

NA 06-0100-C H/H Everroad v Astrue  
Judge David F. Hamilton

Signed on 08/10/07

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

DENNY L. EVERROAD, )  
 )  
 ) Plaintiff, )  
 vs. ) NO. 4:06-cv-00100-DFH-WGH  
 )  
 JO ANNE B. )  
 BARNHART, COMMISSIONER OF THE )  
 SOCIAL SECURITY ADMINISTRATION, )  
 )  
 Defendant. )

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

|                                    |   |                              |
|------------------------------------|---|------------------------------|
| DENNY L. EVERROAD,                 | ) |                              |
|                                    | ) |                              |
| Plaintiff,                         | ) |                              |
|                                    | ) |                              |
| v.                                 | ) | CASE NO. 4:06-cv-100-DFH-WGH |
|                                    | ) |                              |
| MICHAEL J. ASTRUE, Commissioner of | ) |                              |
| Social Security, <sup>1</sup>      | ) |                              |
|                                    | ) |                              |
| Defendant.                         | ) |                              |

ENTRY ON JUDICIAL REVIEW

Plaintiff Denny L. Everroad seeks judicial review of a decision by the Commissioner of Social Security denying his claim for disability insurance benefits under the Social Security Act. Acting for the Commissioner, an Administrative Law Judge (“ALJ”) determined that Mr. Everroad suffered from the severe impairments of major depressive disorder, a borderline personality disorder, and a seizure disorder. The ALJ nevertheless concluded that he was not disabled for purposes of the Social Security Act because he was still capable of performing a number of jobs in the national economy. On appeal, Mr. Everroad contends that the ALJ erred in assessing his residual functional capacity and by posing an

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<sup>1</sup>Michael J. Astrue took office as Commissioner of the Social Security Administration while Mr. Everroad’s case was pending before the court. Commissioner Astrue is substituted as the defendant in this action pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

inadequate hypothetical question to the vocational expert. The ALJ did consider all of Mr. Everroad's functional limitations in assessing his residual functional capacity. However, the ALJ failed to convey those functional limitations adequately to the vocational expert, thus undermining the evidentiary support for the ALJ's conclusion that Mr. Everroad could perform work available in the national economy. For that reason, the case must be remanded.

### *Background*

Mr. Everroad was born in 1952 and has a high school education. His relevant past work experience includes work on a factory assembly line, as well as work as a garden associate and stocker in a retail store. He has also worked as a saw operator and assembler for a furniture manufacturer. He alleges that he became disabled on August 12, 2002 due to "seizure disorder, asthma, slow heart beat, [and] diabetes." R. 90. At his hearing before the ALJ, Mr. Everroad claimed also to be disabled due to his mental health problems. R. 556.

Mr. Everroad has a long medical history that involves a number of both physical and mental problems. Because this appeal concentrates on the ALJ's findings regarding Mr. Everroad's depression, the court focuses primarily on facts relevant to that mental impairment.

The bulk of the evidence relating to Mr. Everroad's depression arose after the alleged onset date of disability. There are, however, some prior indications of depression in Mr. Everroad's medical history. The first dates from 1984. After Mr. Everroad's divorce from his first wife, he overdosed after consuming a bottle of pills and spent ten months in a hospital. R. 450. During the hospitalization, he was treated with Zoloft, Seroquel, and Dilantin. *Id.* In June 1998, Mr. Everroad saw Dr. Richard Snellgrove, his personal physician, complaining of problems with reflux. R. 247. Dr. Snellgrove noted that Mr. Everroad also complained of "anxiety, labile emotions, easily angered, not sleeping well. Stressed and depressed." *Id.* Records do not provide details about the cause or severity of Mr. Everroad's depression in 1998. Dr. Snellgrove prescribed Wellbutrin.

