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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 VICKIE L. KIDWELL,) No. CV 12-08822-VBK
12)
13 Plaintiff,) MEMORANDUM OPINION
14) AND ORDER
15 v.)
16) (Social Security Case)
17 CAROLYN W. COLVIN, Acting)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
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18 This matter is before the Court for review of the decision by the
19 Commissioner of Social Security denying Plaintiff's application for
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have
21 consented that the case may be handled by the Magistrate Judge. The
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to
23 enter judgment upon the pleadings and transcript of the Administrative
24 Record ("AR") before the Commissioner. The parties have filed the
25 Joint Stipulation ("JS"), and the Commissioner has filed the certified
26 AR.

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") erred when he

1 did not find Plaintiff's obesity, depression, anxiety,
2 bilateral carpal tunnel syndrom and migraine headaches to be
3 severe medically determinable impairments;

4 2. Whether the ALJ properly assessed Plaintiff's fibromyalgia;
5 and

6 3. Whether the ALJ properly assessed Plaintiff's credibility.

7 (JS at 4.)
8

9 This Memorandum Opinion will constitute the Court's findings of
10 fact and conclusions of law. After reviewing the matter, the Court
11 concludes that for the reasons set forth, the Decision of the
12 Commissioner must be reversed and the matter remanded for calculation
13 of benefits.
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15 INTRODUCTION

16 Plaintiff's Title II disability application was originally filed
17 on November 7, 2000, and alleged an onset date of June 10, 2000 due to
18 "chronic fatigue syndrome." (AR 94-96, 109.) This application has
19 resulted in four hearings before two ALJs, two grants of Plaintiff's
20 Requests for Review by the Appeals Council, and two Opinions by this
21 Court, both of which reversed the Decisions of the Commissioner and
22 remanded the matter for new hearings. Despite these attempts at
23 guidance by both the Appeals Council and this Court, and despite the
24 assignment of a new ALJ to the matter, basically the same errors have
25 been repeated for over a decade. For the reasons to be set forth
26 herein, the Decision of the Commissioner is reversed, and the matter
27 will be remanded for calculation of benefits.

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THE ALJ FAILED TO PROPERLY ASSESS PLAINTIFF'S FIBROMYALGIA

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3 The current ALJ Decision, dated March 31, 2011 (AR 510-521) does
4 find that Plaintiff suffers from severe impairments which include
5 fibromyalgia, diabetes, and a history of spine and right shoulder
6 surgeries. (AR 51.) Nevertheless, when the Decision is read
7 carefully, it is apparent that the ALJ either did not really believe
8 that Plaintiff suffers from fibromyalgia, or, believed that Plaintiff
9 did not have any disabling effects from this disease.

10 In its second Opinion in this case, issued on October 25, 2007
11 (AR 529-526), the Court indicated its concern with the "relative
12 dearth of analysis in this record concerning Plaintiff's CFS
13 [fibromyalgia], and in particular, whether and to what extent it
14 impacts her residual functional capacity ('RFC')." (AR 534.) The
15 Court further indicated that it would be necessary on remand to obtain
16 an objective report by a rheumatologist as to the effect of her
17 fibromyalgia on Plaintiff's RFC, "including the non-exertional
18 components (pain and fatigue) which must be evaluated on remand." (AR
19 535.) Despite this painstakingly clear directive, the ALJ failed to
20 obtain a consultative examination ("CE") from a rheumatologist the
21 third time around, instead obtaining an Internal Medicine CE. The
22 Appeals Council reversed and directed the ALJ to obtain a
23 rheumatological CE (AR 787), which was finally conducted on December
24 13, 2010 by Dr. Zamiri. (AR 879-883.)

25 After conducting an examination, Dr. Zamiri diagnosed Plaintiff
26 as suffering from chronic pain syndrome, fibromyalgia, osteoarthritis,
27 degenerative disc disease of the lumbar and cervical spine, and a
28 history of irritable bowel syndrom, hyperthyroidism, anxiety,

1 diabetes, and hyperlipidemia. (AR 880.) In rendering a functional
2 assessment, Dr. Zamiri noted, in pertinent part, that:

3 "The patient is a 56-year-old female with chronic pain
4 associated to her back problem who is now receiving high
5 dose narcotic pain medication and claims to continus [sic]
6 to have pain. Although she has characteristics of
7 fibromyalgia, her diffuse pain is not explained only by
8 fibromyalgia. For further evaluation of disability, I
9 recommend being evaluated by a pain management group or an
10 orthopedic surgeon. From the standpoint of fibromyalgia,
11 however, I have provided my answers to the questionnaires
12 below."

13 (Id.)

