UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JULIA GONZALEZ,

Plaintiff,

v. **CIVIL NO. 06-CV-6036T**

JoANNE B. BARNHART,
COMMISIONER OF SOCIAL SECURITY,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

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PREMLIMINARY STATEMENT

This action is an appeal pursuant to 42 U.S.C. §§405(g) and 1383(c)(3) of the Social Security Act from the final decision of the Commissioner of Social Security denying plaintiff Julia Gonzalez benefits under Title II and Title XVI of the Social Security Act.

Ms. Gonzalez is a 39 year-old woman who is disabled by AIDS and its manifestations such as chronic herpes simplex outbreaks and chronic leg pain as well as back pain. The Commissioner erred in failing to evaluate her claim properly under the Listings of impairments. She erred in failing to properly evaluate the opinion of the plaintiff's treating physician. She also erred in applying the Medical – Vocational guidelines. As such, the Commissioner's decision denying plaintiff Gonzalez benefits is not based on substantial evidence and contains errors of law.

STATEMENT OF THE CASE

A. Procedural History

Julia Gonzalez applied for Supplemental Security Income benefits on April 23, 2003. Record at 240.[1] Subsequently she filed for Disability Insurance benefits on May 18, 2003. R 60. Various reports completed by Ms. Gonzalez in connection with her application, as well as the Social Security Administration's (SSA's) documentation regarding the denial of her claim are found at R 52-91.

Ms. Gonzalez was initially denied benefits on August 27, 2003. R 29 – 34. She filed a request for a hearing on September 26, 2003. R 35. The hearing was held in Rochester, New York on August 4, 2005, before Administrative Law Judge (ALJ) Bruce R. Mazzarella. Ms. Gonzalez appeared and testified. Ms. Gonzalez was represented by Doris Cortes, a paralegal

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[1] Citations to the transcript of the administrative record filed as part of the defendant Commissioner's Answer are hereinafter referred to as "R" followed by the page number.

employed by the Empire Justice Center. ALJ Mazzarella issued an unfavorable decision on August 22, 2005, finding that Ms. Gonzalez's impairments, while severe, did not meet or equal any of the listings. He concluded that she had the residual functional capacity to perform a full range of sedentary work. R 20 – 27.

Ms. Gonzalez appealed the unfavorable hearing decision to the Social Security Appeals Council on October 17, 2005. R 9 – 12. The Appeals Council upheld the decision on December 7, 2005. R 5 – 8. A timely complaint was filed with this court. Plaintiff Gonzalez now moves for Judgment on the Pleadings, pursuant to Rule 12 of the Federal Rules of Civil Procedure.

B. Medical Evidence

1. Treating Sources

The record documents that Ms. Gonzalez suffers from AIDS. Her CD 4 count was 196 on April 22, 1995.[2] R 232. Laboratory records from July 22, 1997 through June 2, 2005, document continuing low CD4 counts and percentages. R 231. Treatment notes contained in the record begin on September 11, 2002; they reference the earlier laboratory records. On September 11, 2002, Ms. Gonzalez was seen by her infectious disease specialist, Dr. Amneris Luque, at the Strong AIDS Center. She complained that she continued to have breakouts of herpes simplex virus (HSV) once a month and reported that she continued to have episodic pain in her legs that she related to her breakouts of HSV. She was mistakenly taking a lower dose of acyclovir than the recommended dose for prophylaxis of HSV.[3] She was clinically stable without any signs of major opportunistic infections or disease progression. She had relatively

[2] A CD4 or T-cell count is a measurement of immune system function. AIDS is diagnosed when an HIV infected person has a CD4 count below 200. www.cdc.gov/hiv/pubs/brochure/livingwithhiv.htm.
[3] Acyclovir is an anti-viral medication active against herpes viruses. *Physicians' Desk Reference* (PDR) 1704 (57th ed. 2003).

good adherence to her antiretroviral medication. It was noted however, that she had only ever taken her medication once per day (QD). She appeared to be tolerating her new medication regimen relatively well. Her medications were listed as tenofivir 300 mg once a day, didanosine 400 mg once a day, amprenavir 1200 mg bid (twice a day) and nevirapine 400 mg once a day.[4] R 158 - 159.

On December 20, 2002, Ms. Gonzalez was again seen at the AIDS center, this time by Dr. Peter Mariuz, not her usual provider. She complained of red burning lesions on her tongue, which Dr. Mariuz opined were a viral infection transmitted to her by her children. Ms. Gonzalez indicated that she was non-compliant with her anti-retroviral medication, but did not give a reason for her non-compliance. Her HIV/AIDS was stable with normal T- cells and an undetectable viral load. Her HSV was in remission and she was prescribed ferrous sulfate for her anemia. Dr. Mariuz described her condition as asymptomatic.[5] R 155 – 157.

Ms. Gonzalez saw Dr. Luque for follow up the AIDS center on January 9, 2003. She complained of episodes of dizziness with slight nausea. Dr. Luque felt that the dizziness was due to a viral infection and would resolve spontaneously. Ms. Gonzalez denied other symptoms. She reported that she had restarted all of her medications after being told that her viral load had increased to 10,000 on December 20, 2002.[6] During the three months she was off her

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[4] Tenofivir, didanosine, amprenavir and nevirapine are antiretroviral medications. They are used in combination with other antiretroviral medications for treatment of HIV infection. Possible side effects of these medications include: tenofivir - lactic acidosis, didanosine– lactic acidosis, peripheral neuropathy, amprenavir – arthralgias. All of these medications can cause fat redistribution and gastrointestinal symptoms. *PDR* at 1425, 1136, 1439, 1055.

