IN THE UNITED STATES DISTRICT COURT
FOR THE XXXXX OF XXXXX

Firstname Lastname,	)	No. XXXXX
	)	
Plaintiff,	)	Hon. XXXXX,
	)	United States District Judge
v.	)	
	)	Hon. XXXXX,
JO ANNE B. BARNHART,	)	United States Magistrate Judge
Commissioner of Social Security,	)	
	)	PLAINTIFF'S REPLY BRIEF
Defendant.	)	
	)	

I. *Introduction*: The Commissioner is Largely Unresponsive.

Plaintiff, Firstname Lastname, carefully set forth five arguments why this Court should reverse the ALJ's step-two decision with a remand for a rehearing. (Pl.'s Mem. at 6-11.) The Commissioner is largely unresponsive, leaving unrebutted several of Lastname's core contentions. (Def.'s Br. at 8-14.) The Commissioner also relies on improper post hoc rationalizations even though they have been improper for more than half a century:

> The Commissioner insists that "the record as a whole" fills the gaps in the ALJ's analysis . . . . But regardless whether there is enough evidence in the record to support the ALJ's decision, principles of administrative law require the ALJ to rationally articulate the grounds for her decision and confine our review to the reasons supplied by the ALJ. See SEC v. Chenery Corp., 318 U.S. 80, 93-95 [] (1943); Johnson v. Apfel, 189 F.3d 561, 564 (7th Cir. 1999); Sarchet v. Chater, 78 F.3d 305, 307 (7th Cir. 1996). That is why the ALJ (not the Commissioner's lawyers) must "build an accurate and logical bridge from the evidence to her conclusion." Dixon v. Massanari, 270 F.3d 1171, 1176 (7th Cir. 2001). . . . .

Steele v. Barnhart, 290 F.3d 936, 941 (7th Cir. 2002); see also Golembiewski v. Barnhart, 322 F.3d 912, 916 (7th Cir. 2003) (collecting Chenery cases). Lastname replies below to Defendant's Brief following the order of argument in Plaintiff's Memorandum.

II. *Musculoskeletal Impairments*: The Commissioner Does Not Address Lastname's Specific Argument.

The ALJ found that Lastname did not have any musculoskeletal impairment. (Tr. at 16-17.) According to the ALJ, Lastname had no musculoskeletal diagnosis whatsoever that could cause back or neck pain. (Tr. at 16-17.) By reference to objective findings, Lastname proved that this was false. (Pl.'s Mem. at 6-7.) Magnetic resonance imaging showed moderate stenosis, early degenerative changes, and bulging discs in the lumbosacral spine. (Pl.'s Mem. at 7 (citing Tr. at 382-84).) Against Lastname's specific argument attacking the ALJ's finding that Lastname had absolutely no musculoskeletal diagnosis, the Commissioner has nothing to say. (Def.'s Br. at 12-13.)

Citing Lauer v. Apfel, 169 F.3d 489, 494 (7th Cir. 1999) and other Seventh Circuit authority,[1] Lastname further contended that the ALJ erroneously failed to grapple with Dr. ExaminerOne's May 2002 examination. (Pl.'s Mem. at 7.) The Commissioner neither cites nor distinguishes Lauer. (Def.'s Br. at 12-13.) Instead, as an improper post hoc rationalization, the Commissioner alleges that Dr. ExaminerOne's findings "did not appear to significantly limit Plaintiff's ability to perform basic work activities." (Def.'s Br. at 13 (citing Tr. at 383).) But Dr. ExaminerOne did not say that Lastname did not have any work-related limitations. Dr. ExaminerOne only addressed whether Lastname's left-ankle condition was related to his military service and found that it was not. (Tr. at 384.) It matters for the purpose of veterans benefits whether a condition is service-connected. 38 C.F.R. Pt. 4 (2003).

There is another way of understanding the Commissioner's error. The Commissioner invites this Court to weigh medical evidence the ALJ never addressed. (Def.'s Br. at 12-13.) The Commissioner misconceives this Court as a weigher of evidence in the first instance. Instead, the ALJ is responsible for weighing evidence, including evidence that detracts from his decision. Lauer, 169 F.3d at 494; cf. also Eads v. Secretary of Dep't of Health and Human Servs., 983 F.2d 815, 817-18 (7th Cir. 1993) ("It would change our role from that of a reviewing court to that of an administrative law judge, required to sift and weigh evidence in the

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[1] Godbey v. Apfel, 238 F.3d 803, 808 (7th Cir. 2000); Binion ex rel. Binion v. Chater, 108 F.3d 780, 788 (7th Cir. 1997).

first instance, rather than limited as we are to reviewing evidentiary determinations made by the front-line factfinder.").

