

May 17, 2024

Appeals Council
Office of Disability Adjudication and Review
6401 Security Blvd
Baltimore, MD 21235-6401

RE: John Smith
SSN: xxx-xx-1111

Dear Appeals Council:

I represent Mr. John Smith in his claim for Title II Social Security disability benefits. This appeal comes to you after a hearing held by telephone on January 18, 2023 with an issued unfavorable decision. The Appeals Council issued a notice of remand order on August 9, 2023. (9A) The remanded hearing was held on November 14, 2023. The ALJ issued a partially favorable decision on March 6, 2024. We respectfully request the Appeals Council reverse the ALJ's decision due to the significant errors discussed below, which warrant a favorable outcome under 20 C.F.R § 404.970(a) Alternatively, we request for an additional remand for further proceedings to discuss the issues raised below with a second Administrative Law Judge pursuant to HALLEX I-2-1-55(D)(11). The current decision contains errors of law and the findings are not supported by substantial evidence. Specifically, the ALJ erred in her evaluation of the severity of Mr. John Smith's colon rectal cancer stage II in remission, neuropathy of hands and feet, incontinence, and frequent bowel movements due to lower bowel section. The decision also does not adhere to SSR 16-3p and 96-9p. Reversal of these erroneous findings would lead to a favorable finding of benefits at step five.

RELEVANT FACTS

Mr. John Smith alleges an onset date of October 31, 2019. Mr. John Smith was sixty-one-year-old at his alleged onset date. He has past work experience as a police officer, pastor, and automobile body supervisor. (1E/1) The ALJ assessed he has severe impairments including peripheral neuropathy, obesity, carpal tunnel syndrome, and hypertension. The ALJ further assessed the claimant has the residual functional capacity to perform medium work with the following limitations of occasional climbing, kneeling, crouching, and crawling. He can frequently balance and stoop. The claimant can perform frequent handling and fingering with the bilateral upper extremities prior to May 1, 2023. The ALJ also found that beginning on May 1, 2023 the claimant had the residual functional capacity to perform a full range of sedentary work. Therefore, the ALJ's decision changed the alleged onset date from October 31, 2019 to May 1, 2023. However, the decision contains errors and the ALJ's findings are not supported by substantial evidence as further discussed below.

ARGUMENT

- I. The ALJ erred at step two by finding the claimant's severe post-colon resection gastrointestinal symptoms are not severe pursuant to SSR 16-3p.**
- a. The ALJ's decision erred when she did not find the claimant's primary care provider's treating source statement persuasive pursuant to SSR 16-3p. This opinion is supported by substantial evidence.**
 - b. The ALJ's decision also erred by not reflecting the claimant's severe medication side-effects in the claimant's RFC. Specifically, Jeremy Sexton, PA-C opined the claimant's gastrointestinal issues are medically related to his past colon resection procedure and medication side-effects.**
 - c. The ALJ's decision erred when she did not properly evaluate third-party statements when discussing the claimant's residual functional capacity pursuant to SSR 16-3p.**

The ALJ fundamentally erred in dismissing the claimant's severe gastrointestinal complications stemming from his colon resection surgery. These complications are well-documented and significantly impact his ability to work. An impairment is "not severe" and a finding of "not disabled" is made at step two when medical evidence establishes only a slight abnormality which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered. A determination that an impairment is not severe requires a careful evaluation of the medical findings which describe the impairment and an informed judgment about its limiting effects on the individual's physical and mental abilities to perform basic work activities; thus, an assessment of function is inherent in the medical evaluation process itself. The ALJ's assessment of function is insufficient as it is not consistent with substantial evidence. Specifically, the record supports the claimant's intestinal complications are severe and would cause more than a minimal effect of his ability to perform gainful employment.