[5] Asymptomatic HIV infection is a phase of varying length during chronic infection with HIV, in which there is a slow deterioration of the immune system without clinical symptoms associated with HIV, such as fevers, weight loss or opportunistic infections. http://www.nlm.nih.gov/medlineplus/ency/article/000682.htm

[6] Viral load testing measures the amount of HIV found in the blood. www.cdc.gov/hiv/pubs/brochure/livingwithhiv.htm

medications her leg pain completely disappeared. A physical examination revealed that her legs were thin due to the loss of subcutaneous fat. She was made aware of guidelines regarding decreasing the dose of didanosine when used in combination with viread because of an increased chance of medication side effects[7]. R 153 - 154.

On February 13, 2003 Ms. Gonzalez presented at Strong Memorial Hospital with nausea, vomiting and renal colic. Radiologic tests revealed the development of a left adexnal cyst and gallstones. R 187 – 188.

Ms. Gonzalez saw Dr. Luque for an infectious disease follow up on April 17, 2003. She had restarted working and was having difficulty due to excruciating pain in her lower extremities.[8] She described the pain as throbbing and constant, unaccompanied by fevers, chills, redness or warmth. She continued to have decreased fat in her limbs. She reported 100% compliance with her medications; however, perhaps due to a misunderstanding, she was only taking amprenavir once a day, not the two times a day it was prescribed. A physical examination revealed extreme pain on pressure of thigh muscle bilaterally, proximal weakness and decreased strength in the legs, although her gait was normal. Dr. Luque opined that the symptoms pointed to myopathy and ordered a CK test, noting that if the CK was elevated the antiretroviral medications would be suspended.[9] R 149 – 150. Test results revealed an elevated CK level and

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[7] Viread is a brand name for tenofivir. *PDR* at 1425.
[8] Ms. Gonzales was able to work for only approximately one month in 2003. Her earnings record can be found at R 67.
[9] A CK is a blood test that measures creatine phosphokinase (CPK), an enzyme found predominantly in the heart, brain, and skeletal muscle. When the total CPK level is substantially elevated, it usually indicates injury or stress to one or more of these areas. The test is used to determine the extent of muscle damage caused by drugs, trauma or immobility. Certain medications can cause increased CPK levels.
http://www.nlm.nih.gov/medlineplus/ency/article/003503.htm

low iron and hematocrit (HCT) levels. R 146 - 148. Treatment notes dated April 29, 2003 indicated that Ms. Gonzalez's antiretroviral medications were subsequently stopped. R 142.

On May 14, 2003 Ms. Gonzalez underwent testing at the EMG Laboratory at Strong to assess for myopathy.[10] The study was normal, with no electrophysiologic evidence of generalized myopathy or polyneuropathy. R 175 – 176. Treatment notes dated August 6, 2003, indicate that Ms. Gonzalez continued to have intermittent leg pain. She described it as deep seated pain that bothered her day and night and was particularly associated with high activity. Ms. Gonzalez related that chores or other physical activity triggered the pain to the extent that after cleaning her house she needed to rest two days for the pain to get better. She took ibuprofen or acetominiphen with some relief. Her symptoms did not improve when she was taken off her antiretroviral medications. R 169 – 170. Her viral load, however, soared to 47,387 on June 5, 2003. R 234. Ms. Gonzalez reported that she sometimes sweated at night. The notes indicate that Ms. Gonzalez had been back on her antiretroviral medications since June and reported good compliance, although she was only taking half of the dose of amprenavir and nevirapine, as she only wished to take medications once a day. Dr. Luque noted that she was on a "rescue regimen" of antiretrovirals.[11] R 169 – 170. On August 6, 2003, Ms. Gonzalez's viral load had decreased to 1273. R 234.

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[10] EMG stands for electromyography. In this test electrodes are placed via needle insertion into skeletal muscles to detect primary muscular disorders along with other muscle abnormalities caused by other system diseases such as nerve dysfunction. Patients with excessive pain may have false results. *Mosby's Diagnostic and Laboratory Test Reference*, 343 (3d ed. 1997).

[11] A rescue regimen is an HIV treatment regimen designed for people who have used many different anti-HIV drugs in the past, have failed to respond to at least two anti-HIV regimens, and have extensive drug resistance. http://aidsinfo.nih.gov/Glossary/GlossaryDataCenterPage.aspx?fromLetter=S

On February 4, 2004, Ms. Gonzalez told Dr. Luque that she was doing well, but continued to have bilateral leg pain when standing more than thirty minutes. She had not missed doses of medication in the past four days or the past four weeks, although she continued to take only half the dose of amprenavir, despite the doctor's advice. Her hematocrit had improved to 29%. R 224 – 225.

Ms. Gonzalez underwent physical therapy from May 17, 2004 through July 23, 2004 for leg pain. R 214 – 221. Dr. Luque's requisition for physical therapy indicates that her leg pain was probably related to medication, and that Ms. Gonzalez had decreased endurance. R 214. Ms. Gonzalez was discharged from therapy with goals only partially achieved. She was issued a TENS unit for relief of pain. [12] R 217.

