

# SOCIAL SECURITY ADMINISTRATION

## OFFICE OF HEARING OPERATIONS

IN RE: **Robert \*\*\*\*\***

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### MOTION TO RE-OPEN AND REVISE THE PRIOR CLAIM

This office represents the above referenced individual in a claim for Social Security Disability benefits. This case is scheduled for hearing on August 4, 2022 at 10:30AM CST over Microsoft Teams. At this time, we respectfully request that you consider the following motion.

#### Motion to Reopen Prior Title II Case under HALLEX I-2-9-40(E) and HALLEX I-2-9-60

The alleged onset date in the prior Title II claim was May 23, 2018. As per 20 CFR 404.988(C) and HALLEX I-2-9-60(A), an Administrative Law Judge has the authority to reopen the Unfavorable determination or hearing decision which is otherwise final in order to correct an error that appears on the face of the evidence that was considered when the determination or decision was made. By Unfavorable Decision dated December 17, 2019 the Honorable \*\*\*\*\* found that the claimant was not disabled. The Claimant was un-represented at the filing, and the ALJ Hearing.

The claimant protectively filed for Title II benefits on August 29, 2018 alleging the following severe impairment: status-post trimalleolar fracture of the left ankle status-post open reduction and internal fixation. (1A, 6).

Under HALLEX I-2-9-40(A), for good cause, a prior Title II claim that is otherwise final, may be reopened by an ALJ if challenged within four years from the date of the notice of the Initial Determination. The Claimant's Initial denial was dated October 1, 2018. Hence, this request is timely. In addition, the undersigned included this motion with it's electronic filing of this present (initial) claim on August 3, 2021 [Ex 1A, 11]

As per HALLEX I-2-9-40(B)(3) Good cause exists when evidence that was considered in making the determination clearly shows on its face that an error was made. We respectfully assert that the error occurred after the oral hearing in which the Claimant was sent for a Post Hearing CE with specific instructions to x-ray the LEFT ankle. As we can elicit through testimony if you prefer, when the Claimant arrived at the CE, the Examiner reviewed his paperwork and immediately commented that the Agency had made a scrivener's error on the order sheet. The error was obvious as he saw the impaired leg was not on his order sheet. The Examiner informed the Claimant that unless he X-Rayed the limb stamped on his order, there would be no payment submitted. As such, he informed the Claimant that he would denote the error on the paperwork, and was expecting him back. His unimpaired, right, ankle was X-Rayed instead of the left ankle.

In all due respect Your Honor, had the Claimant been represented, he would have immediately informed us of these developments and we would have immediately informed the OHO of the error and filed a timely motion for a rescheduling of the CE in order to X Ray the correct limb.

In page 4 of the decision the ALJ indicates that a copy of the Post Hearing CE was proffered to the *Un-Represented* Claimant (additional word added). In page 6 of her decision which we have attached, the ALJ completely omits the fact that the wrong limb was X-Rayed and the reader clearly *has no idea of this glaring omission when reading the decision*. In addition, the ALJ downplayed (our emphasis) the extent of his condition when it was indicated: ...”soft tissue swelling...atrophy of the left calf...” We respectfully assert, that such an error would not have gone unchallenged, and this too would have been the basis of our appeal.

Under HALLEX I-2-9-40(E), error on the face of the evidence is an obvious error that clearly causes an incorrect determination or decision, for example, the evidence or the evidence in possession of SSA at the time of a determination or decision clearly shows that the determination or decision was incorrect.

The hearing took place on September 11, 2019 and as stated, the Claimant was not represented by counsel. (Ex. 1A, p4). At the time, the Claimant had been financially unable to obtain treatment for his ankle condition to further develop his SSA record. (1A, 8). Consequently, the ALJ scheduled a Consultative Examination after the hearing, which the claimant attended on October 23, 2019. (1A, 9). After the CE, the ALJ scheduled an x-ray for the Claimant’s ankle, which the claimant attended on October 28th. (3F, 6). However, despite the claimant’s Step 2 impairment being in the left ankle, the SSA provider x-rayed the claimant’s right ankle, which showed no abnormalities. (3F, 6). The ALJ did not schedule a follow-up appointment to obtain an x-ray of the correct ankle.