14
15 With regard to the referenced questionnaire, this is a Social
16 Security Administration ("SSA") form entitled "Medical Source
17 Statement of Ability to Do Work-Related Activities (Physical)." In
18 it, Dr. Zamiri rendered the following opinions as to exertional and
19 non-exertional restrictions:

20 Occasional ability to lift up to ten pounds, no ability
21 to lift more;

22 Ability to carry up to ten pounds, never more;

23 Ability to sit two hours at one time without
24 interruption, stand for 30 minutes, and walk for 15 minutes.
25 In an eight-hour day, ability to sit for six hours, stand
26 for one hour, and walk for one hour;

27 Requirement of a cane to ambulate more than five feet
28 as a medical necessity;

1 No ability to ambulate without using a wheelchair,
2 walker, or two canes or two crutches; or to walk a block at
3 a reasonable pace on rough or uneven surfaces; or to climb
4 a few steps at a reasonable pace with the use of a single
5 handrail;

6 Problems with balance.

7 (AR 881-883.)

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9 In rendering his Decision, the ALJ determined that Plaintiff has
10 the RFC to perform light work, with certain occasional exertional
11 limitations, and no non-exertional limitations. (AR 514.) He thus
12 rejected Dr. Zamiri's central conclusion that Plaintiff would be
13 capable of no more than sedentary exertion. (AR 517.) Despite finding
14 that Plaintiff has fibromyalgia as a severe impairment, the ALJ
15 concluded that there was no deleterious effect from this disease,
16 finding that Plaintiff has been treated only on a conservative basis
17 for various "subjective symptoms" related to fibromyalgia, and that
18 there have been "few, if any, supporting objective findings to account
19 for these symptoms." (AR 518.) Without belaboring the point, this is
20 basically a reiteration of what two ALJs have mistakenly concluded
21 regarding Plaintiff's condition in four Decisions over a decade-long
22 period despite objective support documenting that condition, and a
23 treatment regimen which has been administered to Plaintiff, to which
24 she has adhered scrupulously.

25 Plaintiff has consistently been diagnosed as suffering from
26 chronic fatigue syndrome, sometimes designated as fibromyalgia or
27 arthralgia. (AR 199, 209, 424, 427, 577, 583, 660.) These diagnoses
28 have been based upon accepted diagnostic methods. Indeed, as this

1 Court previously pointed out, SSA has promulgated Social Security
2 Ruling ("SSR") 99-2p as a methodology to evaluate cases involving
3 chronic fatigue syndrome. Subsequently, SSR 12-2p has been provided to
4 assist in a determination of evaluation of fibromyalgia and to provide
5 guidance in evaluation of disability claims involving these
6 conditions. In 2004, the Ninth Circuit discussed fibromyalgia as
7 having an unknown cause, without cure, and as a disease which is
8 diagnosed on the basis of patients' reports of pain and other
9 symptoms. See Benecke v. Barnhart, 379 F.3d 587, 590 (9th Cir. 2004).

10 Both SSR 99-2p and 12-2p provide a description of the requisite
11 medical signs and laboratory findings which must be present to
12 establish the existence of this disease. These include "persistent,
13 reproduceable muscle tenderness on repeated examinations, including
14 the presence of positive tender points; ..." Looking back to the
15 report of rheumatologist Dr. Sussman in December 2000, there is
16 consistent documentation of widespread muscle and joint pain (AR 568,
17 577, 579, 588); however, even in the latest ALJ Decision, the
18 interpretation given to Dr. Sussman's report is that "there were no
19 significant objective medical findings which definitively diagnosed
20 her condition." (AR 515.)

21 The guidance provided by SSR 12-2p, post-dated the latest ALJ
22 Decision, but did not materially change the analysis. It provides
23 that fibromyalgia may be determined as a medically determinable
24 impairment if there is a history of widespread pain, repeated
25 manifestations of six or more fibromyalgia symptoms, and evidence of
26 other disorders that could have caused the repeated manifestation of
27 symptoms, signs or co-occurring conditions are excluded. In
28 Plaintiff's case, there is not just ample but consistent and

1 substantial evidence as to all of these factors. Going back as far as
2 2000, Plaintiff has complained of widespread body pain. (AR 162, 387,
3 440, 568, 577, 583, 586, 589, 658, 661, 819.) Next, Plaintiff's
4 records indicate persistent fatigue (AR 568, 577, 588, 589, 593, 702);
5 depression (AR 427, 440, 577, 635); anxiety (AR 430, 432, 436, 576-
6 77); irritable bowel syndrome (AR 436, 441, 584, 753-54); headaches
7 (AR 429, 432, 572, 734); and dizziness (AR 583, 585, 615-17). All of
8 these impairments are identified as symptoms of fibromyalgia by SSR
9 12-2p. In May 2008, a medical examination documented 16 out of 18
10 tender points. In August 2009, 11 out of 18 tender points were found
11 (AR 812), and in December 2010, 14 of 18 trigger points were located
12 (AR 880). Thus, Plaintiff's objective examinations meet the
13 requirements of the American College of Rheumatology which requires at
14 least 11 positive tender points upon examination to satisfy a
15 diagnosis of fibromyalgia. (SSR 12-2p.)