During a December 1, 2004 office visit Ms. Gonzalez reported increased recurrences of HSV with worsening leg pain prior to the outbreaks. She improved with an increased dose of neurontin that was noted to have first been given to her in October, when she came to the clinic for pain. Because Dr. Luque now believed that the leg pain was related to her outbreaks of herpes, she put her on a prophylactic dose of acyclovir. She reported an episode of amenorrhea followed by a vaginal bleed lasting three weeks after her medication was changed from amprenavir to fosamprenavir. She was urged to take her prescribed dose of fosamprenavir, but indicated that she wished to wait for lab results before doing so. Her iron deficiency anemia had resolved. R 253 – 254.

In a follow up visit on March 7, 2005, Ms. Gonzalez reported that she had been feeling well, but still had leg pain almost daily that seemed to coincide with breakouts of genital herpes.

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[12] TENS stands for transcutaneous electrical nerve stimulation, the application of mild electrical stimulation to skin electrodes placed over a painful area. It causes interference with transmission of painful stimuli. *Taber's Cyclopedic Medical Dictionary,* 1982 (18th ed. 1997).

The pain in her legs was described as a five out of ten in intensity. A physical exam revealed a small dorsocervial fat pad and a lot of subcutaneous fat anteriorly on the neck.[13] She was clinically stable without any signs of major opportunistic infection or disease progression. Ms. Gonzalez reported that neurontin made her sleepy, so her dose was split throughout the day. She was now taking the full recommended doses of her antiretroviral medications.

2. Opinions of Treating Physician

On July 25, 2005, Dr. Luque completed a medical questionnaire. The doctor listed the following treating diagnoses: HIV/AIDS, uterine prolapse, myopathy of unclear origin, disc herniation L3-L4, disc bulging L4-L5 and gallstones. Dr. Luque stated that Ms. Gonzalez was limited by fatigue and weakness to standing for one hour in an eight hour workday, and walking one hour in an eight hour workday. She further limited Ms. Gonzalez to lifting five pounds and carrying two pounds for a distance of 100 yards. R 226 – 228.

A clinic note dated June 1, 2005 was attached to the report. The note details Ms. Gonzalez's continuing complaints of lower extremity pain aggravated by physical activity and requiring long periods of rest after household chores. Often the episodes of leg pain were associated with HSV outbreaks. She also reported having non-radiating pain over her dorsocervical fat pad. Otherwise, Ms. Gonzalez was clinically stable without signs of major opportunistic infection or disease progression. She continued to take prophylactic acyclovir. She was one hundred percent compliant with medications. R 229. Dr. Luque also attached the report of an MRI of the lumbar spine. The report showed right paracentral disc herniation at L3-L4 and paracentral disc bulging at L4-L5. R 237.

[13] See note 4 regarding fat re-distribution as an HIV medication side effect.

An employability assessment prepared by Dr. Luque on July 21, 2005, is consistent with the July 25 report. In it, Dr. Luque indicates that Ms. Gonzales cannot stand for more than thirty minutes and is greatly limited in pushing, carrying, lifting and climbing. The doctor also indicates that Ms. Gonzalez had been her patient since 1996. R 239 – 239A.

After the hearing decision was issued, additional records, not previously available, were sent to the Appeals Council.[14] On September 7, 2005, Dr. Luque completed a medical source statement of ability to do work related activities. The report indicates that Ms. Gonzalez was limited to lifting less than 10 pounds frequently, standing and walking less than two hours in an eight hour day, sitting less than six hours in an eight hour work day, and was also limited in pushing and pulling in both the upper and lower extremities due to myopathy of unclear origin with persistent pain on thighs as well as lumbar disc bulging. All postural activities were limited by frequent pain. Dr. Luque specifically stated that the plaintiff's recurrent HSV infection resulted in pain and difficulty sitting for long periods. R 247 – 252.

3. Reports of Consultative Examiners

A consultative internal medical examination was performed at the behest of SSA on August 13, 2003, by Ramon M. Medalle, M. D. R 198- 201. Ms. Gonzalez reported being HIV positive for 13 years and having recurrent herpes infections in her genitalia. She also reported pain in both lower extremities, especially the thighs, with pain worse on the left. She indicated that after prolonged walking the legs would feel tired and feel like they would give way. She also reported that she was found to be anemic and was started on iron pills. Ms. Gonzalez stated that she did not take her medications as prescribed. R 198. Based on his one time examination,

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[14]This evidence must also be considered as part of the administrative record. *See*, *Perez v. Chater*, 77 F 3d. 41 (2d Cir. 1996), (finding evidence first submitted to the Appeals Council becomes part of the administrative record).

Dr. Medalle found Ms. Gonzalez to be mildly limited in activities requiring sustained moderate to heavy physical exertion because of her HIV infection and AIDS complicated by myopathy. R 201.

C. Educational and Vocational Evidence

Ms. Gonzalez is currently 39 years old. Although she was born in New York, she was raised in Puerto Rico. She returned to the mainland when she was approximately 19 years old. R 272. Ms. Gonzalez obtained her G.E.D in Spanish in Rochester, New York. R 271. Although she can understand very simple questions in English, she required an interpreter for the hearing. She has past relevant work as an assembly line worker. [15] Her past assembly line jobs were with Century Group from July of 1999 until July of 2000, as well as for Kodak from 2000 through November of 2002. Additionally, she worked for one month in 2003. R 267 - 270.

She applied for benefits in April of 2003. R 240. Her last attempt at working was in 2004, after she applied for benefits. The job lasted only a day and a half when she stopped due to fatigue. R 270.