On December 17<sup>th</sup>, the ALJ issued the Unfavorable decision at Step 5, finding that the Claimant had a residual functional capacity for a full range of sedentary work as defined by 20 CFR 404.1567(a) and 416.967(a), but that he could never crawl, only occasionally kneel, and never work at unprotected heights or around moving parts. (1A, 7).

The determination shows error on its face because SSA x-rayed the Claimant’s unimpaired, right ankle during the post-hearing consultative exam. (3F, 6). Because SSA made this error and the ALJ failed reschedule an x-ray of the right ankle, the determination clearly shows on its face that an error was made under HALLEX I-2-9-40(B)(3). Therefore, there is Good Cause to reopen the prior claim.

As per HALLEX I-2-5-56, an ALJ has a duty to ensure the administrative record is fully and fairly developed by making reasonable attempts to obtain evidence pertinent to the matters at issue and must make “every reasonable effort” to obtain evidence. Given that the SSA x-rayed the unaffected, right ankle, and the ALJ failed to reschedule the x-ray for the left ankle, the ALJ did not make every reasonable effort to obtain the evidence as required. This near dereliction of duty constitutes an obvious error under HALLEX I-2-9-40(E). Therefore, the claimant’s prior Title II claim should be reopened.

The consultative examiner opined that the claimant had the following residual functional capacity: never perform postural activities such as climbing stairs, ramps, ladders, or scaffolds, never balance, never stoop, never kneel, never crouch, never crawl, that the claimant could sit one hour at a time without interruption, stand one hour at a time without interruption, and walk 20 minutes at a time without interruption. (3F, 8 and 10). The examiner found the Claimant could frequently

lift to 20 lbs., and never carry more than 10 lbs. occasionally. (3F, 7). The consultative examiner found the claimant could walk a total of one hour out of an eight-hour day, sit six hours out of an eight-hour day, and stand a total of one hour out of an eight-hour day. (3F, 8). The consultative examiner found that the claimant needed to use a cane to ambulate. *Id.*

When the ALJ evaluated this examining provider's opinion, she only used one factor, consistency, in her C.F.R. §404.1520(C) analysis. Whereas the C.F.R. §404.1520(A) states that weight should be given to source statements "together using the factors listed in paragraphs (c)(1) through (c)(5) of this section." The ALJ only used one factor and concluded that since the Consultative Examiner opined a lifting capability of 20 lbs. frequently, by implication the Claimant could stoop in order to lift 20 lbs. (1F, 9). Instead of citing objective medical evidence as required by C.F.R. §404.1520(A) and (C), the ALJ cited "internal inconsistency" as the reason for her failing to give weight to this examining physician's opinion. (1A, 9). Since the ALJ failed to cite multiple factors as required by C.F.R. §404.1520(A) and (C), she committed error on the face of the evidence that caused the incorrect determination.

Had the ALJ had properly conducted her C.F.R. §404.1520(C) analysis she would have noted the Claimant's left ankle atrophy, his observed distress when walking or standing, his soft tissue swelling, inability to walk on his toes, heels, complete a tandem walk, and his observed limp. If the ALJ had properly assessed the source statement, an approval was required at best, and at least, a supplemental hearing taking additional vocational expert testimony to determine the availability of jobs with that revised residual functional capacity. We reiterate ALJ's denial was an error on the face of the evidence that clearly caused an incorrect determination under HALLEX I-2-9-40(B)(3). Thus, we respectfully request that the Claimant's prior Title II claim be reopened.

Additionally, it's worth noting under HALLEX I-2-9-40(E) the objective medical evidence obtained during the CE supported a finding of Disability under SSR 96-9p. Specifically, the CE Examiner found the Claimant's left ankle has "significantly reduced range of motion" and "atrophy." (1A, 9). The Examiner observed claimant's limp, inability to walk on his toes, heels, complete a tandem walk, and observed the claimant in "moderate distress" when walking or standing. These objective findings support a finding that the claimant cannot stoop as per the examiner's opinion, which would result in a fully favorable decision under SSR 96-9p.

