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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CALVIN BUTTS,

Plaintiff,

v.

CAROLYN W. COLVIN, ACTING
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,^{1/}

Defendant.

Case No. CV 12-4999 JCG

**MEMORANDUM OPINION AND
ORDER**

Calvin Butts (“Plaintiff”) challenges the Social Security Commissioner’s (“Defendant”) decision denying his application for disability benefits. Specifically, Plaintiff contends that the Administrative Law Judge (“ALJ”) failed to properly develop the record by not obtaining documents from his treating physician. (Joint Stip. at 3-5, 8.) For the reasons discussed below, the Court agrees with Plaintiff.

“[T]he ALJ has a special duty to fully and fairly develop the record and to assure that the claimant’s interests are considered.” *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (citing *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983)). If

^{1/} Carolyn W. Colvin is substituted as the proper defendant herein. *See* Fed. R. Civ. P. 25(d).

1 the evidence is ambiguous or inadequate to permit a proper evaluation of a
2 claimant’s impairments, the ALJ must also “conduct an appropriate inquiry” into
3 that deficiency. *Id.* at 1288.

4 Here, the ALJ failed to obtain Plaintiff’s *only* available treatment records, and,
5 as a result, decided the case based solely on the unfavorable opinions of the
6 consultative examiner and the state agency consultant. (AR at 26.) Notably, the
7 ALJ did so even after acknowledging Plaintiff’s testimony that he received treatment
8 from Kaiser Permanente. (AR at 26; *see* AR at 38-39.)

9 Reasoning that Plaintiff “was given ample opportunity” to submit his medical
10 records, the ALJ appears to place the burden of obtaining evidence on Plaintiff. (AR
11 at 26.) This rationale is misguided, albeit understandable. Plaintiff does have
12 the burden of producing evidence of a disability. *Meanel v. Apfel*, 172 F.3d 1111,
13 1113 (9th Cir. 1999); (*see* Joint Stip. at 5-6). But this burden exists vis-a-vis
14 Defendant, and does not absolve the ALJ of his *independent* duties to develop the
15 record and to assure that Plaintiff’s interests are being considered. *Armenta v.*
16 *Astrue*, 2012 WL 4512491, at *3 (C.D. Cal. Oct. 1, 2012); *see White v. Barnhart*,
17 287 F.3d 903, 908 (10th Cir. 2001).

18 Turning then to the ALJ’s efforts at developing the record, the Court finds
19 them insufficient. Granted, the state social services agency did make an initial
20 attempt to obtain Plaintiff’s records from the Kaiser Permanente facility in Tracy,
21 California. (AR at 170-72.) That facility, however, responded, stating that it did not
22 have Plaintiff’s records because Plaintiff is a southern California patient. (AR at
23 173.) Thus, to fulfill his duty, the ALJ should have requested records from Kaiser
24 Permanente’s southern California division. No evidence suggests that such an
25 endeavor was made, and thus a finding of error is appropriate.^{2/}

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27 ^{2/} This error is particularly significant given the great deference typically
28 afforded to treating opinions. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

1 With error established, this Court has discretion to remand or reverse and
2 award benefits. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). Where no
3 useful purpose would be served by further proceedings, or where the record has been
4 fully developed, it is appropriate to exercise this discretion to direct an immediate
5 award of benefits. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004).
6 But where there are outstanding issues that must be resolved before a determination
7 can be made, or it is not clear from the record that the ALJ would be required to find
8 plaintiff disabled if all the evidence were properly evaluated, remand is appropriate.
9 *See id.* at 594.

10 Here, the Court cannot determine disability based on the record before it.
11 Therefore, on remand, the ALJ shall seek Plaintiff's treatment records, if there be
12 any, from Kaiser Permanente's offices in southern California.

13 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
14 **REVERSING** the decision of the Commissioner denying benefits and
15 **REMANDING** the matter for further administrative action consistent with this
16 decision.

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18 Dated: March 5, 2013



20 Hon. Jay C. Gandhi
21 United States Magistrate Judge

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