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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSEPH P. RUSSELL,)	Case No. CV 07-03470-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the)	
Social Security)	
Administration,)	
)	
Defendant.)	
_____)	

I. Factual and Procedural Background

This is an action for judicial review of the Social Security Commissioner's final decision denying Plaintiff Joseph P. Russell's application for disability insurance benefits under 42 U.S.C. §§ 416(i), 423. Plaintiff alleges disability due to diabetes mellitus, diabetic neuropathy, chronic osteomyelitis, fatigue, and depression.

Plaintiff is currently 44 years of age and has completed high school. He has relevant work experience as a purchasing agent, sales manager, advertising manager, inventory clerk, sales clerk, sales person, receptionist and advertising representative. On June 21, 2004, Plaintiff filed an application for Title XVI Supplemental Security

1 Income ("SSI") benefits. On July 14, 2004, Plaintiff filed an
2 application for Title II disability insurance benefits. In both his
3 Title II and Title XVI applications, Plaintiff alleged that he had been
4 disabled since April 8, 2003 due to diabetes mellitus and diabetic
5 neuropathy.

6 Plaintiff's application for a period of disability was denied
7 initially and upon reconsideration. Prior to his hearing before an
8 administrative law judge, Plaintiff amended his application to allege
9 depression as one of his disabling conditions. Administrative Law Judge
10 Larry B. Parker held a video teleconference hearing on Plaintiff's claim
11 on February 25, 2005. Plaintiff, who was represented by counsel,
12 testified at the hearing. John Morse, M.D., provided expert medical
13 testimony, and Alan E. Cummings, Ph.D., provided expert vocational
14 testimony.

15 On September 5, 2006, ALJ Parker issued a decision finding that
16 Plaintiff was not entitled to a period of disability and disability
17 insurance benefits and was not eligible for SSI payments. Though ALJ
18 Parker found that Plaintiff suffered from severe physical impairments,
19 he determined that Plaintiff did not have an impairment or combination
20 of impairments that met or equaled a listed impairment. ALJ Parker
21 determined that Plaintiff could not perform his past work but had the
22 residual functional capacity ("RFC") to perform a full range of
23 sedentary work for which he had transferable skills. He further found
24 that Plaintiff's depression was not severe within the meaning of 20
25 C.F.R. § 404.1521. ALJ Parker found that Plaintiff's RFC allowed him to
26 perform substantial gainful activity in jobs existing in significant
27 numbers in the national economy. On this basis, ALJ Parker decided that
28 Plaintiff was not under a disability as defined in the Social Security

1 Act.

2 On October 3, 2006, Plaintiff requested that the Appeals Council
3 review ALJ Parker's decision. The Appeal's Council denied Plaintiff's
4 request for review on March 30, 2007.

5 Plaintiff filed this action on June 5, 2007. The parties have filed
6 a Joint Stipulation presenting one disputed issue: whether ALJ Parker
7 properly evaluated Plaintiff's allegations of depression. The matter is
8 now ready for decision.

9
10 **II. Standard of Review**

11 Under 42 U.S.C. § 405(g), a district court may review the
12 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
13 decision must be upheld unless "the ALJ's findings are based on legal
14 error or are not supported by substantial evidence in the record as a
15 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Parra v.*
16 *Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means
17 such evidence as a reasonable person might accept as adequate to support
18 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*
19 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a
20 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,
21 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial
22 evidence supports a finding, the reviewing court "must review the
23 administrative record as a whole, weighing both the evidence that
24 supports and the evidence that detracts from the Commissioner's
25 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
26 the evidence can support either affirming or reversing the ALJ's
27 conclusion," the reviewing court "may not substitute its judgment for
28 that of the ALJ." *Robbins*, 466 F.3d at 882.

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2 **III. Discussion and Analysis: Whether the ALJ Properly Evaluated**
3 **Plaintiff's Purported Mental Impairment**

4 Plaintiff's sole contention is that the ALJ committed legal error
5 by improperly evaluating his depression. The Social Security
6 Administration's ("SSA") regulations at 20 C.F.R. § 404.1520a ("section
7 404.1520a") require that the ALJ apply a "special technique" to evaluate
8 "the severity of mental impairments." The "special technique" is
9 actually a set of steps to be applied in the course of evaluating a
10 claimant's mental condition.