The Claimant's prior Title II claim should be reopened in the interest of justice and public policy. The claimant was previously unrepresented and has limited education (1A, 10). Thus, he was not equipped to counter the ALJ's errors so eloquently ignored under HALLEX I-2-9-40(B)(3) and HALLEX I-2-9-40(E). Had the Claimant been represented, counsel would have demanded another x-ray of the left, impaired ankle under DI 22510.005(B)(1), (4), and (5) and HALLEX I-2-5-56 as evidence of the severity of the left leg was needed in order to establish severity, resolve inconsistency, and obtain evidence from an examining source.

Finally Your Honor, we further request this claim be reopened because shortly after the Claimant's unfavorable decision, on January 9, 2020, the first case of COVID-19 was discovered. Eighteen Days later on January 27<sup>th</sup>, the Secretary of Health and Human Services declared a public health emergency due to COVID-19. Given the chaos the Claimant and all American's experienced during that time, coupled with lack of counsel in 2020, the Claimant did not file an appeal of that decision. In addition, and most unfortunately, the Claimant's Date Last Insured is June 30, 2020 some 6 months after the Unfavorable Decision. In the interest of public policy, given the extraordinary circumstances presented by the unprecedented Pandemic, coupled with the claimant's lack of representation at his prior hearing, I respectfully request that Your Honor re-open the prior Title II claim.

A handwritten signature in blue ink, reading "Vic Arruda". The signature is fluid and cursive, with the first name "Vic" and last name "Arruda" clearly distinguishable.

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Atty. Victor J. Arruda,



**SOCIAL SECURITY ADMINISTRATION**  
**Office of Hearings Operations**

**DECISION**

**IN THE CASE OF**

Robert \_\_\_\_\_  
(Claimant)

\_\_\_\_\_  
(Wage Earner)

**CLAIM FOR**

Period of Disability, Disability Insurance  
Benefits, and Supplemental Security Income

\_\_\_\_\_  
(Social Security Number)

**JURISDICTION AND PROCEDURAL HISTORY**

On August 29, 2018, the claimant protectively filed a Title II application for a period of disability and disability insurance benefits. The claimant also filed a Title XVI application for supplemental security income on August 29, 2018. In both applications, the claimant alleged disability beginning May 4, 2018. These claims were denied initially on October 1, 2018. Thereafter, the claimant filed a written request for hearing received on October 11, 2018 (20 CFR 404.929 *et seq.* and 416.1429 *et seq.*). The claimant appeared and testified at a hearing held on September 11, 2019, in \_\_\_\_\_ M.Ed., C.R.C., an impartial vocational expert, also testified at the hearing, via telephone. Although informed of the right to representation, the claimant chose to appear and testify without the assistance of an attorney or other representative (15B).

The claimant submitted or informed the Administrative Law Judge about all written evidence at least five business days before the date of the claimant's scheduled hearing (20 CFR 404.935(a) and 416.1435(a)).

Following the hearing, the claimant attended a consultative orthopedic examination with \_\_\_\_\_, M.D. The resulting report was proffered to the claimant (2F; 13E).

**ISSUES**

The issue is whether the claimant is disabled under sections 216(i), 223(d) and 1614(a)(3)(A) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

With respect to the claim for a period of disability and disability insurance benefits, there is an additional issue whether the insured status requirements of sections 216(i) and 223 of the Social Security Act are met. The claimant's earnings record shows that the claimant has acquired sufficient quarters of coverage to remain insured through June 30, 2020. Thus, the claimant must

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As referenced above, the claimant attended a consultative examination following the hearing, in October 2019 (2F). He reported to the evaluator that he continued to use a crutch and/or a cane, except for taking a few steps in his home, and took ibuprofen for pain. He complained that at times his left ankle hurt so much that he was unable to put on a sock, but did endorse an ability to stand for 60 minutes, walk for 20 minutes, and complete a one-time lift of 24 pounds. The examiner observed the claimant to appear to be in moderate distress when standing and walking, and noted a limp, as well as an inability to walk on his toes, heels, and/or complete a tandem gait. The claimant was able to get on/off the examination table and rise from a chair independently. With regard to his left ankle specifically, the claimant was observed to have soft tissue swelling and a significantly reduced range of motion, as well as atrophy in his left calf.

