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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|---------------------------------|---|---------------------------|
| WANDA M. MILES, |) | NO. CV 11-8564-E |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | MEMORANDUM OPINION |
| |) | |
| MICHAEL J. ASTRUE, COMMISSIONER |) | |
| OF SOCIAL SECURITY, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

PROCEEDINGS

Plaintiff filed a Complaint on October 20, 2011, seeking review of the Commissioner's denial of benefits. The parties filed a "Consent to Proceed Before a United States Magistrate Judge" on November 10, 2011.

Plaintiff filed a "Motion for Summary Judgment" on April 2, 2012. Defendant filed a "Motion for Summary Judgment" on May 2, 2012. The Court has taken both motions under submission without oral argument. See L.R. 7-15; "Order," filed October 21,

1 2011.

2
3 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**
4

5 Plaintiff filed an application for benefits on August 28, 2007,
6 alleging disability beginning February 19, 2002 (Administrative Record
7 ("A.R.") 119-25). In an accompanying "Disability Report," Plaintiff
8 identified the "illnesses, injuries, or conditions that limit [her]
9 ability to work" as "chronic pain in both legs, knees and feet" (A.R.
10 129). Later in the administrative process, Plaintiff added that she
11 had been "in a car accident Dec. 3, 2007 and was later diagnosed with
12 fibromyalgia, neck, hand and arm tremors" (A.R. 170). When examined
13 by a consultative psychiatrist in June of 2008, Plaintiff denied she
14 had any mental illness, denied receiving any type of mental health
15 treatment, and reported no limitations in functioning due to any
16 mental problem (A.R. 666-69). In a subsequent hearing before an
17 Administrative Law Judge ("ALJ"), Plaintiff complained only of alleged
18 pain, fibromyalgia, loss of control of her body, dizziness, blackouts,
19 headaches, seizures, hearing deficits, and incontinence (A.R. 42-53).
20 Thus, neither before nor during the administrative hearing did
21 Plaintiff ever claim to have any mental impairment.

22
23 Not surprisingly, the evidence before the ALJ of any significant
24 mental impairment was essentially nonexistent. The consultative
25 psychiatrist gave no mental diagnosis, stating that "[w]hile the
26 claimant does have complaints of depression, they are not out of the
27 context of psychosocial medical stressors she is experiencing, and she
28 does not meet diagnostic criteria for an Axis I diagnosis. As such,

1 she has no symptoms of a major mental illness that would impair her
2 ability to tolerate the stress inherent in the work environment,
3 maintain regular attendance, or work without supervision" (A.R. 669).
4 Although Plaintiff at one point listed "trazodone" as an
5 "antidepressant medication" (A.R. 173), she reportedly was "not
6 currently taking any psychiatric medications" as of June of 2008 (A.R.
7 667). A non-examining physician reviewed the record and found no
8 medically determinable mental impairment as of July of 2008 (A.R.
9 670). In a note dated March 24, 2009, Dr. F.L. Irwin assessed
10 "anxiety/depression," along with "chronic neck pain . . . cervical
11 degenerative disc disease . . . cervical disc protrusion . . .
12 cervical facet dysfunction . . . chronic pain syndrome . . . [and]
13 fibromyalgia" (A.R. 789). Dr. Irwin did not offer an opinion
14 regarding any functional limitation, did not prescribe any medication
15 or treatment for "anxiety/depression," and in fact refused to
16 prescribe the narcotics that Plaintiff requested (A.R. 789).

17
18 On June 16, 2009, the ALJ issued a decision finding Plaintiff not
19 disabled (A.R. 31-36). This decision, which did not find any severe
20 mental impairment, eventually became the final decision of the
21 Administration (Id.; see A.R. 1).

22
23 Plaintiff challenges this decision, arguing that the decision
24 should have "use[d] the psychiatric review technique" in evaluating
25 and assessing a possible mental impairment. In support of her
26 argument, Plaintiff cites 20 C.F.R. sections 404.1520a, 416.920a and
27 Keyser v. Commissioner, 648 F.3d 721 (9th Cir. 2011) ("Keyser").

28 ///

1 Plaintiff's challenge relies largely on evidence that was not
2 available to the ALJ. Following the ALJ's adverse decision, Plaintiff
3 submitted to the Appeals Council for the first time over 600 pages of
4 additional materials, including some new evidence of alleged mental
5 problems (A.R. 4-5). This new evidence, dated more than eight months
6 after the ALJ's decision, reflects that Plaintiff underwent an
7 "initial assessment" in February of 2010, which diagnosed a "mood
8 disorder" (A.R. 833). Records dated later in 2010 mention depression
9 and the prescribing of medication for depression (A.R. 837). None of
10 the newly-submitted documents appear to contain any medical opinion
11 concerning Plaintiff's mental health condition during the relevant
12 time frame (February 19, 2002 - June 16, 2009). Nor do these
13 documents appear to contain any medical opinion concerning any
14 functional limitation assertedly resulting from Plaintiff's supposed
15 "mood disorder" or "depression," although one of the documents did
16 rate Plaintiff's GAF at 50 as of February 12, 2010 (A.R. 833).

