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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARICELA OLEA,)	NO. CV 13-768-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
CAROLYN W. COLVIN, ACTING)	AND ORDER OF REMAND
COMMISSIONER OF SOCIAL SECURITY, ¹)	
)	
Defendant.)	
)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary
judgment are denied and this matter is remanded for further
administrative action consistent with this Opinion.

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¹ Carolyn W. Colvin, who became Acting Commissioner of
Social Security as of February 14, 2013, is hereby substituted as
Defendant in this matter. See Fed. R. Civ. P. 25(d)(1); 42
U.S.C. § 405(g).

1 interjected, "Well, that's more of a legal definition in looking at
2 whether it's SGA and the self-employment issues, so that's a different
3 issues [sic]. That's not really a vocational question" (A.R. 76)
4 (emphasis added).

5
6 On August 10, 2011, two days after the administrative hearing,
7 counsel for Plaintiff reportedly faxed a letter to the ALJ (A.R. 229,
8 233-34). This letter states in pertinent part:

9
10 The claimant contends that her work activity as a jewelry
11 seller does not constitute past relevant work and that even
12 if the claimant could perform such work it would not preclude
13 a finding of disability. The claimant never earned more than
14 \$7,850 per year performing this work as a self employed
15 individual. On a prorated basis this is approximately \$650 a
16 month[,] well below the amounts for substantial gainful
17 activity (SGA).

18
19 Under the Regulations when self employment is performed at a
20 level below SGA[,] additional assessment is required. The
21 three part test² involves an inquiry into whether the
22 claimant performed the work at the level of SGA, in a way
23 similar to others in the community, and if the claimant was
24 manipulating the work activity for income purposes. The
25 claimant contends that the work activity as a jewelry seller

26
27 ² [Regulations, as well as a Social Security Ruling, set
28 forth the particulars of this three-part test. See 20 C.F.R. §
404.1575; 20 C.F.R. 416.975; Social Security Ruling 83-34.]

1 was not past relevant work because the amount earned does not
2 rise to the level of SGA and because the activity when
3 assessed under the three part test does not meet the
4 requirements of being SGA (A.R. 234).

5
6 The ALJ reportedly refused to make this letter a part of the
7 Administrative Record (A.R. 229).

8
9 On August 12, 2011, the ALJ issued a decision finding Plaintiff
10 not disabled (A.R. 25-32). According to the ALJ, Plaintiff has severe
11 rheumatoid arthritis, but retains the residual functional capacity to
12 perform the jewelry sales work as Plaintiff actually performed the work
13 (A.R. 27-32). The ALJ's decision characterizes the jewelry sales work
14 as Plaintiff's "past relevant work" (A.R. 31-32). The decision
15 contains no explanation regarding this characterization and no
16 discussion regarding the "three part test" for substantial gainful
17 activity referenced in the August 10, 2011 letter submitted by
18 Plaintiff's counsel (A.R. 25-32).

19
20 In seeking review from the Appeals Council, counsel for Plaintiff
21 argued, inter alia, that the ALJ erred in characterizing Plaintiff's
22 jewelry selling as "past relevant work" in the absence of any
23 demonstrated analysis of whether the work constituted substantial
24 gainful activity (A.R. 228-29). Counsel made this argument in a
25 May 25, 2012 letter to the Appeals Council (A.R. 227-31). This letter
26 appended a copy of counsel's August 10, 2011 letter to the ALJ (A.R.
27 229, 233-34). The Appeals Council considered both letters but denied
28 review, stating that "the Administrative Law Judge's decision is the

1 final decision of the Commissioner of Social Security in your case"
2 (A.R. 5-9).

3
4 **STANDARD OF REVIEW**

5
6 Under 42 U.S.C. section 405(g), this Court reviews the
7 Administration's decision to determine if: (1) the Administration's
8 findings are supported by substantial evidence; and (2) the
9 Administration used proper legal standards. See Carmickle v.
10 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
11 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such
12 relevant evidence as a reasonable mind might accept as adequate to
13 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971)
14 (citation and quotations omitted); Widmark v. Barnhart, 454 F.3d 1063,
15 1067 (9th Cir. 2006).

