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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHEILA M. JOHNSON,)	NO. CV 07-7263 SS
)	
Plaintiff,)	MEMORANDUM DECISION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

I.
INTRODUCTION

Sheila M. Johnson ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying her application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED.

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II.

PROCEDURAL HISTORY

Plaintiff filed an application for SSI on May 8, 2001 (Administrative Record ("AR") 72-81). She alleged a disability onset date of June 1, 1996 (AR 72) due to bleeding hemorrhoids, anemia, Lupus, and pain in her back, neck, leg and right side of her body. (AR 30, 55).

The Agency denied Plaintiff's claim for SSI initially on October 18, 2001. (AR 54). On September 17, 2002, Administrative Law Judge ("ALJ") Ariel Sotolongo conducted a hearing to review Plaintiff's claim. (AR 65). The ALJ denied benefits on December 19, 2002. (AR 19-23). Plaintiff sought review of the ALJ's decision before the Appeals Council, which denied her request on November 10, 2003. (AR 5).

Thereafter, Plaintiff sought judicial review of the ALJ's decision. (AR 311-23). On October 27, 2004, this Court reversed and remanded the matter for further administrative proceedings on the grounds that the ALJ improperly evaluated Plaintiff's credibility, and the ALJ erroneously relied upon the opinion of the consultative examiner. (AR 321-23).

On December 22, 2003, Plaintiff filed an application for Disability Insurance Benefits ("DIB"). (AR 383-85). On June 28, 2004, Plaintiff filed a second application for SSI. (AR 378-82). For both of these applications, Plaintiff alleged a disability onset date of January 1, 2000. (AR 378, 383). On August 15, 2004, the Commissioner denied the

1 application for benefits. (AR 365-69). On September 14, 2004,
2 Plaintiff requested a hearing before an ALJ. (AR 307).

3
4 ALJ Alexander Weir III consolidated all of Plaintiff's three filed
5 applications. (AR 296-97). On March 22, 2007, the ALJ held a remand
6 hearing, where Plaintiff, a vocational expert, and a medical expert
7 provided testimony. (AR 550-602). The ALJ issued an unfavorable
8 decision on March 28, 2007 again denying benefits. (AR 293-305).
9 Plaintiff requested a review of the ALJ decision (AR 286), and the
10 Appeals Council denied review on September 26, 2007. (AR 248-50).

11
12 Therefore, the ALJ's decision became the final decision of the
13 Commissioner. (Id.). Plaintiff commenced the instant action on
14 November 13, 2007.

15
16 **III.**

17 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

18
19 To qualify for disability benefits, a claimant must demonstrate
20 a medically determinable physical or mental impairment that prevents him
21 from engaging in substantial gainful activity¹ and that is expected to
22 result in death or to last for a continuous period of at least twelve
23 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
24 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
25 incapable of performing the work he previously performed and incapable

26 _____
27 ¹ Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 of performing any other substantial gainful employment that exists in
2 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
3 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

4
5 To decide if a claimant is entitled to benefits, an ALJ conducts
6 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are as
7 follows:

8
9 (1) Is the claimant presently engaged in substantial gainful
10 activity? If so, the claimant is found not disabled.
11 If not, proceed to step two.

12
13 (2) Is the claimant's impairment severe? If not, the
14 claimant is found not disabled. If so, proceed to step
15 three.

16
17 (3) Does the claimant's impairment meet or equal one of a
18 list of specific impairments described in 20 C.F.R. Part
19 404, Subpart P, Appendix 1? If so, the claimant is
20 found disabled. If not, proceed to step four.

21
22 (4) Is the claimant capable of performing her past work? If
23 so, the claimant is found not disabled. If not, proceed
24 to step five.

25
26 (5) Is the claimant able to do any other work? If not, the
27 claimant is found disabled. If so, the claimant is
28 found not disabled.

1
2 Tackett, 180 F.3d at 1098-99; see also 20 C.F.R. §§ 404.1520(b)-(g)(1),
3 416.920(b)-(g)(1); Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th
4 Cir. 2001) (citations omitted).

5
6 The claimant has the burden of proof at steps one through four, and
7 the Commissioner has the burden of proof at step five. Bustamante, 262
8 F.3d at 953-54. If, at step four, the claimant meets his burden of
9 establishing an inability to perform past work, the Commissioner must
10 show that the claimant can perform some other work that exists in
11 "significant numbers" in the national economy, taking into account the
12 claimant's residual functional capacity ("RFC"),² age, education, and
13 work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
14 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may
15 do so by the testimony of a VE or by reference to the Medical-Vocational
16 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2
17 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157,
18 1162 (9th Cir. 2001). When a claimant has both exertional (strength-
19 related) and nonexertional limitations, the Grids are inapplicable and
20 the ALJ must take the testimony of a VE. Moore v. Apfel, 216 F.3d 864,
21 869 (9th Cir. 2000).