D. Subjective Evidence

Ms. Gonzalez testified that the most significant symptom she suffered from due to her HIV status was pain in the legs. She stated that the leg pain was caused by her medications and that it was present all day long. It was relieved a "little bit" by neurontin. R 276. She also stated that she has flare ups of herpes (HSV) every month lasting two weeks, since around 1993, improving with medication, but never having been controlled. R 277. Ms. Gonzalez described a burning sensation and pain in her legs preceding the herpes breakouts. She testified that she suffered from diarrhea once or twice per week, depending on what she ate. Ms. Gonzalez also

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[15] Past relevant worked is defined as substantial gainful activity performed within the past fifteen years. 20 C.F.R. § 416.965(a).

expressed that she suffered from tiredness or sleepiness because of her HIV status and her medications. R 282. Ms. Gonzalez indicated that she had night sweats on a daily basis and that she needed to take naps daily. R 289. Ms. Gonzalez also stated that she suffered from nausea. R 290.

Ms. Gonzalez testified that she could only sit for one half hour and stand for only ten or fifteen minutes due to back pain. R 284. She indicated that she could lift no more than a half gallon of milk because of lack of strength in her arms. R 285. She required help with grocery shopping and required two days to complete the task of shopping because she was unable to do it all in one day. The day after shopping she needed to rest. R 286 and 288. She also described needing to rest between household chores and needing to break house work into stages; for example, she could sweep one day but needed to wait until the next day to be able to mop. R 285. Ms. Gonzalez testified that she needed a nap daily, as she was drained and very tired by one p.m. R 289.

SCOPE OF REVIEW

The standard to be applied by the court in reviewing defendant's factual determinations is whether the defendant's decision is supported by substantial evidence on the record as a whole. *Gold v. Secretary of HEW*, 463 F.2d 38, 41 (2d Cir. 1972). Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Cruz v. Sullivan***,** 912 F.2d 8, 11 (2d Cir. 1990), quoting *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 38 L.Ed 2d 842 (1971).

"Where evidence has not been properly evaluated because of an erroneous view of the law, however, the determination of the [Commissioner] will not be upheld." *Marcus v. Califano*, 615 F.2d 23, 27 (2d Cir. 1979). *See also Johnson v. Bowen,* 817 F.2d 983, 986 (2d Cir. 1987) ("Where

there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles.").

A remand may be made pursuant to the fourth sentence of 42 U.S.C. Section 405(g) where the Commissioner has failed to provide a full hearing, to make explicit findings or have correctly applied the law and regulations. *See Melkonyan v. Sullivan,* 111 S.Ct. 2157, 2165, 501 U.S. 89, 115 L.Ed 78 (1991).

ARGUMENT

I. THE COMMISSIONER FAILED TO PROPERLY EVALUATE PLAINTIFF GONZALEZ'S CLAIM UNDER LISTINGS 14.08D2a OR 14.08 N.

The Commissioner's regulations found at Appendix 1 of 20 C.F.R. Subpart P, Part 404, describe impairments that are considered severe enough to prevent a plaintiff from doing any gainful work. These regulations list impairments, any of which is sufficient to create an "irrebuttable presumption of disability." *Shaw v. Chater*, 221 F.3d 126, 132 (2d Cir. 2000). The *per se* disabilities in the Listing of Impairments described at 20 C.F.R. §§404.1525 & 416.925 apply to plaintiffs "whose individual medical conditions are so serious that they are obviously incapable of earning a living…without further inquiry into their vocational background." *Chico v. Schweiker,* 710 F.2d 947, 951 (2d Cir. 1983).

AIDS is classified as a terminal illness by the Social Security Administration.[16] The "listing" for Human Immunodeficiency Virus (HIV) infection is found under section 14.08. Listings under section 14.08 require documentation of HIV infection by laboratory evidence or by

[16] AIDS is designated by Social Security's Programs Operations Manual System as a terminal illness entitled to expedited processing. POMS DI 11005.601, available at www.ssa.gov.

other generally accepted methods consistent with the prevailing state of medical knowledge and clinical practice, as well as specific additional conditions. The specific additional conditions included in subsections 14.08D2a and 14.08 N are most relevant to Ms. Gonzalez's case.

A. Listing 14.08D2a

Listing 14.08D2a requires proof of HIV infection as well as herpes simplex virus (HSV) causing mucocutaenous infection (e.g., oral, genital, perianal) lasting for one month or longer. In the instant case, the plaintiff has been diagnosed with AIDS and has presented with manifestations of HIV disease including recurrent HSV.[17] ALJ Mazzarella incorrectly stated that the plaintiff's herpes simplex virus is controlled or maintained through use of medication. R 22. He erroneously dismissed her HSV as non-severe.[18]

The record, however, is replete with mentions of Ms. Gonzalez's chronic HSV infection, dating back to September 2002. Virtually every progress note from her treating physician lists recurrent HSV, indicating that it was a significant ongoing concern. Ms. Gonzalez testified she had HSV flare ups monthly since 1992 or 1993. She stated that although medication helped her HSV

[17] HSV is specifically indicated as an opportunistic infection associated with HIV infection. 20 C.F.R. § 404, Appendix 1 (2005), § 14.08D2a.