The ALJ decision asserts "the record does not support a severe gastrointestinal impairment". The ALJ's decision further disregards the claimant's primary care provider, Jeremy Sexton, PA-C at the Family Medicine Associates of Lincoln County opinion dated on October 1, 2019 that lists the claimant's medical history of colorectal cancer and treatment side effects impair his daily activities to the point that he requires to be near a restroom at all times. The ALJ explains she does not find this opinion persuasive because "most review of symptoms ... are negative for diarrhea", "there is no diagnosis of fecal incontinence", and "there is no indication of use of protective undergarments". (Hearing Decision, Page 4 out of 16) First, Social Security has long since recognized that "remissions and exacerbations of variable duration are a hallmark..." of gastrointestinal disorders. (See POMS DI 34005.105 Digestive Disorders) Second, the ALJ errs by dismissing the treating source's opinion, which indicates that the claimant's intestinal issues are a result of prior surgery and medication side effects. Additionally, there is substantial medical evidence of record which document continued gastrointestinal complications.

The first recorded objective medical evidence that supports long-standing issues following his prior ileostomy closure included post-treatment colonoscopies in March 2015 which were significant for anatomic ulceration. Subsequent biopsies revealed inflamed granulomatous tissue. (2F/43,44) These colonoscopies were not discussed in the decision. In 2018 at Atrium Health, the claimant reported bowel movement unpredictability. Specifically, he complained since the surgery he has one bowel movement every four to five days. (2F/62) He also endorsed prior to his surgery his bowel movements were normal. (2F/62) Then in October 1, 2019, Jeremy Sexton, PA-C noted the claimant's medical history of colorectal cancer and treatment side effects... requires him to be near a restroom at all times. The claimant completed a function report in 2020 where he reported he needed to be close to a bathroom because of his medications. Mr. Smith also endorsed he needed to use the bathroom seven to eight times per day. (5E/2) (10E/2) Subsequently, the claimant followed up at the Family Medicine Associates of Lincoln County with reports in 2022 that "he has to use the restroom approximately eight times per day due to his cancer treatment and surgery." (14F/1) On December 18, 2023, he was noted to have constipation issues. (24F/92) Jeremy Sexton, PA-C explained these gastrointestinal issues are a reasonable consequent to his ileostomy surgery.

Furthermore, the claimant's wife, Cynthia Hensley completed a third-party function report on May 23, 2021 where she explained Mr. Smith "gets up during the night because of bathroom issues" and must excessively use the toilet due to bowel resection." (10E/2) This third party-report was not mentioned in the decision. 20 C.F.R. § 404.1545(a)(3) provides the ALJ "will ... consider [in assessing the claimant's RFC] descriptions and observations of [the claimant's] limitations from [his or her] impairment(s), including limitations that result from [his or her] symptoms, such as pain, provided by [the claimant's], family, neighbors, friends, or other persons." 20 C.F.R. § 404.1529(c)(3) provides, in relevant part, the ALJ "will consider all of the evidence presented [in evaluating the intensity and persistence of your symptoms], including information about [the claimant's] prior work record, [the claimant's] statements about [his or her] symptoms, evidence submitted by [the claimant's] medical sources, and observations by [Social Security's] employees and other persons." SSR 16-3p further provides, "[Non-medical sources such as family] may provide information from which [the ALJ] may draw inferences and conclusions about an individual's statements that would be helpful to us in assessing the intensity, persistence, and limiting effects of symptoms," and "The adjudicator will consider any personal observations of the individual in terms of how consistent those observations are with the individual's statements about his or her symptoms as well as with all of the evidence in the file."

II. The ALJ erred when she found the claimant's need for an assistive device is not medically necessary pursuant to Social Security Ruling 96-9p.

a. The ALJ erred when she did not find the claimant's medical need to change positions because of his neuropathy at will to be medically necessary.