17
18 The Appeals Council considered the newly-submitted evidence, but
19 denied review (A.R. 1-3).

20 21 **STANDARD OF REVIEW**

22
23 Under 42 U.S.C. section 405(g), this Court reviews the
24 Administration's decision to determine if: (1) the Administration's
25 findings are supported by substantial evidence; and (2) the
26 Administration used correct legal standards. See Carmickle v.
27 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
28 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such

1 relevant evidence as a reasonable mind might accept as adequate to
2 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
3 (1971) (citation and quotations omitted); see also Widmark v.
4 Barnhart, 454 F.3d 1063, 1067 (9th Cir. 2006).

5
6 Where, as here, the Appeals Council considered additional
7 material but denied review, the additional material becomes part of
8 the Administrative Record for purposes of the Court's analysis. See
9 Harman v. Apfel, 211 F.3d 1172, 1179-80 (9th Cir.), cert. denied, 531
10 U.S. 1038 (2000) (reviewing court properly may consider materials
11 submitted to the Appeals Council when the Appeals Council addressed
12 the materials in denying review); Ramirez v. Shalala, 8 F.3d 1449,
13 1452 (9th Cir. 1993) ("although the Appeals Council declined to review
14 the decision of the ALJ, it reached this ruling after considering the
15 case on the merits; examining the entire record, including the
16 additional material; and concluding that the ALJ's decision was proper
17 and that the additional material failed to provide a basis for
18 changing the hearing decision. For these reasons, we consider on
19 appeal both the ALJ's decision and the additional material submitted
20 to the Appeals Council") (citations and quotations omitted); Penny v.
21 Sullivan, 2 F.3d 953, 957 n.7 (9th Cir. 1993) ("the Appeals Council
22 considered this information and it became part of the record we are
23 required to review as a whole"); see generally 20 C.F.R. §§
24 404.970(b), 416.1470(b).

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1 impairment presented for the first time to the Appeals Council
2 postdated the relevant time frame by more than eight months, did not
3 purport to opine regarding Plaintiff's condition during the relevant
4 time period, and did not reflect any functional limitation.

5
6 The facts of the present case are dramatically different from the
7 facts in Keyser. In Keyser, the ALJ had disregarded treating
8 physicians' opinions that mental illnesses (including bipolar
9 disorder, paranoid and schizotypal personality traits, severe
10 depression and generalized anxiety disorder) significantly impacted
11 the claimant's ability to work in a variety of respects. See Keyser
12 at 723-24, 726. The facts of the present case are more akin to the
13 facts in Sanchez v. Secretary, 812 F.2d 509, 511 (9th Cir. 1987)
14 ("Sanchez"). In Sanchez, the Ninth Circuit deemed psychological
15 evaluations prepared after the Administration's final decision to
16 indicate "at most, mental deterioration after the hearing, which would
17 be material to a new application, but not probative of [the
18 claimant's] condition at the hearing. Sanchez's mental condition was
19 not significantly at issue at the hearing [before the ALJ]. He
20 reported some loss of concentration, depression and anxiety as a

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27 ¹(...continued)
28 (observing that circuit courts are divided with respect to the proper scope of judicial review when the Appeals Council considers new evidence but denies further administrative review).

1 result of his back condition." Id. at 511-12.²

2
3 In sum, the rule of Keyser does not require this Court to discern
4 harmful error on the facts of the present case. The administrative
5 decision is supported by substantial evidence and is free from
6 material legal error. There is no substantial likelihood that any
7 alleged error materially affected the disability analysis. See McLeod
8 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011) (discussing general
9 harmless error standard applicable in social security disability
10 cases).

11
12 **CONCLUSION**

13
14 For all of the reasons discussed herein, Plaintiff's motion for
15 summary judgment is denied and Defendant's motion for summary judgment
16 is granted.

17
18 LET JUDGMENT BE ENTERED ACCORDINGLY.

19
20 DATED: May 8, 2012.

21
22 _____/S/_____
23 CHARLES F. EICK
24 UNITED STATES MAGISTRATE JUDGE

25
26 _____
27 ² The Sanchez decision appears to have addressed evidence
28 submitted to the court rather than to the Appeals Council. Nevertheless, the factual parallel is instructive with regard to the late-submitted evidence's lack of probity.