11 "Under the special technique [the ALJ] must first evaluate [the
12 claimant's] pertinent symptoms, signs and laboratory findings to
13 determine whether [the claimant has] a medically determinable mental
14 impairment(s)."¹ 20 C.F.R. § 404.1520a(b)(1). The ALJ then must "rate the
15 degree of functional limitation resulting from the impairment(s)." 20
16 C.F.R. § 404.1520a(b)(1). Rating the degree of functional limitation
17 caused by a mental impairment requires the ALJ to consider,

18 multiple issues and all relevant [clinical signs and
19 laboratory findings, the effects fo your symptoms, and how
20 your functioning may be affected by factors including, but not
21 limited to, chronic mental disorders, structured settings,
22 medication, and other treatment] to obtain a longitudinal
23 picture of [the claimant's] overall degree of functional
24 limitation.

25 20 C.F.R. § 404.1520a(c)(1). The degree of functional limitation is

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¹ "A physical or mental impairment must be established by medical
28 evidence consisting of signs, symptoms, and laboratory findings, not
only by your statement of symptoms." 20 C.F.R. § 404.1508.

1 rated in four functional areas: daily living; social functioning;
2 concentration, persistence, or pace; and episodes of decompensation. 20
3 C.F.R. § 404.1520a(c)(3). Point scales are used by the ALJ to rate the
4 degree of limitation in these four functional areas. 20 C.F.R. §
5 404.1520a(c)(4).

6 After rating the degree of mental impairments, the ALJ determines
7 the severity of the claimant's mental impairment(s). 20 C.F.R. §
8 404.1520a(d)(1). If a claimant's mental impairment(s) is severe, then
9 the ALJ will determine if it meets or is equivalent in severity to a
10 listed mental disorder. 20 C.F.R. § 404.1520a(d)(2). The ALJ will then
11 record the rating of the degree of functional limitation and the
12 criteria in his decision. *Id.* If a claimant's mental impairment(s) is
13 not severe, the ALJ will then assess a claimant's RFC on that basis. 20
14 C.F.R. § 404.1520a(d)(3).

15 "At the administrative law judge hearing ... [the ALJ] will
16 document application of the [special] technique in the decision." 20
17 C.F.R. § 404.1520a(e). The ALJ's decision "must incorporate the
18 pertinent findings and conclusions based on the technique." 20 C.F.R. §
19 404.1520a(e). The decision must discuss the examination and laboratory
20 findings and function limitations considered in determining the severity
21 of the mental impairment(s). 20 C.F.R. § 404.1520a(e). Further, "[t]he
22 decision must include a specific finding as to the degree of limitation
23 in each of the functional areas described in [section 404.1420a(c).]" 20
24 C.F.R. § 404.1520a(e)(2).

25 Where there is a colorable claim of mental impairment, the failure
26 to apply the special technique of section 404.1520a and document its
27 application in the decision requires remand to the ALJ. *Gutierrez v.*
28 *Apfel*, 199 F.3d 1048, 1050 (9th Cir. 2000); *cf. Salerno v. Astrue*, 2008

1 WL 313178 at *2 (9th Cir. 2008).² "A colorable claim is one which is not
2 'wholly insubstantial, immaterial, or frivolous.'" *McBride Cotton &*
3 *Cattle Corp. v. Veneman*, 290 F.3d 973, 981 (9th Cir. 2002)(*citation*
4 *omitted*).

5 In his decision, the ALJ determined that Plaintiff did not have a
6 severe mental impairment. (AR 14.) Aside from the opinion of Dr. Heidi
7 Solz, Plaintiff's treating physician, the ALJ found "no evidence of
8 [Plaintiff] experiencing any significant work-related limitations due to
9 a mental impairment for a period of at least 12-continuous months." (*Id.*)
10 The ALJ noted that Dr. Solz, a family practitioner, found exertional and
11 non-exertional limitations due to Plaintiff's physical impairments and
12 depression. (*Id.*) The ALJ found that because Dr. Solz is not a
13 psychiatrist or clinical psychologist, her opinion as to Plaintiff's
14 mental status is not entitled to any controlling weight or deference.
15 (*Id.*) Though the ALJ recognized that Plaintiff had been prescribed
16 antidepressants, he noted the absence of evidence that Plaintiff has
17 received any other treatment from a medical health professional for
18 depression. (*Id.*) The ALJ also noted that Plaintiff has never been
19 hospitalized for depression. (*Id.*)