Mr. Everroad's complaints of depression were pronounced during a February 3, 2003 visit with Dr. Snellgrove. R. 217. Mr. Everroad's second wife had urged him to seek treatment after he indicated that thoughts of suicide had crossed his mind. He was not yet at the point of having planned specifically how he might kill himself. Dr. Snellgrove prescribed both Effexor and Trazodone while also arranging a visit with a psychiatrist. During a neurological exam with Dr. Daniel Stubler on February 5, 2003, Mr. Everroad was described as "very severely depressed." R. 258-59. During a follow-up visit with Dr. Snellgrove on February 11, 2003, Mr. Everroad said that serious marital problems were causing his depression. R. 216. The physician decided during this follow-up to wean Mr. Everroad from Effexor and to begin a course of Lexapro.

Mr. Everroad's treating psychiatrist was Dr. Terry Passman. The record contains no treatment notes from Dr. Passman but includes a June 2003 residual functional capacity questionnaire that he completed. R. 266. Dr. Passman diagnosed Mr. Everroad with major depression. He found that Mr. Everroad had marked deficiencies of concentration; moderate ability to understand, carry out, and remember instructions; moderate difficulty in maintaining social functioning; and moderate frequency of decompensation episodes. *Id.*

In July 2003 Mr. Everroad was seen at the Mobile (Alabama) Infirmary Medical Center after he had put a gun to his neck and threatened to kill himself following a dispute with his wife. R. 450. He was diagnosed with major depressive disorder and remained hospitalized for nine days. Upon admission, Mr. Everroad was assigned a Global Assessment of Functioning ("GAF") score of 35. R. 471.<sup>2</sup> Upon discharge, his GAF was assessed at 55. R. 450.<sup>3</sup>

After discharge, Mr. Everroad continued to seek counseling through an employee assistance program in Indiana from August through September 2003. His counselor noted that he was "extremely depressed," R. 441, angry, and had

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<sup>2</sup>A GAF score between 31 to 40 indicates a major impairment in several areas. American Psych. Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 34 (4th ed. text rev. 2000) ("DSM-IV") at 32.

<sup>3</sup>A GAF score between 51 to 60 indicates moderate difficulty in social, occupational, or school functioning. DSM-IV at 32.

experienced “nightmares of suicide and suicide ideation” after speaking with his children over the phone. R. 437.

In September 2003, Mr. Everroad was admitted into the Community Hospital in Indianapolis, Indiana. He was diagnosed with major recurrent depressive disorder and reported suicidal ideations. He reported feeling “Hopeless, helpless, worthless[], depressed, anxious, decrease in appetite, decrease in weight, irritable.” R. 325. He also reported feeling “homicidal about his wife.” *Id.* Upon admission, he was assigned a GAF of 10.<sup>4</sup> After several days of treatment, Mr. Everroad was discharged in significantly better condition. His GAF was rated at 60. R. 325. He was no longer suicidal or homicidal. R. 326. In October 2003, Mr. Everroad was seen on referral at Adult & Child Center, Inc. He was diagnosed again with major recurrent depression. R. 315. His GAF was rated at 45. R. 318.<sup>5</sup>

As part of its disability determination, the Social Security Administration asked Dr. Alfred Barrow to evaluate Mr. Everroad in January 2004. R. 268. Barrow reviewed the records, administered a Minnesota Multi-Phasic Personality Inventory-2 (“MMPI-2”), and also conducted a clinical interview and mental status examination. *Id.* Dr. Barrow found that the MMPI-2 suggested “exaggeration of

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<sup>4</sup>A GAF score of 10 indicates persistent danger of severely hurting oneself or others or a serious suicidal act with clear expectation of death. DSM-IV at 32.

<sup>5</sup>A GAF score of between 41 to 50 indicates serious symptoms or any serious impairment in social, occupational, or school functioning. DSM-IV at 32.

response style, nevertheless, there is a suggestion of significant depressive tendencies which are consistent with his clinical presentation and social history.” R. 274. Dr. Barrow diagnosed major depressive disorder, recurrent, severe, and without psychotic features. R. 275. He assigned a GAF score of 55. *Id.* Later in January 2004, Dr. Barrow completed a function-by-function assessment of Mr. Everroad’s mental residual functional capacity. R. 281-82. His ratings ranged from “marked” limitations in some areas to “slight” limitations in others. *Id.*<sup>6</sup>

In November 2004, Mr. Everroad was admitted into Community Hospital for a series of electroconvulsive treatments. R. 512. Nine such treatments were administered over the course of several months. R. 474-520.