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27 ² Residual functional capacity is "the most [one] can still do
28 despite [one's] limitations" and represents an assessment "based on all
the relevant evidence in [one's] case record." 20 C.F.R. §§
404.1545(a), 416.945(a).

1 IV.

2 THE ALJ'S DECISION

3
4 The ALJ employed the five-step sequential evaluation process and
5 concluded that Plaintiff was not disabled within the meaning of the
6 Social Security Act. (AR 304-05). At the first step, the ALJ observed
7 that Plaintiff had not engaged in substantial gainful activity since the
8 filing date of her application. (AR 299). Next, he found that
9 Plaintiff had the severe impairments of systemic lupus erythematosus³
10 ("Lupus" or "SLE"), mild anemia, a history of knee and hip pain, a
11 benign hard palette and hemorrhoids. (AR 299-302, 304).
12

13 At the third step, the ALJ found that the severe and non-severe
14 impairments at step two did not meet or medically equal a listed
15 impairment. (AR 302). Next, at step four, the ALJ found that Plaintiff
16 could no longer perform her past work, but she retained the RFC to
17 perform work with restrictions. (AR 302-04). The ALJ found that
18 Plaintiff could lift and carry twenty pounds occasionally and ten pounds
19 frequently, sit for six hours, and stand or walk for six hours, with
20 normal breaks, in an eight hour day. (AR 304). The ALJ also found that
21

22 _____
23 ³ Systemic lupus erythematosus ("Lupus") is defined as: "a chronic,
24 remitting, relapsing, inflammatory, often febrile multisystemic disorder
25 of connective tissue, acute or insidious in onset, characterized
26 principally by involvement of the skin, . . . joints, kidneys, and
27 serosal membranes. It is of unknown etiology, but it is thought to
28 represent a failure of regulatory mechanisms of the autoimmune system,
as suggested by the high level of numerous autoantibodies against
nuclear and cytoplasmic cellular components." Dorland's Illustrated
Medical Dictionary, 1072 (30th ed. 2003).

1 she can push and pull commensurate with her lifting ability without any
2 significant limitations. (Id.).

3
4 Finally, at step five, the ALJ concluded that, based on Plaintiff's
5 RFC and the testimony of the VE, Plaintiff could perform work her past
6 relevant work as a cafeteria worker. (Id.). Accordingly, the ALJ found
7 that Plaintiff was not disabled, as defined in the Social Security Act,
8 at any time through the date of the decision. (AR 305).

9
10 **V.**

11 **STANDARD OF REVIEW**

12
13 Under 42 U.S.C. § 405(g), a district court may review the
14 Commissioner's decision to deny benefits. The court may set aside the
15 Commissioner's decision when the ALJ's findings are based on legal error
16 or are not supported by substantial evidence in the record as a whole.
17 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
18 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

19
20 "Substantial evidence is more than a scintilla, but less than a
21 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
22 which a reasonable person might accept as adequate to support a
23 conclusion." Id. To determine whether substantial evidence supports
24 a finding, the court must "'consider the record as a whole, weighing
25 both evidence that supports and evidence that detracts from the
26 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny
27 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can
28 reasonably support either affirming or reversing that conclusion, the

1 court may not substitute its judgment for that of the Commissioner.
2 Reddick, 157 F.3d at 720-21.

3
4 **VI.**
5 **DISCUSSION**
6

7 Plaintiff contends that the ALJ erred by failing to consider
8 various instances in the medical record indicating periods of active
9 Lupus to assess Plaintiff's RFC. (Joint Stipulation ("Jt. Stip.") at
10 4-8). Plaintiff further argues that the ALJ erred by relying solely
11 upon the testimony of the medical expert to determine that Plaintiff's
12 Lupus is inactive. (Id.). For the reasons discussed below, the Court
13 agrees with Plaintiff's contention.

14
15 The medical record includes Plaintiff's clinical reports from over
16 a dozen visits to the Harbor UCLA Medical Center ("Harbor") from August
17 16, 2001 through March 25, 2004, due to her lupus. (AR 492-534). On
18 August 16, 2001, the attending physician noted a possible diagnosis of
19 Lupus and indicated that Plaintiff reported symptoms of fatigue, pain,
20 and weakness. (AR 522-24). On March 1, 2002, the attending physician
21 stated that Plaintiff has "continual symptoms including anemia,
22 [decreased white blood cell] count, continual fatigue, and athryalgias.
23 (AR 514). The attending physician noted that Plaintiff exhibited
24 improved symptoms due to the Lupus medication on October 13, 2002.
25 However, from December 26, 2002 through August 14, 2003, the Harbor
26 clinical reports indicated extreme fatigue, myalgia or muscular pain,
27 and fatigue due to Lupus. (AR 501, 503, 506, 508).