[18] A severe impairment is one which significantly limits a plaintiff's physical or mental ability to do basic work activities. The Commissioner uses a five step sequential evaluation to determine disability claims. The Commissioner asks, in turn, whether a plaintiff: 1) is engaged in substantial gainful activity; if the plaintiff is so engaged she is not disabled; 2) has an impairment (or combination of impairments) that is severe; if the plaintiff does not she is not disabled; 3) has an impairment which meets or equals a listed impairment; if the plaintiff does she is disabled; 4) can return to her past relevant work, despite her impairment (or combination of impairments); if the plaintiff can she is not disabled; and 5) can perform other work existing in sufficient numbers in the national economy; if the plaintiff can, she is not disabled. 20 C.F.R. §§ 416.920(a)(4), (b)-(f). The severity determination is described as a *de-minimis* step, whose utility is limited to the disposal of groundless claims. *Dixon v. Shalala*, 54 F.3d 1019, 1030 (2d Cir. 1995); *McCrea v. Commissioner of Social Security*, 370 F.3d 357, 360 (3d Cir. 2004). Indeed, a finding that an impairment (or combination of impairments) is not severe will not hold unless the medical evidence establishes only "a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work." SSR 85-28.

condition, it had never been controlled. R 277. Ms. Gonzalez also told the consultative medical examiner that she had had a recurrent genital herpes infection for the past thirteen years. R 198.

Evidence subsequently submitted to the appeals council supports and even amplifies the record that was before the ALJ. On September 5, 2005, her treating physician, Dr. Luque, opined that recurrent episodes of HSV and the accompanying pain limited her ability to sit for long time periods. R 252. The most recent treatment record in the file, dated June 1, 2005, also indicates that she was experiencing leg pain often associated to her outbreaks of HSV and that she was on a prophylactic dose of acyclovir. R 258.

Because she has HIV infection with recurrent genital HSV documented for years, Ms. Gonzales meets listing 14.08D2a.

B. Listing 14.08N

Listing 14.08N requires proof of HIV infection as well as repeated manifestations of HIV infection resulting in significant, documented symptoms or signs (e.g. fatigue, fever, malaise, weight loss, pain, night sweats) and one of the following at the marked level: restrictions of activities of daily living; or difficulties in maintaining social functioning; or difficulties in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace. For HIV infected individuals evaluated under 14.08N, listing level severity is to be assessed in terms of the functional limitations imposed by the impairment. Important factors to be considered in evaluating the functioning of individuals with HIV infection include, but are not limited to: symptoms, such as fatigue and pain; characteristics of the illness, such as the frequency and duration of manifestations or periods of exacerbation and remission in the disease course; and the functional impact of treatment of the disease, including the side effects of medication. 20 C.F.R. § 404, Appendix 1 (2005), § 14.00 D 8.

In the instant case, the ALJ did no analysis under listing 14.08N, although the medical record and subjective evidence both clearly indicate that such an analysis would have resulted in a finding of disability. Ms. Gonzalez testified to fatigue, chronic leg pain and night sweats, as well as repeated outbreaks of HSV, an infection specifically mentioned in the listings. The medical evidence clearly documented recurrent HSV infections and chronic leg pain. Night sweats were documented on August 6, 2003. R 169. She testified to sleepiness as a side effect of her medication, indicating that it caused her to be unable to work at a job she attempted after filing for benefits. R 270. Treatment notes repeatedly document fat redistribution. Ms. Gonzalez had an elevated CPK level as an effect of medication, necessitating interruption of her antiretroviral medications. R 149-50. No analysis of these symptoms was made under listing 14.08 N. Had the ALJ correctly performed a review under 14.08N, the evidence clearly shows that the plaintiff meets the listing.

ALJ Mazzarella erroneously dismissed Ms. Gonzalez's leg pain, characterizing it as related to use of medication and not her HIV+/AIDS status. R 23. This is error, since even if Ms. Gonzalez's leg pain was a side effect of the medication, the listing unequivocally requires that the side effects of medication be considered. Moreover, ALJ Mazzarella opined that her leg pain was controllable by a change in her medication. Notably, the ALJ's assertion that her leg pain would be controllable by a change in medication demonstrates the ALJ's misunderstanding of her medication situation. The record indicates that she is on a "rescue regimen" of HIV medication.[19] R 170. As such, her choices for medication to treat her HIV infection are limited. Although a change in medication might in fact alleviate the plaintiff's chronic leg pain, she may not have the luxury of altering her HIV medication regimen.

[19] See note 11.

Additionally in speculating on the effect a medication could have on Ms. Gonzalez's condition, the ALJ illegally second guessed her treating physician, Dr. Luque, who opined that Ms. Gonzaleaz's leg pain was disabling and was possibly related to her medication, but nonetheless did not change the plaintiff's medication. It also ignores the doctor's most recent theory that Ms. Gonzalez's leg pain is associated with her HSV outbreaks. R 258. This speculative medical judgment is beyond the province of an ALJ. *Balsamo v. Chater*, 142 F.3d 75, 81 (2d Cir. 1998).