20 ALJ Parker did not document his application of the special technique
21 required by section 404.1520a. The remaining question then is whether
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23 ² See also *Lellhame v. Barnhart*, 128 Fed.Appx. 618 (9th Cir.
24 2005)(Though ALJ's determination of claimant's ability to perform medium
25 work was supported by substantial evidence, failure to apply and
26 document the "special technique" to evaluate claimant's alleged
27 depression required remand.); *Dykstra v. Barnhart*, 94 Fed.Appx. 449, 451
28 (9th Cir. 2004)("Failure to [demonstrate application of "special
technique" requires reversal if the plaintiff had a 'colorable claim of
a mental impairment.'"). Because these unpublished decisions were handed
down prior to January 1, 2007, the parties could not have cited them to
this court and they are not, in any case, precedential. See Fed. R. App.
P. 32.1; Ninth Circuit Rule 36-3.

1 Plaintiff presented a colorable claim that he suffered from depression.³
2 Many documents in the record exhibit that Plaintiff suffered from
3 depression. Treatment records spanning November 2004 to June 2005 from
4 Cedars Sinai Medical Center document diagnosis, symptoms, and medication
5 for Plaintiff's depression. (AR 256-58, 466, 481, 520.) Treatment records
6 from clinics in September 2005 and February 2006 also document
7 Plaintiff's depression. (AR 653, 666.) In May 2006, a psychiatric
8 evaluation at West Central Mental Health Center found that Plaintiff
9 suffered from major depressive disorder with psychotic features. (AR 684-
10 689.) Plaintiff also informed ALJ Parker at the hearing that depression
11 was among the principal limitations on his ability to work and that he
12 had been receiving treatment at West Central Mental Health Center for
13 approximately six months. (AR 724, 727, 741.)

14 On the basis of these records and the information provided at the
15 hearing, Plaintiff's claim to suffer from depression was not "wholly
16 insubstantial, immaterial, or frivolous." *McBride Cotton & Cattle Corp.*,
17 290 F.3d at 981. Had Plaintiff equivocated about the disabling nature of
18 his depression or otherwise failed to develop a record of potentially
19 severe depression, then his claim might not be colorable. *See, e.g.*,
20 *Salerno*, 2008 WL 313178 at *2 (Plaintiff's submission of no evidence that
21 his depression prevents him from working and statement to the ALJ that
22 his disability was not based on depression eliminated the requirement to
23 apply and document the section 404.1520a special technique.). Plaintiff
24 has presented a colorable claim that his depression is disabling. As a
25 result, the ALJ's failure to apply and document the section 404.1520a

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28 ³ Plaintiff first claimed that his alleged depression was a
disabling limitation in his application for an ALJ hearing. (AR 104.)

1 special technique to Plaintiff's alleged depression requires remand.⁴

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3 **IV. Conclusion**

4 For the reasons stated above, it is **ORDERED** that the case be
5 remanded to the Commissioner for proceedings consistent with this
6 opinion.

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9 DATED: February 7, 2008



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11 MARC L. GOLDMAN
12 United States Magistrate Judge

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22 ⁴ As explained in a recent district court decision, it is of no
23 moment for purposes of the section 404.1520a requirements that ALJ
24 Parker determined Plaintiff's mental impairment to be not severe:

25 A finding that the claimant's mental impairment is *not severe*
26 is not the same as a finding that claimant does not have a
27 medically determinable impairment *at all*. The regulations
28 indicate that once a medically determinable mental impairment
is identified, the special technique must be applied in order
to determine the degree of the claimant's limitation. ... [A]
finding that the impairment is not severe does not obviate the
need to perform the specified analysis and documentation.

McCarty v. Barnhart, 2005 WL 5108536 at *10 (N.D. Cal.)