III. *20 C.F.R. § 404.1530 (2003)*: The Commissioner Tries to Jettison the ALJ's Rationale.

The Commissioner is in a quandary. On the one hand, the ALJ cited 20 C.F.R. § 404.1530 (2003), and stated that this regulation provides "that if a claimant does not follow prescribed treatment without a good reason, the claimant will not be found disabled . . . ." (Tr. at 16.) On the other hand, the ALJ did not make the findings that section 404.1530 requires. (Pl.'s Mem. at 7-8 (explaining why section 404.1530 cannot be applied at step two).) To escape the quandary, the Commissioner denies that the ALJ meant what he said: "the ALJ did not base his decision . . . . on [Lastname's] poor compliance with recommended treatment . . . ." (Def.'s Br. at 10.) The Court should reject the Commissioner's attempt to jettison the ALJ's express rationale in litigation. It is too late to revise the ALJ's rationale. Rewriting the ALJ's rationale in litigation is also inappropriate given that the Commissioner does not deny that section 404.1530 cannot be applied at step two, the step at which the ALJ decided that Lastname was not disabled. (Compare Pl.'s Mem. at 8 (citing 20 C.F.R. § 404.1530 (2003); SSR 82-59; McKnight v. Sullivan, 927 F.2d 241, 242 (6th Cir. 1990); Shramek v. Apfel, 226 F.3d 809, 812-13 (7th Cir. 2000)), with Def.'s Br. at 10-11.)

IV. *Dr. NonexaminerOne and Dr. NonexaminerTwo*: The Commissioner Does Not Address Lastname's Argument.

Lastname demonstrated that the ALJ erroneously evaluated the opinions of non-examining state-agency physicians Dr. NonexaminerOne and Dr. NonexaminerTwo. (Pl.'s Mem. at 8-9; Tr. at 17, 267-73.) The ALJ purportedly agreed with Dr. NonexaminerOne and Dr. NonexaminerTwo even though Dr. NonexaminerOne and Dr. NonexaminerTwo provided opinions markedly inconsistent with the ALJ's finding that Lastname did not even have a more-than-minimal step-two impairment. (Pl.'s Mem. at 8-9.) The Commissioner does not address Lastname's argument. (Def.'s Br. at 13.) Instead, the Commissioner asserts that the ALJ rejected Dr. NonexaminerOne's and Dr. NonexaminerTwo's opinions. (Def.'s Br. at 13.)

Assuming arguendo that the ALJ did not agree with Dr. NonexaminerOne and Dr. NonexaminerTwo even though the ALJ said that he agreed with them (Tr. at 17), the

Commissioner's proposed reason for disagreeing with Dr. NonexaminerOne and Dr. NonexaminerTwo does not withstand muster (Def.'s Br. at 13). The Commissioner believes that Dr. NonexaminerOne and Dr. NonexaminerTwo did not appreciate that Lastname's "treatment for tuberculosis ended after ten months of treatment . . . ." (Def.'s Br. at 13 (citing Tr. at 291).) The Commissioner makes a fundamental mistake. The Commissioner assumes that a claimant's tuberculosis has no residual effect whatsoever after active tuberculosis is no longer present. (Pl.'s Mem. at 9, 12.) The Commissioner identifies no medical evidence or authority for this assumption. Hence, if the ALJ himself had based his decision on the assumption that a claimant without active tuberculosis has no residual effect from tuberculosis, substantial evidence would not support the ALJ's decision. Cf. Schmidt v. Sullivan, 914 F.2d 117, 118 (7th Cir.1990) ("But judges, including administrative law judges of the Social Security Administration, must be careful not to succumb to the temptation to play doctor.").

The Commissioner also misstates the record. (Pl.'s Mem. at 13.) The Commissioner apparently alleges that only one doctor believed that Lastname's pulmonary condition would cause limitations beyond one year. (Pl.'s Mem. at 13 ("rather than one doctor's speculation").) This is inaccurate. Examining physician Dr. ExaminerTwo did not report that Lastname's pulmonary condition with attendant limitations would not last more than one year. (Tr. at 315-16.) Neither of the non-examining physicians—Dr. NonexaminerOne and Dr. NonexaminerTwo—suggested that Lastname's pulmonary condition would not persist for more than twelve months. (Tr. at 266-73.) Likewise, medical expert Dr. MEOne did not suggest that the effects of Lastname's pulmonary condition would not last one year. (Tr. at 52-53.)

VI. *Combined Impairments*: The Commissioner Does Not Address Lastname's Argument.

Lastname demonstrated how his combined impairments constituted a severe impairment at step two. (Pl.'s Mem. at 10-11 (collecting authority).) The ALJ erroneously rejected Dr. ExaminerTwo's and Dr. MEOne's opinions based on Lastname's combined impairments. (Pl.'s Mem. at 10-11 (citing Tr. at 52-53, 316).) While the Commissioner mentions in boilerplate the need to consider a claimant's combined impairments at step two (Def.'s Br. at 11), the Commissioner appears to have no specific response to Lastname's argument at pages 10 and 11

of Plaintiff's Memorandum.

VII. Conclusion

The Court should reverse the Commissioner's final decision with a remand for a rehearing and readjudication. 42 U.S.C. § 405(g) (sentence four); see Sarchet v. Chater, 78 F.3d 305, 309 (7th Cir. 1996) ("When the decision of that tribunal on matters of fact is unreliable because of serious mistakes or omissions, the reviewing court must reverse unless satisfied that no reasonable trier of fact could have come to a different conclusion, in which event a remand would be pointless.").

Respectfully submitted,

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Firstname Lastname

CERTIFICATE OF SERVICE

I, Eric Schnaufer, certify that on May 23, 2003 I caused to be served by First Class U.S. Mail the foregoing Plaintiff's Reply Brief to counsel of record for the Defendant at the following address:

Anne Lipnitz
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