ALJ Mazzarella also did not follow the instructions included in the introduction to the listings under the 14.00 Immune System category, which provide guidance for evaluating claims of individuals with HIV infection. Specifically, the ALJ erred in failing to consider Ms. Gonzalez's complaints in the context of manifestations of HIV specific to women. "[W]hen evaluating the claim of a woman with HIV infection, it is important to consider gynecologic and other problems specific to women." 20 C.F.R. Pt. 404, Subpt. P, App. 1, listing14.00(D)(5). Here, the ALJ made mention of plaintiff's HSV, but did not address it as a possible manifestation of HIV, although it appears as a listed infection under 14.08. Nor was there any indication that he considered her HSV infection from the standpoint of a manifestation of HIV specific to women. Rather, he dismissed the resultant impairment as non- severe. R 22. The ALJ's failure to find that the plaintiff's HSV was not limiting enough to even meet the *de minimus* severity standard, considering her testimony and the treating physician's records, was error.[20]

ALJ Mazzarella also failed to consider the exacerbation and remission in the disease course as required by the listing. Ms. Gonzalez described HSV flare ups every month, lasting two weeks since 1993. She testified that although medication was helpful, her HSV had never been controlled. Ms. Gonzalez described a burning sensation and pain in her legs preceding these monthly breakouts.

[20] See note 18.

R 277 and 282. The ALJ's dismissal of the plaintiff's HSV as non-severe precluded the required analysis of the exacerbation and remission in her disease course.

Listing 14.08 N also requires a marked level of limitation in restrictions of activities of daily living, difficulties in maintaining social functioning; or difficulties in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace. The plaintiff's testimony supports a finding of marked restrictions of activities of daily living. Ms. Gonzalez stated that she needed help with shopping, and that it took her two days to complete due to fatigue. She also testified that she needed daily naps and was drained and very tired by one p.m. daily. She was required to rest between household chores and had to break down house work into manageable parts. R 286 and 288. Her allegations are supported by Dr. Luque's assessment of her residual functional capacity, as well as by the record as a whole.

The ALJ's failure to evaluate the plaintiff under 14.08 N, his failure to properly consider the side effects of medication, as well as his failure to properly consider the plaintiff's HSV infection constitute legal error. Moreover, evidence submitted to the Appeals Council reinforces and strengthens the assertion the Ms. Gonzalez meets listing 14.08N. In her report of September 7, 2005, Dr. Luque detailed persistent and frequent pain on the thighs. She also specifically stated that the plaintiff's recurrent HSV infection resulted in pain and difficulty sitting. R 247-252. The administrative record clearly shows that Ms. Gonzalez meets listing 14.08N.

Lastly, the ALJ stated that the plaintiff's January 1, 2003, CD4 count of 656 was not of listing severity. R 23. The ALJ concludes his opinion by stating that the claimant is invited to reapply for benefits in the event her CD4 count falls below 200. R 26. This demonstrates a misunderstanding of listing 14.08. While the introduction to the listing states that generally CD4 counts below 200 indicate increased susceptibility to opportunistic disease, there is no listing under

14.08 that includes reference to a CD 4 count as a criteria. Application of such a standard is legal error.

II. THE ALJ DID NOT ACCORD PROPER WEIGHT TO THE TREATING PHYSICIAN'S OPINIONS

The opinion of a treating physician, if well supported and not contradicted, is entitled to controlling weight under 20 C.F.R. §§404.1527 & 416.927. Adjudicators must apply various factors when the treating physician's opinion is not given controlling weight in order to determine the weight to give the opinion: (i) the frequency of examination and the length, nature, and extent of the treatment relationship; (ii) the evidence in support of the opinion; (iii) the opinion's consistency with the record as a whole; (iv) whether the opinion is from a specialist; and (v) other relevant factors. In weighing the opinions of treating physicians, the ALJ may not substitute his own judgment for competent medical opinion. Nor is he free to set his own expertise against that of a physician who submitted on opinion. *Balsamo*, 142 F.3d 75, 81.

The plaintiff's treating physician, Dr. Luque, gave several opinions regarding the plaintiff's residual functional capacity that were available to the ALJ at the hearing. On July 25, 2005, the doctor indicated that Ms. Gonzalez was limited by fatigue and weakness to one hour standing, one hour walking, lifting five pounds and carrying two pounds. R 227. The doctor stated that she was moderately limited in sitting. R 239. Because her reports show that the plaintiff is limited to lifting significantly less than ten pounds and does not likely have the ability to sit or stand/walk for a full eight hour workday, Dr. Luque's assessments establish a residual functional capacity that is less than sedentary.[21] As such she is disabled.

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[21] Social Security defines sedentary work as work involving lifting and carrying no more than ten pounds and occasionally lifting and carrying articles like docket files, ledgers, and small tools. A

ALJ Mazzarella disregarded Dr. Luque's assessment of the plaintiff's residual functional capacity as "inconsistent with the evidence of record." R: 31. The ALJ misstates or improperly discounts evidence in coming to this conclusion.

ALJ Mazzarella misstates Dr. Luque's opinion regarding the plaintiff's ability to sit, stating that the doctor concluded that she has no restrictions with regard to her sitting capacity. R 24. In fact, in the exhibit the ALJ cites to, in one instance Dr. Luque neglected to indicate whether there was a limitation in sitting or not. R 227. In the second report included in the exhibit that ALJ Mazzarella cites, however, Dr. Luque indicates at least a moderate limitation for sitting. R 239. ALJ Mazzarella is thus either misrepresenting the evidence or misunderstood what occurred. As the Court of Appeals noted in *Pratts v. Chater,* 94 F.3d 34, 39 (2d Cir. 1996), such error "further winnow[s] the amount of substantial evidence underlying the ALJ's decision to deny [plaintiff] disability benefits."