#### *Testimony at Hearing*

On Mr. Everroad’s application for Social Security disability benefits was denied in January 2003. At his request, a hearing was held before Administrative Law Judge James R. Norris in July 2004. Mr. Everroad was asked if anything other than seizures kept him from working. He replied that his “mental status” interfered with his ability to work. R. 556. He added: “It don’t take but just a

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<sup>6</sup>In September 2004, Dr. Barrow re-examined Mr. Everroad. While Dr. Barrow suggested that the claimant exaggerated his performance on the MMPI-2 during this re-evaluation, he nevertheless concluded that Mr. Everroad’s “profile is suggestive of considerable depressive symptomology.” R. 289. Dr. Barrow concluded that the severity of Mr. Everroad’s mental limitations ranged from “slight” to “marked.” R. 291-92.

drop of a pin to set me off anymore, you know. The first thing that goes through my mind is I want to, you know, commit suicide.” *Id.*

At the request of the ALJ, Dr. James Brooks testified at the initial hearing. Dr. Brooks noted Mr. Everroad’s diagnoses of major depression and borderline personality disorder. R. 565. He also testified that based on his review of the record, Mr. Everroad’s depression “is close, but probably not quite meeting a listing” at step three of the disability determination. R. 566.

Before issuing a decision, the ALJ convened a supplemental hearing on January 6, 2005. Dr. Jack Thomas testified that Mr. Everroad would “be limited to simple repetitive tasks. He would also be limited to only occasional contact with the general public, and that is due to both the depressive disorder and . . . personality disorder.” R. 532.

The ALJ also asked vocational expert Michael Blankenship about a hypothetical person with Mr. Everroad’s age, education, and work experience. The ALJ asked the expert to assume a hypothetical person who:

has limitations of avoid concentrated exposure to dangerous machinery, hazards, heights and the like. I’ve also heard say open water. Hazards such as that. And also the additional restrictions would be simple and repetitive work, only occasional contact with the general public, and no work in assembly like situations or other fast-paced work, and I would also offer that that would be fast food is indicative of similar type of work, although that may not be fast-paced all the time, it does have periods when it can be.

R. 541. Blankenship testified that an individual with such restrictions could not do Mr. Everroad's past work. R. 542. He added that such a person could still work as a stock clerk or order filler, of which there was a significant number of jobs in the state and national economy. R. 543. The vocational expert also testified that such an individual could work as an inspector, tester, sorter, sampler, and weigher. *Id.*

### *Procedural History*

The ALJ concluded that Mr. Everroad was not disabled for purposes of the Social Security Act. R. 16-33. The Appeals Council denied Mr. Everroad's request for review, leaving the ALJ's decision as the final decision of the Commissioner of Social Security. See *Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000); *Luna v. Shalala*, 22 F.3d 687, 689 (7th Cir. 1994). Mr. Everroad now seeks this court's review of the denial of his application. The court has jurisdiction in the matter under 42 U.S.C. § 405(g).

### *The Statutory Framework for Determining Disability*

To be eligible for disability insurance benefits, a claimant must establish that he suffers from a disability within the meaning of the Social Security Act. To prove disability under the Act, the claimant must show that he is unable to engage in any substantial gainful activity by reason of a medically determinable physical

or mental impairment that could be expected to result in death or that has lasted or could be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d). Mr. Everroad was disabled only if his impairments were of such severity that he was unable to perform work that he had previously done and if, based on his age, education, and work experience, he also could not engage in any other kind of substantial work existing in the national economy, regardless of whether such work was actually available to him. *Id.*

This standard is a stringent one. The Act does not contemplate degrees of disability or allow for an award based on partial disability. *Stephens v. Heckler*, 766 F.2d 284, 285 (7th Cir. 1985). Even claimants with substantial impairments are not necessarily entitled to benefits, which are paid for by taxes, including taxes paid by those who work despite serious physical or mental impairments and for whom working is difficult and painful.