16
17 Where, as here, the Appeals Council considered additional
18 material but denied review, the additional material becomes part of
19 the Administrative Record for purposes of the Court's analysis. See
20 Brewes v. Commissioner, 682 F.3d 1157, 1163 (9th Cir. 2012) ("[W]hen
21 the Appeals Council considers new evidence in deciding whether to
22 review a decision of the ALJ, that evidence becomes part of the
23 administrative record, which the district court must consider when
24 reviewing the Commissioner's final decision for substantial evidence.";
25 expressly adopting Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir.
26 1993)); Taylor v. Commissioner, 659 F.3d 1228, 1231 (2011) (courts may
27 consider evidence presented for the first time to the Appeals Council
28 "to determine whether, in light of the record as a whole, the ALJ's

1 decision was supported by substantial evidence and was free of legal
2 error"); Penny v. Sullivan, 2 F.3d 953, 957 n.7 (9th Cir. 1993) ("the
3 Appeals Council considered this information and it became part of the
4 record we are required to review as a whole"); see generally 20 C.F.R.
5 §§ 404.970(b), 416.1470(b).

7 DISCUSSION

8
9 Unless a claimant's prior work constituted substantial gainful
10 activity, the work cannot qualify as "past relevant work." See 20
11 C.F.R. § 404.1560(b)(1); 20 C.F.R. § 416.960(b)(1); Vertigan v. Halter,
12 260 F.3d 1044, 1051 (9th Cir. 2001). Where, as in the present case,
13 the claimant's prior work was self-employment, the Administration
14 "must" consider "three tests" to determine whether the self-employment
15 constituted substantial gainful activity. Social Security Ruling
16 ("SSR") 83-34;³ see 20 C.F.R. § 404.1575;⁴ 20 C.F.R. § 416.975; Weber
17 v. Astrue, 2012 WL 274707, at *3-7 (E.D. Wash. Jan. 31, 2012); Le v.
18 Astrue, 540 F. Supp. 2d 1144, 1149-50 (C.D. Cal. 2008). To qualify as
19 substantial gainful activity under "Test One," the claimant's services
20 must have been "significant to the operation of the business" and the
21 claimant must have received "a substantial income from the business."
22 SSR 83-34.

23 ///

25 ³ SSRs are "binding on ALJs." Terry v. Sullivan, 903
26 F.2d 1273, 1275 n.1 (9th Cir. 1990).

27 ⁴ Plaintiff's motion fails to cite 20 C.F.R. section
28 404.1575, instead citing 20 C.F.R. section 404.1574, a regulation
that concerns the evaluation of work done "as an employee."

1 If it is clearly established that this self-employed person
2 is not engaging in SGA on the basis of significant services
3 and substantial income [i.e. "Test One"], both the second and
4 third SGA test concerning comparability and worth of work
5 must be considered. According to these tests, the individual
6 will be engaged in SGA if the evidence clearly demonstrates
7 that: a. The individual's work activity in terms of all
8 relevant factors such as hours, skills, energy output,
9 efficiency, duties, and responsibilities is comparable to
10 that of unimpaired individuals in the same community engaged
11 in the same or similar businesses as their means of
12 livelihood; or b. The individual's work activity, although
13 not comparable to that of unimpaired individuals as indicated
14 above, is, nevertheless, clearly worth more than the amount
15 shown for the particular calendar year in the SGA Earnings
16 Guidelines when considered in terms of its value to the
17 business, or when compared to the salary an owner would pay
18 to an employee for such duties in that business setting. . .
19 . When the impaired individual operates a business at a
20 level comparable to that of unimpaired individuals in the
21 community who make their livelihood from the same or similar
22 kind of business, there can be a finding of SGA by the
23 impaired person. To establish comparability of work
24 activity, it is necessary to show that the disabled person is
25 performing at a level comparable to that of unimpaired
26 persons, considering the following factors: hours, skills,
27 energy output, efficiency, duties and responsibilities. The
28 lack of conclusive evidence as to the comparability of the

1 required factors will result in a finding that work performed
2 is not SGA. SSR 83-34.

