it will give controlling weight to a treating source's opinion on the nature and severity of impairments if it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence" in the case record. 20 C.F.R. 404.1527(c)(2).

injections Tr. 325-32. Dr. Hurt offered this treatment over a nine year period. Tr. 300-32, 375-83, 387-96.

The ALJ makes no mention of this treatment or the longevity of it. *See generally* Tr. 21-22. This was error. *Allen v. Califano,* 613 F.2d 139, 145 (6th Cir.1980) ("In determining the question of substantiality of evidence, the reports of physicians who have treated a patient over a period of time or who are consulted for purposes of treatment are given greater weight than are reports of physicians employed and paid by the government for the purpose of defending against a disability claim")

The decision also fails to consider supportability as a factor in analyzing the opinion of Dr. Hurt. For example, an MRI as early as March 5, 2008 showed narrowing of the L5 nerve root foraminal bilateral and a left paramedian disk extrusion at L3-4.. Tr. 296. A lumbar MRI in July 2009 confirmed degenerative disc disease from L3 to S1, most pronounced at L5-S1. There was mild central stenosis at L3-4 secondary to moderate annular bulging and facet arthropathy. Similar findings were seen at L4-5 with moderate bilateral neural foraminal narrowing, but no central stenosis. Anterolisthesis of L5-S1 was again noted. Tr. 293/321-22. X-rays in August 2009 showed unstable anterolisthesis at L4-5. Tr. 292/320. X-rays in November 2011 also confirmed anterolisthesis at L5-S1 and other degenerative changes such as spurring. Tr. 361-62. Examination by Consultative Examiner Saghafi in November 2011 showed an antalgic gait with a

hunched posture. Tr. 354. Range of motion of the lumbar spine was reduced. Tr. 358.

The decision does not address consistency as a factor in weighing Dr. Hurt's opinion on Mr. McQ's need to lie down. *See generally* Tr. 21. The only mention of consistency is to note that Dr. Hurt has consistently noted positive right lumbar facet loading and that his opinion on alternating positions was consistent with observations of Dr. Sag and other medical evidence of record. Tr. 21. No other physician was asked whether Mr. McQ would need to lie down during the workday.

Finally, the decision does not address Dr. Hurt's specialization in pain management . Indeed, the decision makes no mention of the fact that Dr. Hurt was Mr. McQ's pain management doctor. *See generally,* Tr. 21-22.

The ALJ must make and articulate the reasons for rejecting treating physician opinion. 20 C.F.R. § 404.1527(c)(2) ("we will always give good reasons in our . . . decision for the weight we give your treating source's opinion"); *see also Wilson v. Comm'r of Soc. Sec.,* 378 F.3d 541 (6th Cir. 2004). Where an ALJ has failed "to follow the procedural requirement of identifying the reasons for discounting the opinions and for explaining precisely how these reasons affected the weight accorded the opinions denotes a lack of substantial evidence, even where the conclusion of the ALJ may be justified based upon the record." *Rogers v. Comm'r,* 486 F.3d at 243 (quoting in part *Wilson v. Commissioner*, 378 F.3d at 544) (internal punctuation omitted).

Where an ALJ fails to consider whether a treating physician opinion still deserves significant weight under the factors described in the regulations, she has

failed to provide good reasons. *Hensley v. Astrue*, 573 F.3d 263, 266-67 (6th Cir. 2009); *see also Blakley v. Comm'r of Soc. Sec.*, 581 F.3d 399, 408 (6th Cir. 2009) ("Treating source medical opinions are still entitled to deference and must be weighed using all of the factors provided in [the regulations]").

Accordingly, remand is required. "We do not hesitate to remand when the Commissioner has not provided 'good reasons' for the weight given to a treating physician's opinion and we will continue remanding when we encounter opinions from ALJ's that do not comprehensively set forth the reasons for the weight assigned to a treating physician's opinion." *Hensley v. Astrue*, 573 F.3d 263, 267 (6th .Cir. 2009) (citing *Wilson v. Commissioner*, 378 F.3d at 545)

CONCLUSION

Plaintiff McQ is disabled. Reversal is appropriate. At minimum, remand is required to correct the errors identified above.