The implementing regulations for the Act provide the familiar five-step process to evaluate disability. The steps are:

- (1) Has the claimant engaged in substantial gainful activity? If so, he was not disabled.
- (2) If not, did the claimant have an impairment or combination of impairments that are severe? If not, he was not disabled.
- (3) If so, did the impairment(s) meet or equal a listed impairment in the appendix to the regulations? If so, the claimant was disabled.

- (4) If not, could the claimant do his past relevant work? If so, he was not disabled.
- (5) If not, could the claimant perform other work given his residual functional capacity, age, education, and experience? If so, then he was not disabled. If not, he was disabled.

See generally 20 C.F.R. § 404.1520. When applying this test, the burden of proof is on the claimant for the first four steps and on the Commissioner for the fifth step. *Briscoe v. Barnhart*, 425 F.3d 345, 352 (7th Cir. 2005); *Young v. Barnhart*, 362 F.3d 995, 1000 (7th Cir. 2004).

Applying the five-step process, the ALJ found that Mr. Everroad satisfied step one because he had not engaged in substantial gainful activity since his alleged onset date of disability. At step two, the ALJ found that he suffered the severe impairments of major depressive disorder, a borderline personality disorder, and a seizure disorder. At step three, the ALJ found that Mr. Everroad did not meet or equal any listed impairment. At step four, the ALJ found that Mr. Everroad was not able to perform any of his past relevant work. The ALJ then considered Mr. Everroad's residual functional capacity at step five. He found that Mr. Everroad's mental impairments would prevent him from performing the full range of work at any exertional level because he was limited to "performing simple and repetitive work that requires no more than occasional contact with the general public and does not require fast-paced assembly, working in a fast food restaurant, or doing other similar fast-paced work." R. 32. The ALJ nevertheless concluded that Mr. Everroad could perform a number of jobs in the national

economy, such as that of a stock clerk, order filler, weigher, measurer, checker, sampler, and record keeper. *Id.*

### *Standard of Review*

“The standard of review in disability cases limits . . . the district court to determining whether the final decision of the [Commissioner] is both supported by substantial evidence and based on the proper legal criteria.” *Briscoe v. Barnhart*, 425 F.3d 345, 351 (7th Cir. 2005), quoting *Scheck v. Barnhart*, 357 F.3d 697, 699 (7th Cir. 2004). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Diaz v. Chater*, 55 F.3d 300, 305 (7th Cir. 1995), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971). To determine whether substantial evidence exists, the court must “conduct a critical review of the evidence,’ considering both the evidence that supports, as well as the evidence that detracts from, the Commissioner’s decision . . . .” *Briscoe*, 425 F.3d at 351, quoting *Lopez v. Barnhart*, 336 F.3d 535, 539 (7th Cir. 2003); see also *Zurawski v. Halter*, 245 F.3d 881, 888 (7th Cir. 2001). The court must not attempt to substitute its judgment for the ALJ’s judgment by reweighing the evidence, resolving material conflicts, or reconsidering facts or the credibility of witnesses. *Cannon v. Apfel*, 213 F.3d 970, 974 (7th Cir. 2000); *Luna v. Shalala*, 22 F.3d 687, 689 (7th Cir. 1994). Where conflicting evidence allows reasonable minds to differ as to whether a claimant is entitled to benefits, the court must defer to the Commissioner’s resolution of that conflict. *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997).

A reversal and remand may be required, however, if the ALJ committed an error of law, *Nelson v. Apfel*, 131 F.3d 1228, 1234 (7th Cir. 1997), or based his decision on serious factual mistakes or omissions. *Sarchet v. Chater*, 78 F.3d 305, 309 (7th Cir. 1996). This determination by the court requires that the ALJ's decision adequately discuss the relevant issues: "In addition to relying on substantial evidence, the ALJ must also explain his analysis of the evidence with enough detail and clarity to permit meaningful appellate review." *Briscoe*, 425 F.3d at 351, citing *Herron v. Shalala*, 19 F.3d 329, 333-34 (7th Cir. 1994). Although the ALJ need not provide a complete written evaluation of every piece of testimony and evidence, *Schmidt v. Barnhart*, 395 F.3d 737, 744 (7th Cir. 2005), a remand may be required if the ALJ has failed to "build an accurate and logical bridge from the evidence to her conclusion." *Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002), quoting *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001).