3
4 In the present case, the Administration erred by characterizing
5 Plaintiff's prior self-employment as "past relevant work," without
6 discussing whether the self-employment constituted substantial gainful
7 activity under the applicable tests. See id.; McGlothlin v. Astrue,
8 2012 WL 5512348, at *3 (C.D. Cal. Nov. 14, 2012) ("The ALJ found that
9 Plaintiff's past work as a caterer and as a companion qualified as
10 'past relevant work' without discussing or rebutting the earnings
11 presumption or making any specific findings as to whether those jobs
12 meet the Commissioner's definition of substantial gainful activity.
13 This was legal error."); see also Pinto v. Massanari, 249 F.3d 840, 844
14 (9th Cir. 2001) ("Although the burden of proof lies with the claimant
15 at step four,⁵ the ALJ still has a duty to make the requisite factual
16 findings to support his conclusion."); Lewin v. Schweiker, 654 F.2d
17 631, 634-35 (9th Cir. 1981) (ALJ's decision should include a statement
18 of the subordinate factual foundations on which the ALJ's ultimate
19 factual conclusions are based, so that a reviewing court may know the
20 basis for the decision).

21
22 This error may have been material. Plaintiff's supposedly
23 continuing capacity to perform her past work as a jewelry seller
24 represented the sole basis on which the Administration denied benefits

26
27 ⁵ As stated in the ALJ's decision, step four in the
28 sequential analysis of disability examines, inter alia, whether
the claimant's past work was substantial gainful activity (A.R.
27).

1 (A.R. 5-8, 25-32). This supposed capacity would not support a denial
2 of benefits unless Plaintiff's past work as a jewelry seller
3 constituted substantial gainful activity. It appears that Plaintiff
4 did not receive a "substantial income" from her past work, within the
5 meaning of Test One. See SSR 83-34 ("A self-employed individual will
6 have substantial income from a business if 'countable income' [roughly
7 net profits] from the business averages more per month than the amount
8 shown for the particular calendar year in the SGA Earnings Guidelines⁶
9 . . . [or] if the livelihood which he or she derives from the business
10 is comparable to that which he or she had before becoming disabled,⁷ or
11 is comparable to that of unimpaired self-employed individuals in his or
12 her community engaged in the same or similar businesses as their means
13 of livelihood") (emphasis added). Fuller development of

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21 ⁶ The amount shown in the SGA Earnings Guidelines for the
22 calendar year 2000 is \$700. See 20 C.F.R. § 404.1574(b)(2); 20
23 C.F.R. § 416.974(b)(2). Subsequent calendar years have threshold
24 amounts equal to or greater than \$700. See id. Reportedly,
25 Plaintiff's average monthly revenue from selling jewelry was less
26 than \$700 (A.R. 69-71, 157-58).

27 ⁷ Defendant's motion emphasizes the underlined portion of
28 Test One. This portion of Test One appears to address the
situation (not present here) in which an allegedly disabled
individual currently is engaging in self-employment work that may
constitute substantial gainful activity disentitling the claimant
from receiving further benefits.

1 the record⁸ may have to precede the required analyses under Test Two
2 and Test Three, but it appears that Plaintiff's past work may well fail
3 to qualify as substantial gainful activity under these alternate tests.
4
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6 Because the circumstances of this case suggest that further
7 administrative review could remedy the Administration's errors, remand
8 is appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
9 see generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of
10 an administrative determination, the proper course is remand for
11 additional agency investigation or explanation, except in rare
12 circumstances).

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24 ⁸ See generally Brown v. Heckler, 713 F.2d 441, 443 (9th
25 Cir. 1983) ("[t]he ALJ has a special duty to fully and fairly
26 develop the record and to assure that the claimant's interests
27 are considered. This duty exists even when the claimant is
28 represented by counsel."); see also Sims v. Apfel, 530 U.S. 103,
110-11 (2000) ("Social Security proceedings are inquisitorial
rather than adversarial. It is the ALJ's duty to investigate the
facts and develop the arguments both for and against granting
benefits. . . .").