16 Moreover, as to the question of whether other disorders could
17 have caused these repeated manifestations of symptoms, it appears not.
18 X-rays of Plaintiff's lumbar spine revealed only mild degeneration (AR
19 403), and x-rays of the cervical spine showed, again, only minimal
20 degenerative changes. (AR 709.) There is no other medical explanation
21 for Plaintiff's lightheadedness and fatigue. (AR 617-618.)

22 The ALJ essentially rejected all of Plaintiff's treating source
23 medical opinions as being unsupported by objective evidence. As the
24 Court has indicated, this is an erroneous finding with regard to Dr.
25 Sussman. Similarly, the ALJ improperly rejected the opinions of
26 Plaintiff's primary care physician, Dr. Tanedo, who opined as to
27 Plaintiff's migraine headaches, muscle pain, bone pain, abdominal
28 cramping, and diabetes. (AR 596.) The ALJ incorrectly determined that

1 Dr. Tanedo's opinions were based on Plaintiff's subjective complaints,
2 not objective findings. (AR 516.) The Court finds that the ALJ failed
3 to articulate specific and legitimate reasons to reject the opinions
4 of these treating physicians, in violation of the clear direction
5 provided by the Ninth Circuit in its decisions. See Lester v. Chater,
6 81 F.3d 821, 828 (9th Cir. 1995). The Court further finds that while
7 the ALJ is charged with evaluating competing medical opinions, there
8 is no legitimate basis for him to have relied upon the one-time
9 examination of internal medicine examiner Dr. Singh in May 2008. (AR
10 519.) This was a brief examination which, in any event, resulted in
11 Dr. Singh's confirmation of the diagnosis of fibromyalgia based on
12 notation of 16 out of 18 tender points. (AR 602.)

13 As to Dr. Zamiri, while the ALJ's Decision referenced his report
14 (AR 517), it failed to indicate what weight (if any) might have been
15 given to Dr. Zamiri's findings. Certainly the confirmation of the
16 existence of pain and fatigue based on examination is critical with
17 regard to possible non-exertional limitations in determining an
18 individual's RFC. Dr. Zamiri in fact did confirm the existence of
19 chronic pain and noted also that Plaintiff's current medications
20 included very serious pain relief formulas, including Vicodin and
21 morphine. (AR 879.) The record further indicates that even before the
22 date last insured, Plaintiff was consistently taking pain reduction
23 medications; thus, the Court finds it difficult, at the least, to
24 understand the ALJ's rejection of the effect of Plaintiff's
25 fibromyalgia based on his conclusion that Plaintiff had only been
26 prescribed conservative measures to treat her condition.

27 The almost total misanalysis of the effect of Plaintiff's
28 fibromyalgia on her exertional and non-exertional abilities, and the

1 fact that the Commissioner has had four opportunities to make a proper
2 evaluation, are enough to reverse and remand for benefits. In 2009,
3 Medical Expert ("ME") Dr. Alpern testified that if all of Plaintiff's
4 subjective testimony was accepted, and including the medical diagnoses
5 in the record, Plaintiff "would not be able to work a full workday."
6 (AR 487.) It is the Court's conclusion that Plaintiff's testimony is
7 credible and is consistent with the medical diagnoses in the record.
8 Consequently, she is disabled. Thus, the Court will only briefly
9 touch upon the remaining issues, which concern the lack of finding of
10 certain impairments as severe, and asserted error in the credibility
11 analysis.

12 Turning first to the credibility analysis, the ALJ again relied
13 largely upon a supposed lack of objective evidence to reject
14 Plaintiff's consistent complaints of pain. (AR 518.) Plaintiff did
15 not blanketly complain of unrelenting pain. For example, she
16 testified she had surgery on both wrists for tendinitis, and that the
17 pain improved after that surgery, but she still experienced weakness
18 in her hands. (AR 49.) Indeed, Plaintiff's testimony at her hearings
19 was very detailed, and very much to the point, and was consistent with
20 the reports of her treating physicians. There is an absence of clear
21 and convincing evidence to support the rejection by the ALJ of
22 Plaintiff's pain complaints.

23 With regard to the omission of certain impairments as severe, the
24 Court need not address that issue, since it would only be relevant if
25 this matter were to be remanded for a new hearing.

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