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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KATHY S. SHADE, Plaintiff, v. MICHAEL J. ASTRUE COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION, Defendant.	NO. CV 09-1153-E **MEMORANDUM OPINION AND ORDER OF REMAND**

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS HEREBY ORDERED that Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

Plaintiff filed a complaint on February 24, 2009, seeking review of the Commissioner's denial of benefits. Plaintiff and Defendant consented to proceed before a United States Magistrate Judge. Plaintiff filed a motion for summary judgment on June 29, 2009 ("Pl.'s

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Mot.”). Defendant filed a cross-motion for summary judgment on July 23, 2009 (“Def.’s Mot.”). The Court has taken both motions under submission without oral argument. See L.R. 7-15; “Order,” filed February 27, 2009.

BACKGROUND

Plaintiff filed an application for supplemental security income on or about July 23, 2007, alleging disability beginning December 30, 2002 (Administrative Record (“A.R.”) 7, 98, 118-19). Plaintiff asserts disability based on several alleged impairments, including “lack of oxygen/numbness of left side of body and very poor vision specially [sic] on the right eye, depression and mental condition” (A.R. 119; see also Pl.’s Mot., p. 2 (adding chronic headaches)). An ALJ examined the medical record and heard testimony from Plaintiff and from a vocational expert (A.R. 7-373).

The ALJ found Plaintiff suffers from severe impairments (i.e., “chronic headaches, neck pain and vision problems”), but retains the residual functional capacity to perform a limited range of medium work[1] (A.R. 9-11). Specifically, the ALJ found Plaintiff could:

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[1] Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, the Administration deems such claimant able to do sedentary and light work. See 20 C.F.R. § 416.967(c). SSR 83-10 instructs:

> A full range of medium work requires standing or walking, off and on, for a total of approximately 6 hours in an 8-hour workday in order to meet the requirements of

(continued...)

. . . lift and carry 50 pounds occasionally and 25 pounds frequently. She can sit and stand for 6 hours out of an 8 hour day. She can occasionally walk on uneven terrain, climb ladders and work around heights. The claimant has visual problems restricting her near acuity.

(A.R. 11).

The ALJ stated Plaintiff has "past relevant work" as a home attendant, retail sales clerk, telemarketer, and security guard (A.R. 12). The ALJ found that Plaintiff retains the capacity to perform the telemarketing job "as it was actually and generally performed" (A.R. 12-13 (purportedly adopting vocational expert testimony at A.R. 56-58)).[2] The Appeals Council denied review (A.R. 1-3).

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the

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[1](...continued)
frequent lifting or carrying objects weighing up to 25 pounds. As in light work, sitting may occur intermittently during the remaining time. Use of the arms and hands is necessary to grasp, hold, and turn objects, as opposed to the finer activities in much sedentary work, which require precision use of the fingers as well as use of the hands and arms.

See SSR 83-10.

[2] The Administration properly may deny disability benefits when the claimant can perform the claimant's past relevant work as "actually performed" or as "usually" or "generally" performed. See Pinto v. Massanari, 249 F.3d 840, 845 (9th Cir. 2001).

Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used proper legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); Widmark v. Barnhart, 454 F.3d 1063, 1067 (9th Cir. 2006).

DISCUSSION

For the reasons discussed below, both parties' motions for summary judgment are denied and this matter is remanded for further administrative proceedings pursuant to sentence four of 42 U.S.C. section 405(g).

In finding that Plaintiff could perform her past relevant work as a telemarketer, the ALJ stated:

> The vocational expert testified that because of her restricted vision, the claimant cannot perform her past jobs as a home attendant, retail sales clerk, or security guard, but the vocational expert testified that she can perform her past work as a telemarketer.

(A.R. 12). This statement mischaracterizes the vocational expert's testimony.

The vocational expert did not testify that Plaintiff can perform her past work as a telemarketer. The vocational expert testified that a person with the limitations the ALJ posed could work as a telemarketer "per" the Dictionary of Occupational Titles ("DOT") (A.R. 55-56). However, the vocational expert also testified that the DOT's definition of telemarketing was 20 years old, implying that the DOT definition may no longer accurately describe the job "as generally performed" (A.R. 56). When the ALJ clarified the record by confirming with Plaintiff that the telemarketing job as Plaintiff performed the job required Plaintiff to "stare at a computer screen all day long, the vocational expert testified that Plaintiff could not perform her job as a telemarketer (A.R. 57). Accordingly, substantial evidence does not support the ALJ's determination that Plaintiff could perform her past telemarketing job as "actually" performed. On the present record, substantial evidence also fails to support the ALJ's alternative determination that Plaintiff could perform the job as "generally" performed. The vocational expert's reference to the dated and possibly outmoded nature of the DOT's telemarketing definition precludes affirmance on the basis of this alternative determination.