### *Discussion*

#### *I. The ALJ's Mental Residual Functional Capacity Assessment*

Mr. Everroad first argues that the ALJ erred at step four by failing to perform an adequate function-by-function analysis as part of his residual functional capacity assessment. When the ALJ determines, as he did here, that the claimant suffers from severe mental impairments that do not meet a listing, the ALJ must perform a mental residual functional capacity assessment. 20 C.F.R. § 404.1520a(d)(3). To perform competitive, remunerative work, a person

must be capable of a number of mental activities. SSR 96-8p. “[T]he broad factors that the ALJ must consider include the ability to (1) understand, remember and carry out simple instructions; (2) make simple work-related decisions; (3) respond appropriately to supervision, coworkers and customary work pressures in a work setting; and (4) deal with routine changes in work settings.” *Lechner v. Barnhart*, 321 F. Supp. 2d 1015, 1035 (E.D. Wis. 2004), citing 20 C.F.R. § 404.1545(c), SSR 96-9p, SSR 85-16.

In evaluating Mr. Everroad’s mental RFC, the ALJ accepted the assessment of Dr. Jack Thomas, the testifying medical expert:

Based on the overall record, and consistent with Dr. Barrow’s limitations, Dr. Thomas opined that the claimant would be mentally limited to simple and repetitive, unskilled work that requires only occasional contact with the general public. Dr. Thomas gave his opinion that the claimant should avoid assembly and other similarly fast-paced work environments, such as fast food work. Dr. Thomas’ conclusions are accepted and made findings, *as they are consistent with the objective evidence and with the opinions of Dr. Barrow and Dr. Passman.*

R. 29 (emphasis added). Dr. Thomas did not state his findings in the function-by-function manner outlined in 20 C.F.R. § 404.1545(c). He stated his findings in more conclusory terms about the kinds of work the claimant could perform: that Mr. Everroad would be “limited to simple and repetitive, unskilled work that requires only occasional contract with the general public.” This was not, however, the full extent of the ALJ’s residual functional capacity assessment. Before accepting Dr. Thomas’s assessment, the ALJ performed an extensive function-by-

function review of Mr. Everroad's RFC in light of the factors enumerated in 20 C.F.R. § 404.1545(c). The ALJ did so by exhaustively reviewing the function-by-function determinations made by Mr. Everroad's treating and examining mental health professionals. The ALJ first reviewed the findings of Dr. Passman, who found that Mr. Everroad was not precluded from performing any of the relevant work-related functions:

Dr. Passman, the claimant's psychiatrist, opined in June of 2003 that the claimant had a moderate limitation in his ability to understand, carry out, and remember instructions in a work setting . . .<sup>7</sup> Dr. Passman gave his opinion that the claimant had only slight impairments in his ability to respond appropriately to supervision and co-workers in a work setting and his ability to perform repetitive tasks in a work setting. . . .<sup>8</sup> Dr. Passman said that the claimant did not have impairment in his ability to perform simple tasks.

R. 28.

The ALJ then reviewed the initial findings of Dr. Barrow, the consulting psychologist. Dr. Barrow initially found that Mr. Everroad had "marked limitation in his ability to respond appropriately to changes in a usual work setting," as well as "marked limitations in his ability to understand, remember, and carry out detailed instructions and the ability to make judgments on simple work-related

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<sup>7</sup>Dr. Passman defined "moderate" as "an impairment which affects but does not preclude the ability to function." R. 267.