The undersigned also considered the opinions contained in the claimant's medical record in developing the above residual functional capacity, including the Disability Determination Explanation by State-agency physician [redacted] D.O. (1A; 2A). Dr. [redacted] reviewed the record and found the claimant able to complete work at the light exertional level, but to require some postural limitations. This conclusion is generally persuasive as it is supported by Dr. [redacted] analysis of the record at the time he issued this opinion, but is inconsistent with the record as a whole including later information (such as the consultative orthopedic examination) supporting a limitation to work at no more than the sedentary exertional level.

Also considered was the opinion of consultative examiner Alan [redacted] M.D. (2F/7-12). Among other statements, Dr. [redacted] opined the claimant can never perform any postural movements, required environmental limitations, can lift 20 pounds for 2/3 of the day but never carry 11-20 pounds, and required manipulative limitations as well as the use of a cane. This opinion is not persuasive for several reasons: it is internally inconsistent in that the lifting/carrying requirements are nonsensical together. Moreover, the claimant has no impairments which correspond to manipulative or environmental limitations, and the claimant is certainly able to perform postural movements – including stooping, which would definitely be required in order for the claimant to perform lifting of 20 pounds as Dr. [redacted] opined elsewhere in his report. The claimant does in fact perform several of these activities as set forth above. Thus, this opinion is neither well-supported nor are Dr. [redacted] conclusions consistent with the record as a whole.

The undersigned considered all of this information, in carefully developing the residual functional capacity. Specifically, the claimant is limited to a sedentary exertional level to account for reduced lifting/carrying and standing/walking, given the severe impairment of status-post trimalleolar fracture of his left ankle status-post open reduction and internal fixation, and resulting pain, weakness, and fatigue with increased lifting/carrying and standing/walking which would exacerbate such symptoms. Further, he can never crawl and only occasionally kneel as such activities would undoubtedly increase his symptoms of pain, weakness and fatigue. He can never work at unprotected heights or around moving mechanical parts, as such conditions would pose additional safety concerns should he begin experiencing symptoms such as pain and/or weakness while working at unprotected heights or around moving mechanical parts.

Based on the entire record, including the lack of anticipated treatment for a disabling ankle condition and the claimant's ability to participate in several activities of daily living, the undersigned concludes the evidence fails to support the claimant's assertions of total disability.



**SOCIAL SECURITY ADMINISTRATION  
Office of Hearings Operations**

**DECISION**

**IN THE CASE OF**

**CLAIM FOR**

Robert  
(Claimant)

Period of Disability and Disability Insurance  
Benefits

(Wage Earner)

(Beneficiary Notice Control Number)  
*Social Security Number removed for your protection*

**JURISDICTION AND PROCEDURAL HISTORY**

This case is before the undersigned on a request for hearing dated December 3, 2021 (20 CFR 404.929 *et seq.*). On August 4, 2022, the undersigned held an online video hearing due to the circumstance presented by the Coronavirus Disease 2019 (COVID-19) Pandemic. All parties participated by online video. The claimant agreed to appear by online video before the hearing (Exhibit 10B) and confirmed such agreement at the start of the hearing. The claimant is represented by Victor J. Arruda, an attorney, of Arruda & Associates, though appearing and

Also appearing and testifying was Abbe May, an impartial vocational expert.

The claimant is alleging disability since May 3, 2018.

The claimant previously filed a Title II application on August 29, 2018. This application is being reopened because new and material evidence has been submitted (Exhibit B14E) (20 CFR 404.988). On August 3, 2022, the claimant's representative submitted a brief, arguing that the claimant's prior unfavorable decision (Exhibit B1A), submitted on January 9, 2020, was based upon findings from a consultative examination, where the claimant had his unimpaired right ankle x-rayed rather than the official order to image the claimant's impaired left ankle. The Administrative Law Judge in the prior case did not re-schedule imaging of the correct ankle. The prior Judge based their decision in part on this examination, even though they noted that the left ankle, upon evaluation, had soft tissue swelling, significantly reduced range of motion, and atrophy in the left calf (Exhibit B1A/9). Per HALLEX I-2-5-56, the representative argued that the prior Judge did not fulfill their duty to fully develop the record, as required, and that per HALLEX I-2-9-40(B)(3), an incorrect determination was made based upon erroneous information. The undersigned concludes that good cause does exist to re-open the prior claim, and this determination addresses the entire period from the claimant's alleged onset date of May 3, 2018, through the date last insured of June 30, 2020.

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