Respectfully submitted,

s/Mary T. Meadows
Mary T. Meadows
Roose & Ressler
A Legal Professional Association
Ohio Bar No. 0058614
Four Seagate
Suite 600
Toledo, OH 43604-2612
Voice: (419) 242-1515
Fax: (419) 241-6002
Email: mtmeadows@rooselaw.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, a copy of the foregoing Plaintiff's Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Mary T. Meadows
Mary T. Meadows
Roose & Ressler
A Legal Professional Association
Ohio Bar No. 0058614
Four Seagate
Suite 600
Toledo, OH 43604-2612
Voice: (419) 242-1515
Fax: (419) 241-6002
Email: mtmeadows@rooselaw.com
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

C.J.S.	)	CIVIL ACTION NO.: 3:15-cv-5555
	)	
PLAINTIFF,	)	MAGISTRATE JUDGE L
	)	
v.	)	
	)	
COMMISSIONER OF SOCIAL SECURITY	)	PLAINTIFF'S REPLY TO
	)	DEFENDANT'S RESPONSE TO
DEFENDANT.	)	PLAINTIFF'S MOTION FOR SUMMARY
	)	JUDGMENT

This reply is allowed under the Magistrate Judge's briefing order.

At issue in this case is the opinion evidence from several examining sources. Dr. M performed a psychological evaluation on June 20, 2011 at the request of Social Security. Tr. 481-89. Dr. Wy performed a neuropsychological evaluation on October 20, 2011. Tr. 547-59. Dr. B performed a neuropsychological evaluation on November 5, 2012. Tr. 660-74. In addition, a reviewing State agency physician, Dr. R, upon whose opinion the administrative law judge claimed to give "some weight" found greater limitation than did the administrative law judge.

Defendant argues that the administrative law judge and Dr. R explained that Dr. Wy's opinion was inconsistent with other tests of Plaintiff's memory and concentration and that this Court should "decline Plaintiff's plea to reweigh the evidence." Defendant's Brief at 6, citing Tr. 28-29, 34, 122. Plaintiff, however, is not asking this Court to reweigh the evidence, but rather, to hold the Commissioner accountable to the Regulations in evaluating physician opinion. As Plaintiff noted, the administrative law judge considered only a very narrow range of the evidence,

ignoring the detailed neurocognitive testing performed by Dr. Wy and Dr. B *See* Plaintiff's Brief at 13-18.

As to Defendant's statement assertion that Dr. R explained the inconsistencies, Defendant overstates the analysis. Dr. R noted the accommodations Dr. Wy mentioned should Ms. S decide to return to school and concluded, "This opinion does not fully correlate with the evidence from this exam that indicates [claimant] is over-endorsing and with multiple other sources exams/MMSEs/GCS from a mild TBI and well controlled Bipolar Dx. No significant weight given." Tr. 122. However, Dr. Wy noted the focus on health problems and brain functioning as an explanation for Ms. Shipley's subjective experience of neurocognitive problems and possibly even some of her pain. Dr. Wy did not find it uncommon for a person to translate issues of inattention and distractibility (outside the lab) with memory issues. Tr. 557.

Defendant, as did the administrative law judge focused on cognitive scores rather than the other testing performed by the evaluating specialists, such as Dr. B. Defendant dismisses the administrative law judge's failure to address the specific neurocognitive testing performed by Dr. B by claiming that there is no "statutory or regulatory provision" that suggests these tests are "a better measure of the ability to perform unskilled work than are the simpler tests of memory or concentration identified by the ALJ." Defendant's Brief at 10-11 citing § 12.00(C)(3), Appendix 1 to Subpart P, Part 404 (serial 7s are a valid measure of concentration, persistence, or pace).

The regulation cited to by Defendant, however, lists serial sevens as one task on a mental status examination designed to help assess concentration. The regulation also mentions that there are other tests used to assess concentration. Further, where neurocognitive impairments are at issue, the regulations recognize that a battery of neuropsychological assessments is an appropriate assessment tool. § 12.00(d)(8), Appendix 1 to Subpart P, part 404.

Defendant notes, as did the administrative law judge, that the testing performed by Dr. B was performed under less than ideal testing condition and that such "distractions" discounted "findings of disabling cognitive limitations." Defendant's Brief at 11, citing Tr. 30. However, the distractions identified (such as the phone ringing, or the sound of a vacuum) are not particularly different than the distractions in the work place. Indeed, the regulations caution against using findings obtained in a distraction-free testing environment as evidence of a person's ability to sustain concentration.