<sup>8</sup>Dr. Passman defined "slight" or "mild" as "a suspected impairment of slight importance which does not affect the ability to function." R. 267.

decisions.” *Id.*<sup>9</sup> Dr. Barrow felt Mr. Everroad had only moderate limitations in his “ability to interact appropriately with the public, supervisors, and co-workers and the ability to respond appropriately to changes in a routine work setting.” *Id.*<sup>10</sup> Mr. Everroad was evaluated as having “slight limitations” in his ability to understand, remember, and carry out short, simple instructions. *Id.*<sup>11</sup>

The ALJ also reviewed the second opinion of Dr. Barrow, rendered in September 2004. R. 29. Modifying his earlier findings, Dr. Barrow observed that Mr. Everroad had “marked limitation” in his ability to respond appropriately to changes in the routine work setting. *Id.* Mr. Everroad had only “moderate limitations” in his ability to understand, remember, and carry out detailed instructions. *Id.* Other conclusions about Mr. Everroad’s functional abilities remained unchanged.

Mr. Everroad focuses on the fact that the ALJ never stated explicitly his own findings as to Mr. Everroad’s functional capacities before accepting Dr. Thomas’ conclusory characterization as to the kind of work he remained capable of performing. A fair reading of the ALJ’s opinion, however, makes clear that in

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<sup>9</sup>“Marked” limitations exist when “There is serious limitation in this area. The ability to function is severely limited but not precluded.” R. 291.

<sup>10</sup>“Moderate” limitations exist when “There is moderate limitation in this area but the individual is still able to function satisfactorily.” R. 291.

<sup>11</sup>“Slight” limitations exist when “There is some mild limitations in this area, but the individual can generally function well.” R. 291.

adopting Dr. Thomas' opinion, the ALJ was generally accepting the function-by-function assessments performed by both Dr. Barrow and Dr. Passman. Dr. Thomas' conclusions were accepted based on the fact that they were "consistent with . . . the opinions of Dr. Barrow and Dr. Passman." R. 29.<sup>12</sup> As Dr. Thomas himself testified, his conclusions were based on his review of the record and reports. R. 532.

## II. *ALJ's Hypothetical Question to the Vocational Expert*

Mr. Everroad argues that the ALJ posed an incomplete hypothetical question to the vocational expert. The hypothetical question played a crucial role in this case. The ALJ relied on vocational expert Michael Blankenship's opinion to find at step five that Mr. Everroad remained capable of performing a number of jobs in the national economy. When the ALJ poses the key hypothetical question to a vocational expert, the ALJ "ordinarily must include all limitations supported by medical evidence in the record," including limitations imposed by depression. *Steele*, 290 F.3d at 942 (ALJ's question omitted claimant's depression); see also *Young*, 362 F.3d at 1003 (remanding where key hypothetical question omitted mental and social impairments). "The reason for the rule is to

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<sup>12</sup>Mr. Everroad also questions whether Dr. Barrow's findings are in fact consistent with Dr. Thomas' conclusions. The ALJ had sufficient basis for finding that the two opinions were consistent. While Dr. Barrow noted that Mr. Everroad had "marked" limitations in certain areas, this finding does not preclude the kind of work described in Dr. Thomas' testimony. R. 291. Dr. Thomas had opportunity to review the record and reports and testified that the two were consistent. R. 532. Remand on this basis would be unwarranted because the ALJ's determination was supported by sufficient evidence.

ensure that the vocational expert does not refer to jobs that the applicant cannot work because the expert did not know the full range of the applicant's limitations." *Steele*, 290 F.3d at 942. The hypothetical question does not always need to include all of a claimant's alleged impairments, though, as long as the record shows that the vocational expert in fact considered the relevant medical reports and documents. See *Jones v. Shalala*, 10 F.3d 522, 525 (7th Cir. 1993); *Ehrhart v. Secretary of HHS*, 969 F.2d 534, 540-41 (7th Cir. 1992). The record here contains no indication that the vocational expert in this case reviewed Mr. Everroad's medical reports or other supporting documents.

