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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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|------------------------|---|------------------------|
| MARTHA MARQUEZ, |) | No. CV 10-06682-VBK |
| |) | |
| Plaintiff, |) | MEMORANDUM OPINION |
| |) | AND ORDER |
| v. |) | |
| |) | (Social Security Case) |
| MICHAEL J. ASTRUE, |) | |
| Commissioner of Social |) | |
| Security, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") committed legal

1 error in not adequately assessing the testimony of
2 Plaintiff's daughter (JS at p. 2); and

- 3 2. Whether the ALJ properly considered a mental impairment. (JS
4 at p. 6.)

5
6 This Memorandum Opinion will constitute the Court's findings of
7 fact and conclusions of law. After reviewing the matter, the Court
8 concludes that for the reasons set forth, the decision of the
9 Commissioner must be reversed and the matter remanded.

10
11 I

12 **THE ALJ PROPERLY CONSIDERED OBJECTIVE MEDICAL EVIDENCE**

13 **CONCERNING PLAINTIFF'S MENTAL IMPAIRMENT, BUT IMPROPERLY REJECTED**

14 **THE TESTIMONY OF PLAINTIFF'S DAUGHTER**

15 The two issues in this case concern the ALJ's evaluation of
16 Plaintiff's mental impairment. In the first issue, Plaintiff asserts
17 that the ALJ erred in rejecting the testimony provided by Plaintiff's
18 daughter, and in the second issue, Plaintiff disputes the ALJ's
19 evaluation of the objective medical evidence. The Court will turn to
20 the second issue first.

21 There is no dispute between the parties that Plaintiff received
22 treatment for anxiety and depression. (See Plaintiff's portion of the
23 JS at 4; Defendant's portion at 7, citing AR 431-33, 438, 441-42, 521-
24 22, 524, 526, and 528.) In addition, at the first administrative
25 hearing in this matter, which occurred on September 18, 2008,
26 Plaintiff provided fairly detailed testimony about her mental health
27 treatment, in particular her treatment and medications for depression.
28 (See, e.g., AR 62-66.)

1 At the request of the Department of Social Services, on June 13,
2 2008, Plaintiff received a complete psychological evaluation ("CE")
3 from Dr. Riahinejad, a clinical psychologist. (AR 461-465.) After
4 performing testing, Dr. Riahinejad diagnosed on Axis I Depressive
5 Disorder, With Anxiety. (AR 464.) He determined Plaintiff is capable
6 of managing funds on her own behalf; she is able to understand,
7 remember and carry out simple and repetitive instructions; she could
8 have moderate difficulty understanding, remembering, and carrying out
9 complex and detailed instructions; she is able to accept instructions
10 from a supervisor and relate with coworkers; she does not have any
11 difficulty with pace. (AR 464-465.)

12 In his decision, the ALJ determined that Plaintiff's mental
13 residual functional capacity ("MRFC") includes, "in the mental realm,
14 the claimant has moderate difficulty in understanding, remembering and
15 carrying out complex and detailed instructions. She has no other
16 significant limitations." (AR 23.) Thus, the ALJ adopted the CE's
17 assessment of Plaintiff's mental functional capacity in determining
18 her MRFC.

19 As to this issue, Plaintiff's objection to the ALJ's adoption of
20 the CE's functional capacity assessment is that the CE admitted that
21 he did not perform specific testing to assess Plaintiff's depression
22 and/or anxiety. (AR 509.) Plaintiff's counsel points out that he
23 requested the ALJ to order specific testing concerning anxiety and
24 depression, which was denied. (AR 37, 39, 41, 114-15.) As such,
25 Plaintiff's contention is that the ALJ failed to develop the record by
26 declining to order this specific testing. (See JS at 6-7, citing Webb
27 v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005.)

28 In response, the Commissioner quite properly points out that the

1 ALJ evaluated all of the evidence in the record, not just the CE's
2 report, in determining that Plaintiff suffered from depression with
3 anxiety. As such, the record is not ambiguous, which is a
4 prerequisite for a mandate to further develop the record. (See
5 Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001).) With
6 regard to Plaintiff's complaint that the ALJ failed to properly
7 evaluate her somatic preoccupations (JS at 7, citing AR 27), these
8 somatic complaints are largely founded on Plaintiff's credibility,
9 which the ALJ found to be severely depreciated. Plaintiff did not
10 dispute that finding, or conclusions rendered by the psychiatric CE
11 that Plaintiff was malingering with regard to certain of her
12 psychiatric symptoms. As such, the Court can find no error in the
13 ALJ's asserted failure to properly evaluate somatic preoccupations.

14 With regard to the first issue, which concerns the ALJ's
15 evaluation of the lay testimony of Plaintiff's daughter, the Court
16 agrees that the ALJ's decision falls short, necessitating remand for
17 reconsideration of this testimony.

18 The ALJ devoted fairly substantial attention in his decision to
19 the testimony of Plaintiff's daughter, Mirabella Marquez. (See AR at
20 28-29.) The ALJ accurately summarized the testimony of Plaintiff's
21 daughter regarding observations of Plaintiff's depression and her
22 functional limitations in daily activities and other areas, including
23 cooking, socializing, sleep difficulties, loss of energy and memory
24 problems. In depreciating this testimony's credibility, however, the
25 ALJ relied on factors which the Court finds insufficient. The ALJ
26 noted that Plaintiff's daughter "made little, if any, mention of
27 anxiety and anxiety-related symptoms, ..." (AR 28), and as a second
28 reason, that Plaintiff's daughter, "despite recognizing the claimant's

1 apparently severe depression, has done little, if anything, to aid her
2 in seeking out needed psychiatric care and treatment. As indicated
3 above, there is a general dearth of evidence that the claimant has
4 been treated by mental health professionals." (AR 28.)

5 The Court must analyze the adequacy of the ALJ's rejection of
6 this lay testimony based upon the reasons set forth in the decision.
7 As the parties acknowledge, testimony from lay witnesses may be of
8 particular value, and can be only rejected based on reasons which are
9 specific and germane to the particular witness. See Regennitter v.
10 Commissioner, 166 F.3d 1294, 1298 (9th Cir. 1999), citing Smolen v.
11 Chater, 80 F.3d 1273, 1288 (9th Cir. 1996).

12 The ALJ's determination that Plaintiff's daughter made "little,
13 if any, mention of anxiety and anxiety-related symptoms" is both
14 factually incorrect and analytically deficient. As to the first,
15 there are numerous instances in the daughter's testimony in which
16 anxiety is referred to by name. For example, she stated, in response
17 to a question, that, "But you know, she would get up, she would sleep,
18 she was depressed, she would cry. She had like anxiety. There was
19 just a lot of different emotions going." (AR 28.) When asked at the
20 hearing whether Plaintiff ever says anything that suggests she suffers
21 from anxiety, Ms. Marquez provided a quite specific answer. (AR 112.)
22 Moreover, it is possible that Ms. Marquez did not fully understand the
23 term anxiety, or how it might be distinguished from depression. When
24 she was asked specifically whether she had any idea what is meant by
25 anxiety, she answered, "Well, if she's doing something, it could be
26 anything, and then you know, the depression comes in or whatever." (AR
27 110.) While the Commissioner cites such testimony to buttress the
28 ALJ's determination that Ms. Marquez somehow ignored Plaintiff's

1 anxiety, the Court finds no basis for that conclusion other than
2 speculation. Indeed, the psychological CE determined that Plaintiff
3 suffers from depression with anxiety, and the terms depression and
4 anxiety may well have a substantial overlap. (See, the American
5 Medical Association Encyclopedia of Medicine, definition of anxiety at
6 122, and definition of depression, at 344-345.)

7 The ALJ's reasoning becomes even more problematic in his
8 conclusion that Plaintiff did not receive mental health care, and that
9 her daughter's failure to seek such care for her mother somehow
10 reflects upon the daughter's lack of credibility. Again, this
11 analysis falls short both factually and analytically. As to the
12 first, the Commissioner admits that Plaintiff in fact did receive
13 treatment for anxiety and depression (see JS at 7, citing to the AR),
14 and as the Court has already noted, Plaintiff herself testified about
15 this treatment, and various medications she received. If the ALJ's
16 view is that the daughter did not inspire her mother to obtain even
17 more treatment, this reasoning inches even further out on a limb. The
18 ALJ does not define what he means when he talks about "aggressive
19 psychiatric treatment" in his decision. (See AR at 28.) Moreover,
20 this assessment is even more problematic from a sociological or
21 cultural point of view. The responsibility of an adult child to
22 monitor or to encourage mental health treatment for a parent who is
23 not incompetent is a delicate and probably controversial issue.
24 Anecdotally, many people have heard examples of adult children who
25 seem powerless to prevent an older parent from driving an automobile,
26 or who fail to encourage a parent with obvious hearing impairments to
27 obtain a hearing aid. There are a myriad of reasons why this may
28 occur, none of which were explored (even if they were relevant) at the