> We must exercise great care in reaching conclusions about your ability or inability to complete tasks under the stresses of employment during a normal workday or work week based on a time-limited mental status examination or psychological testing by a clinician or based on your ability to complete tasks in other settings that are less demanding, highly structured, or more supportive. We must assess your ability to complete tasks by evaluating all the evidence, with an emphasis on how independently, appropriately, and effectively you are able to complete tasks on a sustained basis.

Listing §12.00(C)(3), Appendix 1 to Subpart P, Part 404. In other words, if anything the distractions noted during Dr. B's testing help paint a more accurate picture of Ms. S's abilities in a work environment.

Defendant notes that Dr. B's "bottom-line opinion" was that Ms. S had "below-average ability to listen, pay attention, and concentrate." Defendant's Brief at 11, citing Tr. 674. Defendant argues, then, that by definition "one-half of the workforce has below-average ability" to concentrate. Defendant's Brief at 11. Testing norms, however, are based on the population as a whole, not simply on a working population. Defendant offers absolutely no proof as to how many persons with "below average ability" to concentrate are able to sustain employment. Further, Dr. B indicated that Ms. S's abilities were not simply below average, but "well below average" at times. Tr. 674.

The real "bottom line" issue is that in ignoring specific neurocognitive testing the administrative law judge simply failed to evaluate the record as a whole. Defendant's assertions that these tests simply did not matter would require this Court to pass on an issue of fact that should be left to an administrative law judge. The Court reviews the decision of the Commissioner on the rationale and findings provided by the administrative law judge, not on any new rationale that might be provided on appeal. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978); *Sparks v. Bowen*, 807 F.2d 616, 617 (7th Cir. 1968) (Easterbrook, J.). "Courts are not at liberty to speculate on the basis of an administrative agency's order . . . The court is not free to accept `appellate counsel's *post hoc* rationalization for agency action in lieu of reasons and findings enunciated by the Board.'" *Hyatt Corporation v. N.L.R.B.*, 929 F.2d 361, 367 (6th Cir. 1991).

In this case, Defendant effectively concedes that the administrative law judge ignored specific neurocognitive testing that provided additional explanation of Ms. S's condition and limitations. This was error.

> In the absence of an explicit and reasoned rejection of an entire line of evidence, the remaining evidence is "substantial" only when considered in isolation. It is more than merely "helpful" for the ALJ to articulate reasons ... for crediting or rejecting particular sources of evidence. It is absolutely essential for meaningful appellate review.

Rogers v. Comm'r of Soc. Sec., 486 F.3d 234, 248 (6th Cir. 2007) (quoting *Hurst*, 753 F.2d at 519); *see also Adkins v. Astrue*, No. 2:10-cv-030, 2010 WL 4939953, at *10 (S.D. Ohio, Oct. 8, 2010) ("'[T]he administrative law judge must consider all the record evidence and cannot 'pick and choose' only the evidence that supports his position.'")(quoting *Loza v. Apfel*, 219 F.3d 378, 393 (5th Cir. 2000)); *Loza v. Apfel*, 219 F.3d 378, 393 (5th Cir. 2000)("ALJ must consider all the record evidence and cannot 'pick and choose' only the evidence that supports his position."); *see also Mukes v. Comm'r of Soc. Sec.*, 946 F.Supp 2d 737, 747 (S.D. Ohio 2013).

As to the administrative law judge's assessment of State agency opinion from Dr. R Plaintiff relies on her opening brief to counter Defendant's claim that this opinion evidence was consistent with the ultimate finding of residual functional capacity. *See* Plaintiff's Brief at 18-20.

CONCLUSION

Plaintiff S is disabled. Reversal is appropriate. At minimum, remand is required to correct the errors identified above and in Plaintiff's Brief on the Merits.

Respectfully submitted,

s/Mary T. Meadows
Mary T. Meadows
Roose & Ressler
A Legal Professional Association
Ohio Bar No. 0058614
Four Seagate
Suite 600
Toledo, OH 43604-2612
Voice: (419) 242-1515
Fax: (419) 241-6002
Email: mtmeadows@rooselaw.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, a copy of the foregoing Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment as filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Mary T. Meadows
Mary T. Meadows
Roose & Ressler
A Legal Professional Association
Ohio Bar No. 0058614
Four Seagate
Suite 600
Toledo, OH 43604-2612
Voice: (419) 242-1515
Fax: (419) 241-6002
Email: mtmeadows@rooselaw.com
Attorney for Plaintiff