Thus, the ALJ's hypothetical question in this case was flawed because it did not include mention of several limitations noted elsewhere in the ALJ's decision. The ALJ acknowledged in his decision that "the claimant's mental impairments cause moderate limitations in his maintenance of social functioning and in his maintenance of concentration, persistence, and pace." R. 25. Yet there is no mention of these particular limitations in the hypothetical question. Nor did the ALJ include any of the functional limitations he implicitly accepted from Dr. Passman and Dr. Barrow. The ALJ instead incorporated language solely from Dr. Thomas's conclusory residual functional capacity assessment:

I'm going to ask you to assume a hypothetical individual of the age of 52 years, and with a high school education, and past work as you've described. Further assume that the hypothetical individual has limitations of avoid concentrated exposure to dangerous machinery, hazards, heights and the like. I've also heard it say open water. Hazards such as that. *And also the additional restrictions would be simple and repetitive work, only occasional*

*contact with the general public, and no work in assembly line situations or other fast-paced work, and I would also offer that that would be fast food is indicative of similar type of work, although that may not be fast-paced all the time, it does have periods when it can be.*

R. 541 (emphasis added).

The Commissioner argues that the ALJ's use of Dr. Thomas's opinion sufficiently incorporates any of Mr. Everroad's limitations as to social functioning, concentration, persistence, and pace. As Judge Crabb has noted, there does not appear to be a clear consensus among courts "regarding whether it is proper for an administrative law judge to phrase his mental residual functional capacity and corresponding hypothetical in terms of the work a plaintiff can perform . . . as opposed to simply setting forth plaintiff's limitations and allowing the vocational expert to conclude on his own what types of work plaintiff can perform." *Kusilek v. Barnhart*, 2005 WL 567816, at \*4 (W.D. Wis. March 2, 2005) (collecting conflicting authorities in entry denying plaintiff's EAJA request for fees), *aff'd*, 2006 WL 925033, at \*3 (7th Cir. April 4, 2006). Other courts have found that hypothetical questions similar to the one posed here were adequate. See *Howard v. Massanari*, 255 F.3d 577, 582 (8th Cir. 2001) ("ALJ's hypothetical concerning someone who is capable of doing simple, repetitive, routine tasks adequately captures [plaintiff's] deficiencies in concentration, persistence or pace"); *Smith v. Halter*, 307 F.3d 377, 378-79 (6th Cir. 2001) (hypothetical question limiting plaintiff to jobs that are "routine and low stress" adequately accounted for plaintiff's "deficiencies in concentration, persistence, or pace").

This court's reasoning is guided by the Seventh Circuit's discussion in *Young v. Barnhart*, 362 F.3d 995 (7th Cir. 2004). At issue in *Young* was a hypothetical question phrased in similarly conclusory terms. The ALJ asked the vocational expert to assume a claimant who could perform only "simple, routine, repetitive, low stress work with limited contact with coworkers and limited contact with the public." *Id.* at 1004. While finding remand necessary on other grounds, the Seventh Circuit also found the hypothetical question "flawed in that it purported to tell the vocational expert what types of work Young could perform rather than setting forth Young's limitations and allowing the expert to conclude on his own what types of work Young could perform." *Id.* at 1004 n.4; see also *Kasarsky v. Barnhart*, 335 F.3d 539, 544 (7th Cir. 2002) (remand necessary when hypothetical question did not include ALJ's own observation that claimant suffered from frequent deficiencies of concentration, persistence, or pace). The ALJ's hypothetical question in this case was flawed for the same reasons expressed in *Young*. By using conclusory language to describe Mr. Everroad's limitations, the ALJ did not allow the expert to make a reliable determination about what work the claimant could perform. While the ALJ's characterization was *consistent* with the evidence (as the Commissioner observes), it is impossible to say whether it was sufficient to include all of Mr. Everroad's actual limitations so as to constitute a reliable basis for the vocational expert's determination. This uncertainty undermines the support for the ALJ's ultimate conclusion that Mr. Everroad's serious mental disorders would still allow him to perform certain types of work. Remand for further proceedings is therefore required.

*Conclusion*

It is possible that a vocational expert would find that someone with Mr. Everroad's particular limitations remained capable of performing a significant number of jobs. The vocational expert in this case, however, could not make that assessment accurately based on the hypothetical question posed to him. The denial of benefits is therefore remanded for reconsideration consistent with this entry. Final judgment shall be entered consistent with this entry.

So ordered.

Date: August 10, 2007

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DAVID F. HAMILTON, JUDGE  
United States District Court  
Southern District of Indiana

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