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The ALJ's error in mischaracterizing the vocational expert's testimony concerning the telemarketing job was not harmless.[3] The vocational expert testified that a person with the limitations the ALJ posed could work as a home attendant (DOT 354.377-014) (A.R. 57). However, the ALJ did not find that Plaintiff can work as a home attendant (A.R. 57-58).[4] Moreover, as discussed below, there is insufficient evidence in the record to establish that Plaintiff's prior work as a home attendant amounted to "past relevant work."

Plaintiff reportedly worked as a home attendant for "IHSS In Home Support Services" from May 1997 through October 1997 (A.R. 120). Plaintiff's reported earnings from "IHSS Recipients" in 1997 totaled $1,766.51 (A.R. 103). Assuming Plaintiff worked for IHSS for six

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[3] The ALJ committed a separate error with respect to the vocational expert's testimony, but this separate error may well have been harmless. The ALJ's hypothetical question to the vocational expert assumed a person capable of performing heavy work (i.e., lifting and carrying 100 pounds occasionally and 50 pounds frequently) (A.R. 56). As noted above, the ALJ found that Plaintiff retained the residual functional capacity to perform only medium work. See A.R. 11. Accordingly, the hypothetical question posed to the vocational expert erroneously failed to include all of Plaintiff's exertional restrictions. See Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) (hypothetical questioning of a vocational expert must "set out all of the claimant's impairments").

[4] The ALJ stated, inaccurately, that the vocational expert testified Plaintiff "cannot perform her past job[] as a home attendant . . ." (A.R. 12).

months in 1997 as reported,[5] her monthly income from the home attendant work was $294.42 ($1,766.51 divided by six).

Earnings levels are relevant to the question of whether particular employment does or does not constitute "substantial gainful activity" that could qualify as "past relevant work." See 20 C.F.R. § 960(b)(1) (defining "past relevant work" as work that was "substantial gainful activity"); 20 C.F.R. § 416.974 (guidelines for determining if work is "substantial gainful activity"); Lewis v. Apfel, 236 F.3d 503, 515 (9th Cir. 2001); Keyes v. Sullivan, 894 F.2d 1053, 1056 (9th Cir. 1990); see also Bray v. Commissioner of Social Security Admin., 554 F.3d 1219, 1221 n.1 (9th Cir. 2009) (noting that claimant's unsuccessful work attempt cannot be considered "past relevant work" under the regulations). Unless a claimant's prior work constituted "substantial gainful activity," the work cannot qualify as "past relevant work." See 20 C.F.R. § 416.965(a); Vertigan v. Halter, 260 F.3d 1044, 1051 (9th Cir. 2001).

For the years from January 1990 through June 1999 – a period encompassing the time when Plaintiff worked as a home attendant – the regulations provided that monthly earnings must average more than $500 to show that a person was engaged in "substantial gainful activity." See 20 C.F.R. § 416.974(b)(2)(I). When earnings are less than the levels triggering a presumption of substantial gainful activity, as

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[5] When the ALJ inquired into this position at the hearing, Plaintiff testified that she worked as a home attendant "for two summers, for two years" and affirmed that "would be like three months each time" (A.R. 24). However, there is no record of earnings for "IHSS" in 1998 (A.R. 103).

here, the ALJ should consider and discuss other evidence bearing on the issue of whether the prior work was substantial gainful activity. See 20 C.F.R. § 416.974(b)(3); Lewis v. Apfel, 236 F.3d at 515. Such evidence can include the nature of the claimant's work, how well the claimant performed the work, whether the work was done under special conditions, whether the claimant was self-employed, and the amount of time the claimant spent at the work. Id. Lewis v. Apfel, 236 F.3d at 515-16; 20 C.F.R. §§ 416.973, 416.974(b)(3). In the present case, presumably because the ALJ made no finding regarding Plaintiff's current ability to perform the home attendant job, the ALJ failed to discuss any of the factors pertinent to an analysis of whether Plaintiff's prior work as a home attendant constituted "substantial gainful activity."

When a court reverses an administrative determination, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." INS v. Ventura, 537 U.S. 12, 16 (2002) (citations and quotations omitted). Remand is proper where, as here, additional administrative proceedings could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989); see generally Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984).

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CONCLUSION

For all of the foregoing reasons,[6] Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 18, 2009.

_______________/S/_____________
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[6] The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the payment of benefits would not be appropriate at this time.