1 On November 11, 2003, the attending physician noted that Plaintiff
2 still reported symptoms of fatigue and myalgia, but were "less than
3 before." (AR 495). Plaintiff's Lupus was reported clinically stable
4 on January 20, 2004. (AR 493). On March 25, 2004, the Harbor clinical
5 report indicated that Plaintiff's Lupus was clinically quiescent. (AR
6 494).

7
8 On March 22, 2007, Dr. Harvey Alpern, a medical expert, testified
9 at a hearing before ALJ Weir. (AR 557-65). After reviewing the medical
10 record and hearing Plaintiff's testimony, Dr. Alpern indicated that
11 Plaintiff's Lupus was quiescent or inactive. (AR 559). Dr. Alpern
12 later testified that Lupus can "wax and wane," or go into remission for
13 many years and later flare up. (AR 561-65). Thus, Dr. Alpern opined
14 that Plaintiff retained the ability to perform work at a light RFC. (AR
15 561).

16
17 Here, the ALJ must consider whether Plaintiff is eligible for a
18 closed period of disability during the instances where her Lupus was
19 active. Under the regulations, a person is disabled if he is unable to
20 engage in "any substantial gainful activity by reason of any medically
21 determinable physical or mental impairment which can be expected to
22 result in death or which has lasted or can be expected to last for a
23 continuous period of not less than twelve months." 20 C.F.R. §
24 404.1505(a). In Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1995), the
25 court stated, "Occasional symptom-free periods- and even the sporadic
26 ability to do work- are not inconsistent with disability."

1 Additionally, nonexamining physician's opinions "with nothing more"
2 cannot constitute substantial evidence. Andrews v. Shalala, 53 F.3d
3 1035, 1042 (9th Cir. 1994). However, this does not mean that the
4 opinions of nonexamining sources and medical advisors are entitled to
5 "little" or no weight. Id. at 1041. Reports of a nonexamining advisor
6 "need not be discounted and may serve as substantial evidence when they
7 are supported by other evidence in the record and are consistent with
8 it." Id.

9
10 Moreover, the ALJ cannot "reach a conclusion first, and then attempt to
11 justify it by ignoring competent evidence in the record that suggests an
12 opposite result." Gallant v. Heckler, 753 F.2d 1450, 1455-56 (9th Cir. 1984).
13 See also Reddick v. Chater, 157 F.3d 715, 722-23 (9th Cir. 1998)
14 (impermissible for ALJ to develop evidentiary basis by "not fully accounting
15 for the context of materials or all parts of the testimony and reports").
16

17 Despite the existence of the Harbor clinical reports in the medical
18 record, the ALJ relied upon the opinion of Dr. Alpern to determine that
19 Plaintiff's Lupus was quiescent and treatable with appropriate
20 medication. (AR 301). Thus, the ALJ opined that "although the claimant
21 had SLE [Lupus] . . . the medical evidence did not indicate that the
22 claimant would have limitations from this condition sufficient to meet
23 or equal the criteria of a listed impairment." (Id.).

24
25 However, the Harbor clinical reports clearly demonstrate that
26 Plaintiff suffered from Lupus or symptoms of Lupus from August 16, 2001
27 through November 11, 2003. (AR 495-524). This period of time is "not
28 less than twelve months," and thus, the ALJ should have considered

1 whether Plaintiff qualified for SSI and DIB during this closed period
2 of disability. 20 C.F.R. § 404.1505(a); see also Lester v. Chater, 81
3 F.3d at 833. In assessing Plaintiff's RFC, the ALJ relied upon the
4 testimony of Dr. Alpern, who had not considered all the relevant and
5 material facts, namely the Harbor clinical reports. (AR 301). Andrews
6 v. Shalala, 5 F.3d at 1041. Thus, the ALJ erred by failing to address
7 the Harbor clinical reports, which indicated that Plaintiff may have
8 suffered from Lupus for approximately two years. Gallant v. Heckler, 753
9 F.2d at 1455-56; see also Reddick v. Chater, 157 F.3d at 722-23. Therefore,
10 the ALJ's failure to consider whether Plaintiff was eligible for a
11 closed period of disability warrants remand.

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VII.
CONCLUSION

Consistent with the foregoing, and pursuant to sentence four of 42 U.S.C. § 405(g),⁴ IT IS ORDERED that the decision of the Commissioner is REVERSED and REMANDED for further proceedings. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: December 2, 2008.

/S/

SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

⁴ This sentence provides: "The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing."