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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DOROTHY L. CRISP,) No. CV 10-6821(CW)
)
Plaintiff,) DECISION AND ORDER
)
v.)
)
MICHAEL J. ASTRUE,)
)
Commissioner of)
Security,)
)
Defendant.)
_____)

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner’s denial of disability and disability insurance benefits. As discussed below, the court finds that the Commissioner’s decision should be reversed and remanded for further administrative proceedings consistent with this decision and order.

I. BACKGROUND

Plaintiff Dorothy L. Crisp was born on November 17, 1953, and was fifty-one years old on the alleged disability onset date [Administrative Record, “AR,” 94.] She has a law degree and past

1 relevant work experience as an attorney. [AR 16.] Plaintiff alleges
2 disability due to post-traumatic stress disorder ("PTSD") stemming
3 from a sexual assault. [AR 123.]

4 **II. PROCEEDINGS IN THIS COURT**

5 Plaintiff's complaint was lodged on September 14, 2010, and filed
6 on September 15, 2010. On March 18, 2011, defendant filed an answer
7 and plaintiff's Administrative Record ("AR"). On May 23, 2011, the
8 parties filed their Joint Stipulation ("JS") identifying matters not
9 in dispute, issues in dispute, the positions of the parties, and the
10 relief sought by each party. This matter has been taken under
11 submission without oral argument.

12 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

13 Plaintiff applied for disability insurance benefits ("DIB") on
14 February 17, 2006, alleging disability since August 16, 2005. [AR 94.]
15 She met the insured status requirements of the Social Security Act
16 through December 31, 2009. [AR 13.] After the application was denied
17 initially and upon reconsideration, plaintiff requested an
18 administrative hearing, which was held on September 22, 2008, before
19 Administrative Law Judge ("ALJ") Mary L. Eversine. [AR 22-43.]
20 Plaintiff appeared with counsel and testified [AR 24-35]; the ALJ also
21 heard the testimony of vocational expert ("VE") Elizabeth Cerezo [AR
22 35-41]. The ALJ denied benefits in a decision dated October 16, 2008.
23 [AR 11-18.] When the Appeals Council denied review on July 28, 2010,
24 the ALJ's decision became the Commissioner's final decision. [AR 1-3.]

25 This action followed.

26 **IV. STANDARD OF REVIEW**

27 Under 42 U.S.C. § 405(g), a district court may review the
28 Commissioner's decision to deny benefits. The Commissioner's (or

1 ALJ's) findings and decision should be upheld if they are free of
2 legal error and supported by substantial evidence. However, if the
3 court determines that a finding is based on legal error or is not
4 supported by substantial evidence in the record, the court may reject
5 the finding and set aside the decision to deny benefits. See Aukland
6 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
7 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
8 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
9 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
10 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
11 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

12 "Substantial evidence is more than a scintilla, but less than a
13 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
14 which a reasonable person might accept as adequate to support a
15 conclusion." Id. To determine whether substantial evidence supports
16 a finding, a court must review the administrative record as a whole,
17 "weighing both the evidence that supports and the evidence that
18 detracts from the Commissioner's conclusion." Id. "If the evidence
19 can reasonably support either affirming or reversing," the reviewing
20 court "may not substitute its judgment" for that of the Commissioner.
21 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

22 V. DISCUSSION

23 A. THE FIVE-STEP EVALUATION

24 To be eligible for disability benefits a claimant must
25 demonstrate a medically determinable impairment which prevents the
26 claimant from engaging in substantial gainful activity and which is
27 expected to result in death or to last for a continuous period of at
28 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at

1 721; 42 U.S.C. § 423(d)(1)(A).

2 Disability claims are evaluated using a five-step test:

3 Step one: Is the claimant engaging in substantial
4 gainful activity? If so, the claimant is found not
5 disabled. If not, proceed to step two.

6 Step two: Does the claimant have a "severe" impairment?
7 If so, proceed to step three. If not, then a finding of not
8 disabled is appropriate.

9 Step three: Does the claimant's impairment or
10 combination of impairments meet or equal an impairment
11 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
12 so, the claimant is automatically determined disabled. If
13 not, proceed to step four.

14 Step four: Is the claimant capable of performing his
15 past work? If so, the claimant is not disabled. If not,
16 proceed to step five.

17 Step five: Does the claimant have the residual
18 functional capacity to perform any other work? If so, the
19 claimant is not disabled. If not, the claimant is disabled.

20 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
21 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
22 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
23 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
24 "not disabled" at any step, there is no need to complete further
25 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

26 Claimants have the burden of proof at steps one through four,
27 subject to the presumption that Social Security hearings are non-
28 adversarial, and to the Commissioner's affirmative duty to assist
claimants in fully developing the record even if they are represented
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a *prima facie* case of disability is
made, and the burden shifts to the Commissioner (at step five) to

1 prove that, considering residual functional capacity ("RFC")¹, age,
2 education, and work experience, a claimant can perform other work
3 which is available in significant numbers. Tackett, 180 F.3d at 1098,
4 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520.

5 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

6 Here, the ALJ found that plaintiff had not engaged in substantial
7 gainful activity since August 15, 2005, her alleged disability onset
8 date (step one); that plaintiff had the "severe" impairments of:
9 chronic PTSD, depressive disorder (not otherwise specified, with
10 anxious features), and panic disorder without agoraphobia (step two);
11 and that plaintiff did not have an impairment or combination of
12 impairments that met or equaled a "listing" (step three). [AR 13.]
13 Plaintiff was found to have an RFC to perform a full range of work at
14 all exertional levels, but with non-exertional limitations to simple,
15 repetitive tasks which do not require interaction with the general
16 public and which do not have a high production quota. [AR 14.]

17 Based on this RFC, plaintiff was found unable to return to her
18 past relevant work as an attorney (step four). [AR 16.] Based upon the
19 testimony of the VE, however, the ALJ found that a person of
20 plaintiff's age, education, work experience, and RFC could perform
21 work existing in significant numbers in the national economy, such as
22 a janitor or dishwasher (step five). [AR 17.] Accordingly, plaintiff

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24 ¹ Residual functional capacity measures what a claimant can
25 still do despite existing "exertional" (strength-related) and
26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
28 work without directly limiting strength, and include mental, sensory,
postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminster v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 was found not "disabled" as defined by the Social Security Act (the
2 "Act"). [AR 17-18.]

3 **C. ISSUES IN DISPUTE**

4 The parties' Joint Stipulation identifies two disputed issues,
5 whether the ALJ properly evaluated:

- 6 1. The opinions of the examining psychologist; and
- 7 2. Plaintiff's testimony.

8 [JS 3.] The first issue is dispositive.²

9 **D. ISSUE ONE: EXAMINING PSYCHOLOGIST**

10 Plaintiff first contends the ALJ erred in the RFC assessment
11 because the RFC omits moderate mental functioning limitations
12 articulated by consultative psychological examiner Lance Portnoff,
13 Ph.D., whose opinion the ALJ purported to adopt.

14 Dr. Portnoff examined plaintiff on July 8, 2006, interviewing
15 plaintiff and assessing her mental condition by having her complete a
16 series of psychological tests. [AR 172-77.] Dr. Portnoff then opined
17 that plaintiff has the following mental functioning limitations and
18 abilities:

- 19 • mild restrictions in daily activities, and she does not need
20 assistance or supervision with basic activities of daily living,
21 but has low motivation to groom/bathe/cook due to depressive
22 apathy, but can drive and can manage her money;
- 23 • mild limitations in maintaining social functioning because of
24 deficiencies in retaining information in verbal memory, social
25 judgment also due to anxious depression, PTSD, and Panic
26 Disorder;

27 ² Because issue two does not affect the need for a remand for
28 further proceedings, the court need not reach it.

- 1 • mild difficulties with concentration, persistence, and pace, as
2 measured by psychometrics;
- 3 • no reported history of repeated episodes of emotional
4 deterioration in work-like situations;
- 5 • ability to understand, carry out, and remember simple
6 instructions;
- 7 • moderate limitation in the ability to respond appropriately to
8 co-workers, supervisors, or the public, because of deficiencies
9 in retaining information in memory, attention, processing speed,
10 and in judgment, and because of anxious depression, PTSD, and
11 Panic Disorder;
- 12 • mild limitations in her ability to respond appropriately to usual
13 or routine work situations, such as attendance and safety because
14 of depressive anergia/apathy;
- 15 • moderate limitations in her ability to deal with unexpected
16 changes in a routine work setting, because of deficiencies in
17 judgment and because of anxious depression, PTSD, and Panic
18 disorder.

19 [AR 176.]

20 The RFC assessment of state-agency reviewing physician H.N.
21 Hurwitz, M.D., comports with Dr. Portnoff's for the most part;
22 however, Dr. Hurwitz's assessment concludes that plaintiff can, in
23 fact, "relate adequately with coworkers and supervisors, but not with
24 the public." [AR 180.] Furthermore, Dr. Hurwitz omitted the moderate
25 limitation in plaintiff's ability to deal with unexpected changes that
26 was opined by Dr. Portnoff. [AR 179.]

27 Notwithstanding these inconsistencies, in the hearing decision
28 the ALJ stated that she would credit both "the State agency (Exhibit

1 3F) and the consultative examiner (Exhibit 2F)" (emphasis added) based
2 on "supportability with medical signs and laboratory findings;
3 consistency with the record; and area of specialization." [AR 16.]

4 The RFC, furthermore, adopts only those limitations opined by Dr.
5 Hurwiz, omitting the two moderate limitations found by Dr. Portnoff
6 and mentioned above. [See AR 14, 176.] In so doing, the ALJ
7 effectively rejects Dr. Portnoff's opinion in favor of the less
8 restrictive opinion of the non-examining state-agency reviewing
9 physician.³ This is in error.

10 The opinion of a non-examining physician, by itself, does not
11 provide substantial evidence to justify rejection of the opinion of
12 either a treating or examining physician. Lester v. Chater, 81 F.3d
13 821, 831 (9th Cir. 1995). It is error for an ALJ to neither explicitly
14 reject the opinion of an examining physician nor set forth specific,
15 legitimate reasons for crediting a non-examining medical advisor over
16 an examining physician. Nguyen v. Chater, 100 F.3d 1462 (9th Cir.
17 1996).

18 Accordingly, reversal is required on this issue.

19 **E. REMAND FOR FURTHER PROCEEDINGS**

20 The decision whether to remand for further proceedings is within
21 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
22 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
23 further proceedings, or where the record has been fully developed, it
24 is appropriate to exercise this discretion to direct an immediate
25 award of benefits. Harman, 211 F.3d at 1179 (decision whether to

26 ³ In making these findings, the ALJ specifically declined to
27 credit more significant restrictions opined by plaintiff's treating
28 psychiatrist, Celia Woods, M.D. [see AR 310]; plaintiff does not
challenge that aspect of the decision here. [See JS.]

1 remand for further proceedings turns upon their likely utility).
2 However, where there are outstanding issues that must be resolved
3 before a determination can be made, and it is not clear from the
4 record that the ALJ would be required to find the claimant disabled if
5 all the evidence were properly evaluated, remand is appropriate. Id.


6 Here, the ALJ erred in assessing Dr. Portnoff's opinion and did
7 not present a hypothetical to the VE that included all of the
8 limitations Dr. Portnoff found. Thus, outstanding issues remain
9 before a determination can be made, and remand for further
10 administrative proceedings is appropriate. See e.g., Strauss v.
11 Comm'r of Soc. Sec. Admin., 635 F.3d 1135, 1136 (9th Cir. 2011)
12 (remand for automatic payment of benefits inappropriate unless
13 evidence unequivocally establishes disability).

14 **VI. ORDERS**

15 Accordingly, **IT IS ORDERED** that:

- 16 1. The decision of the Commissioner is **REVERSED**.
17 2. This action is **REMANDED** to defendant, pursuant to Sentence
18 Four of 42 U.S.C. §405(g), for further administrative proceedings
19 consistent with the decision.
20 3. The Clerk of the Court shall serve this Decision and Order
21 and the Judgment herein on all parties or counsel.

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23 DATED: June 13, 2011

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25 _____
26 CARLA M. WOehrLE
27 United States Magistrate Judge
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