The ALJ erroneously found the claimant's treating source statement from Jeremy Sexton, PA-C to be unpersuasive regarding the medical need for the claimant to use a cane and for the claimant's need to change positions from sitting, standing, and walking at will. The ALJ's decision references the Appeals Council Remand Order that lists she would need to address the

treating source statements which support the use of a cane or other hand-held assistive device (10F/4) as well as objective findings including unsteady gait, significant sensory ataxia affecting gait, and balance issues related to neuropathy. (7F/14,15) (12F/1) The ALJ rejects this objective evidence by pointing to subjective intermittent comments in the file which do not provide a realistic scope of his neuropathic impairments. Specifically, the hearing decision reflects the following:

Moreover, it is contradicted by other notes from this provider which show the claimant reported walking at least a mile a day at visits during March and April 2022 (Exhibit 12F/3, 5). Similarly, the claimant reported that he was remaining moderately active at a visit during September 2022. (Exhibit 17F/13).... In December 2023, a report indicates the claimant reported being able to run 2 miles or more (24F/29), though the claimant denied this at the hearing.

First, the ALJ's decision mischaracterizes the record. Exhibit 12F page 3 and 5 document he presented with a complaint of weight gain in March of 2022 and April 2022 with a completely different provider meant to just treat his weight gain issues. On questioning about his physical activity when consulting with his doctor about this weight gain, Mr. Smith reported the only physical activity he does is walking. (12F/3) Early reports in January of 2022 confirm that he can only walk once a day for fifteen to twenty minutes. (12F/9) The claimant explained in the hearing that he did try to walk for a period of time but could not keep up with it and had to completely stop because he would be unable to be on his feet the next day or two. (Hearing Testimony) This is consistent with the record which only documents Mr. Smith went walking for a mile one time in April 2022. Additionally, it is likely the post-operative report in December 2023 after his spinal cord stimulator that mentioned he was able to run for two miles or more was incorrectly reported by the doctor. The claimant explained in the hearing he was never able to run two miles. (Hearing Testimony) He tried walk a few miles a day to push himself but at the end of the day he would feel like the bottom of his feet were bruised and the next day he was unable to walk at all. (Hearing Audio 28:00 – 28:50) It is also unlikely Mr. Smith would be recommended to undergo a permanent spinal cord stimulator procedure if his doctors believed he could really run two miles. In fact, the record documents Mr. Smith was recommended to undergo the spinal cord procedure in the first place because of his severe neuropathy that was impacting his daily functioning. (23F/40,41)

The medical need for the use of an assistive device and the need to change positions at will is supported by the record. Mr. Smith presented to his neurologist on April 28, 2021 with complaints with neuropathy of his bilateral feet and hands. He endorsed poor balance and falling episodes. (7F/11) Progress notes from this consult document he was recommended to use a cane. (7F/11) This recommendation is supported by a neurological examination which demonstrated decreased light touch right upper extremity greater than the left, overall diminished in the bilateral lower extremities' sensation to pinprick, vibration and proprioception in a stocking/glove distribution bilateral upper and lower extremities, unsteady gait, and positive Romberg. (7F/14) He had fairly significant sensory ataxia affecting his gait and balance related to neuropathy. Progress notes document Mr. Smith did go through physical therapy two times per week for twelve weeks at one point for balance but it was not very beneficial. (7F/15)

(18F/31) Subsequent exams from May 31, 2023 through September 7, 2023 also confirmed decreased sensation pinprick, vibration, and light touch. (21F/4,9)

The ALJ “cannot simply cherry-pick facts that support a finding of non-disability while ignoring evidence that points to a disability finding”. *Denton v. Astrue*, 596 F.3d 419, 425 (7th Cir. 2010) This error significantly harms the claimant as the Vocational Expert testified the need for a hand-held assistive device would be work preclusive for all past work and any other work in the national economy. (Hearing Audio 1:11:30 – 1:12:00)

CONCLUSION

The current decision contains errors related to the ALJ’s assessment Mr. Smith’s symptom-related limitations. Mr. Smith respectfully requests a reversal of the denial and an outright award of benefits or a remand as his record supports, he has severe physical impairments that impact his ability to balance, perform work-related activity without the medical need for an assistive device, and manage his chronic pain without excessive breaks. His chronic neuropathy would require excessive breaks resulting in more than 20% off task during the work-day or more than one unexcused absence per month which would be work preclusive per the vocational expert testimony. Please remand the case for further evaluation.

Respectfully Submitted,

Representative