ALJ Mazzarella also discounted the plaintiff's complaints of leg pain, as well as Dr. Luque's assertions regarding her leg pain, simply because EMG testing ruled out several diagnoses. In so doing, the ALJ ignores the longitudinal evidence of the plaintiff's consistent complaints of leg pain. It is evident from the record that Dr. Luque's theories regarding the cause of the plaintiff's leg pain have evolved over time, as causes were posited and ruled out by testing, such as the EMG tests cited by the ALJ. Medically determinable causes that can reasonably be expected to cause leg pain, however, such as chronic HSV or medication side effects, unquestionably exist. In fact, in the next paragraph, ALJ Mazzarella opines that her leg pain is due to medication side effects. (R 24).

ALJ Mazzarella's inappropriately valuing the negative EMG test results over the opinion of the treating physician was incorrect. "[T]he ALJ cannot arbitrarily substitute his own

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sedentary job is defined as one that involves sitting, however, walking and standing are required occasionally. 20 CFR 404.1576(a) and 416.967(a).

judgment for competent medical opinion," nor can he "set his own expertise against that of a physician who [submitted an opinion to or] testified before him." *Balsamo v. Chater,* 142 F.3d at 81.

The ALJ also erred in relying on the one time examiner's opinion to the exclusion of Dr. Luque's opinion. While not according much weight to Dr. Luque's opinion, the ALJ instead relied on the opinion of the one time consultative examiner, stating that "more importantly, an impartial consultative examiner, Dr. Ramon Medalle, determined that the plaintiff is only mildly limited in activities requiring sustained moderate to heavy physical exertion because of her HIV infection and AIDS complicated by myopathy." R 24. *See Iannopollo v. Barnhart*, 280 F Supp.2d 41 (W.D.N.Y. 2003), (finding it was legal error for the ALJ to treat the opinions of the examining physicians on par with the treating physician's opinion). *See also Rosato v. Barnhart,* 352 F. Supp. 2d 386 (E.D.N.Y. 2005), (finding that the ALJ's decision was not supported by substantial evidence where the ALJ accorded great weight to the one time Social Security Consultative Examiner and summarily accorded no weight to the opinions of treating physicians).

In fact, Dr. Luque's opinion is well supported and not contradicted. The doctor cites MRI results showing right paracentral disc herniation at L3-L4 and paracentral disc bulging at L4-L5. R 237. Furthermore, the record shows that the plaintiff has recurrent HSV infections possibly causing leg pain. She is also on a regimen of antiretroviral medications that may cause leg pain as a side effect.

Moreover, evidence submitted to the Appeals Council is consistent with Dr. Luque's earlier opinions. Dr. Luque's September 7, 2005 opinion gives limitations on sitting, specifically less than six hours in an eight hour day. R 248 and 252. That report also contains Dr. Luque's opinion that the plaintiff was limited to lifting less than ten pounds, standing and/or walking less than two hours in an eight hour workday and sitting less than six hours in an eight hour work day. She also indicated that Ms. Gonzalez was limited in pushing and pulling, as well as all postural activities with the exception of balancing. Dr. Luque specifically stated that persistent

pain on thighs precluded walking, lifting, pushing and pulling. An additional attached report completed by the doctor explicitly notes that the plaintiff's recurrent HSV caused pain and difficulty in sitting for long periods. R 247 – 252.

Even if, assuming *arguendo*, Dr. Luque's opinion is not entitled to controlling weight, is should nonetheless be accorded extra weight. ALJ Mazzarella declined to apply any of the factors required by 20 C.F.R. §§404.1527 & 416.927 when a treating physician's opinion is not given controlling weight. He did not analyze the frequency of examination and the length, nature, and extent of the treatment relationship of Dr. Luque and Ms. Gonzalez. He did not take into consideration the fact that Dr. Luque is a specialist in HIV medicine.[22] The ALJ's failure to do so constitutes an error of law, requiring at the very least a remand. *See Schaal v. Apfel*, 134 F.3d 496, 503-04 (2d Cir. 1998), where the Court of Appeals remanded because it could not determine whether the ALJ had applied the treating physician rule as set forth in the regulations.

III. THE ALJ ERRED IN RELYING ON THE MEDICAL – VOCATIONAL GUIDELINES

The Commissioner has established a five step procedure for evaluating disability claims. At step five of the "sequential evaluation," the burden shifts to the Commissioner to show that there is work in the national economy that the plaintiff could perform. The Medical – Vocational Guidelines (Grids) found at Appendix 2 to 20 C.F.R. Part 404, Subpt. P, direct a conclusion as to whether work exists in the national economy that an individual plaintiff could perform based on the plaintiff's physical ability, age, education and work experience. The Grids are applicable at that point in the "sequential evaluation" process where the plaintiff has been determined not to

[22] Dr. Luque is certified by the American Board of Internal Medicine with a specialty in infectious diseases. She is the Medical Director of the Strong Hospital AIDS center and is the chair of the Women's Health committee DOH New York AIDS institute, as well as the vice chair of the medical care criteria committee of the DOH New York AIDS Institute. http://www.nydoctorprofile.com/search_parameters.jsp

meet a listing, but no longer able to return to past relevant work. 20 C.F.R. §§404.1520 & 416.920.

The ALJ erred in reaching this point in the sequential evaluation, since, as set forth above, Ms. Gonzalez's condition meets the listings. He further erred in continuing on to step five and relying on the Medical – Vocational guidelines in this case.[23]

A. THE PLAINTIFF CANNOT PERFORM SEDENTARY WORK

Where a claimant's medical-vocational profile correlates perfectly with that of a particular grid rule, the rule will dictate whether the claimant can be considered disabled. *Decker v. Harris*, 647 F.2d 291, 296 (2d Cir. 1981). All grid rules, however, assume that the claimant is capable of performing a full range of sedentary work. In cases such as this one, where the claimant cannot perform a full range of sedentary work, he or she must be evaluated individually rather than by a mechanical application of the grid rules. *Nelson v. Bowen*, 882 F.2d 45, 46 (2d Cir.1989). Because the claimant cannot perform a full range of sedentary work, the ALJ erred in applying Grid rule 201.23 to conclude that the plaintiff is not disabled.

In this case, there is substantial evidence in the form of the treating physician's opinions that establish that Ms. Gonzalez cannot perform sedentary work. As discussed above, Dr. Luque specified several times that the plaintiff could not lift the required weight to perform sedentary work. She also opined that the plaintiff could not stand and/or walk or sit for a time periods sufficient to total an eight hour work day. The ALJ erred in disregarding the evidence before him and applying the Grid rules. Additionally, the evidence submitted to the Appeals Council is consistent with Dr. Luque's previous opinion that the plaintiff cannot perform sedentary work.

B. THE PLAINTIFF HAS NON-EXERTIONAL IMPAIRMENTS

[23] The ALJ conceded at step four that Ms. Gonzalez was unable to return to her past work. R 25.

"In the ordinary case [the Commissioner] satisfies [her] burden by resorting to the applicable medical vocational guidelines (the grids), 20 C.F.R. Pt. 404, Subpt. P, App. 2." *Bapp v. Bowen,* 802 F.2d 601, 604 (2d Cir. 1986). When, however, a plaintiff's nonexertional impairments significantly diminish her ability to work--over and above any incapacity caused solely from exertional limitations-- so that she is unable to perform the full range of employment indicated by the medical vocational guidelines, the Commissioner must introduce the testimony of a vocational expert (or other similar evidence) as to jobs in the economy that the plaintiff can obtain and perform. *Id.* at 601. *See, e.g., Butts v. Barnhart,* 388 F.3d 377 (2d Cir. 2004), where the Court of Appeals agreed that it was error to rely on the Grids in light of the plaintiff's non-exertional impairments.

ALJ Mazzarella's reliance on the Grid rules was inappropriate because in applying those rules, the ALJ ignored evidence of the plaintiff's non-exertional impairments. Although Dr. Luque indicated that some of Ms. Gonzalez's limitations were due to fatigue and weakness, the doctor also stated that persistent lower extremity pain caused functional limitations. R 226 – 228. Virtually all treatment notes in the record log complaints of leg pain. Ms. Gonzalez testified to pain, stating it was her most significant problem. R 276.

Pursuant to 20 C.F.R. §§404.1569a(d) and 416.969a(d), pain is a non-exertional impairment. Thus, under the regulations, the plaintiff is considered to have combined exertional and non-exertional limitations. As such, the grid rules do not directly apply, unless the Grids are used to direct a conclusion of disabled. "[W]here the plaintiff's work capacity is significantly diminished beyond that caused by his exertional impairment the application of the grids is inappropriate. *Pratts v. Chater*, 94 F.3d at 39, quoting *Bapp v. Bowen*, 802 F. 2d, 601, 604-05(2d Cir 1986).

ALJ Mazzarella found that the plaintiff's complaints of pain and discomfort were not credible. Although the ALJ has discretion to evaluate a plaintiff's credibility, pursuant to 20 CFR 416.929 and SSR 96-7p,[24] the adjudicator must consider the entire case record. *See, e.g., Rivera v. Schweiker,* 717 F.2d 719, 724 (2d Cir. 1983). The ALJ may not summarily discount subjective complaints. *Marcus v. Califano*, 615 F. 2d 23, 27 (2d Cir. 1979).

The ALJ summarily dismissed Ms. Gonzalez's complaints of pain, citing negative EMG test results. R 24. He did not discuss the possibility that the pain is caused by her HSV outbreaks as posited by her treating physician. The ALJ did not take into consideration the MRI report showing both a disc herniation and a disc bulge. R 237. Although he opined that her lower extremity pain is caused by medication side effects, he did not consider that possibility when assessing her credibility. R 24.

Ms. Gonzalez's statements should be found to be credible based on the factors detailed in SSR 96 – 7 p. Her subjective complaints of pain are internally consistent, to both treating sources and consultative examiners, as well as consistent over time. The medical evidence, particularly from her treating physician, as well as the objective evidence of the MRI results is consistent with her statements. Lastly, her history of consistently seeking treatment for her leg pain, including stopping HIV medications due to an elevated CK level, undergoing physical therapy, undergoing an EMG test, as well as taking medications for the pain, supports a finding of credibility under SSR 97 - 7p. The ALJ thus erred in discounting her allegations of pain.

CONCLUSION

[24] *Social Security Ruling (SSR) 96-7p* is available at www.socialsecurity.gov.

Ms. Gonzalez is a 39 year-old woman who is disabled by AIDS and its manifestations such as chronic herpes simplex outbreaks and chronic leg pain, as well as back pain. In his decision, ALJ Mazzarella failed to properly consider Ms. Gonzalez's impairment under the listings. He did not afford the proper weight to the treating physician and set his own expertise against that of the treating physician. ALJ Mazzarella improperly relied on the grids to direct a finding of not disabled. The Commissioner's decision should therefore be reversed, or in the alternative, remanded for proper consideration of the evidence.

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Respectfully Submitted,

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