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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

SHIRLEY DRISKELL,)	No. EDCV 07-1219 CW
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social Security)	
Administration,)	
)	
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 benefits. As discussed below, the court finds that the Commissioner’s decision should be reversed and this matter remanded for further proceedings.

I. BACKGROUND

Plaintiff Shirley Driskell was born on July 22, 1964, and was forty-two years old at the time of her administrative hearing. [Administrative Record (“AR”) 70, 273.] She has a high school education and past relevant work experience as a secretary. [AR 75,

1 79.] Plaintiff alleges disability on the basis of "chronic
2 obstructive pulmonary disease aka emphysema." [AR 74.]

3 **II. PROCEEDINGS IN THIS COURT**

4 Plaintiff's complaint was lodged on September 21, 2007, and filed
5 on October 9, 2007. On May 22, 2008, defendant filed an answer and
6 plaintiff's Administrative Record ("AR"). On September 2, 2008, the
7 parties filed their Joint Stipulation ("JS") identifying matters not
8 in dispute, issues in dispute, the positions of the parties, and the
9 relief sought by each party. This matter has been taken under
10 submission without oral argument.

11 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

12 Plaintiff applied for supplemental security income ("SSI") under
13 Title XVI of the Social Security Act on February 8, 2005, alleging
14 disability since November 2, 2003. [JS 2, AR 12.] After the
15 application was denied initially and upon reconsideration, plaintiff
16 requested an administrative hearing, which was held on April 13, 2007,
17 before Administrative Law Judge ("ALJ") F. Keith Varni. [AR 273.]
18 Plaintiff appeared with counsel and testified at the hearing. [AR
19 274.] The ALJ denied benefits in a decision dated April 23, 2007. [AR
20 12-17.] When the Appeals Council denied review on August 6, 2007, the
21 ALJ's decision became the Commissioner's final decision. [AR 3.]

22 **IV. STANDARD OF REVIEW**

23 Under 42 U.S.C. § 405(g), a district court may review the
24 Commissioner's decision to deny benefits. The Commissioner's (or
25 ALJ's) findings and decision should be upheld if they are free of
26 legal error and supported by substantial evidence. However, if the
27 court determines that a finding is based on legal error or is not
28 supported by substantial evidence in the record, the court may reject

1 the finding and set aside the decision to deny benefits. See Aukland
2 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
3 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
4 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
5 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
6 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
7 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

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

18 V. DISCUSSION

19 A. THE FIVE-STEP EVALUATION

20 To be eligible for disability benefits a claimant must
21 demonstrate a medically determinable impairment which prevents the
22 claimant from engaging in substantial gainful activity and which is
23 expected to result in death or to last for a continuous period of at
24 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
25 721; 42 U.S.C. § 423(d)(1)(A).

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

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

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

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

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

12 Step five: Does the claimant have the residual
13 functional capacity to perform any other work? If so, the
14 claimant is not disabled. If not, the claimant is disabled.

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

21 Claimants have the burden of proof at steps one through four,
22 subject to the presumption that Social Security hearings are non-
23 adversarial, and to the Commissioner's affirmative duty to assist
24 claimants in fully developing the record even if they are represented
25 by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
26 1288. If this burden is met, a prima facie case of disability is
27 made, and the burden shifts to the Commissioner (at step five) to
28 prove that, considering residual functional capacity ("RFC")¹, age,

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; Perminter v. Heckler,

1 education, and work experience, a claimant can perform other work
2 which is available in significant numbers. Tackett, 180 F.3d at 1098,
3 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

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

5 Here, the ALJ found that plaintiff had not engaged in substantial
6 gainful activity since her alleged disability onset date (step one).
7 [AR 14.] At step two, the ALJ determined that plaintiff did not have
8 a medically determinable impairment and, even if she did, it would not
9 be "severe" because it would not impair her ability to perform basic
10 work-related activities for twelve consecutive months. [Id.]
11 Accordingly, plaintiff was found not "disabled" as defined by the
12 Social Security Act. [AR 17.]

13 **C. ISSUES IN DISPUTE**

14 The parties' Joint Stipulation identifies five disputed issues:

- 15 1. Whether the ALJ properly considered evidence of plaintiff's
16 mental impairment;
- 17 2. Whether the ALJ properly considered plaintiff's testimony;
- 18 3. Whether the ALJ properly considered evidence of plaintiff's
19 medication side effects;
- 20 4. Whether the ALJ properly considered whether plaintiff's
21 mental impairment was "severe"; and
- 22 5. Whether the ALJ fully developed the record.

23 [JS 5.]

24 As discussed below, Issue Five is dispositive.

25 **D. DEVELOPMENT OF THE RECORD**

26 During the administrative hearing, plaintiff testified that she

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765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 had experienced depression "off and on for years" but that it had
2 gotten worse in the previous year and a half to two years. [AR 278.]
3 Plaintiff claimed symptoms such as crying, nervousness and problems
4 with concentration. [Id.] The record indicates that plaintiff made
5 similar complaints to a rheumatologist. [AR 112.] At a separate
6 rheumatology visit, the physician reported that plaintiff was seeing,
7 among others, a psychiatric specialist regularly and that she had a
8 prescription for Trazadone and Lamactil as a mood stabilizer. [AR
9 272.]

10 In the administrative decision, the ALJ noted plaintiff's
11 testimony alleging depression but found that, "there is no documented
12 medically determined mental impairment and a consultative psychiatric
13 evaluation at this point would be insufficient to establish one that
14 has lasted or is expected to last twelve months." [AR 17.]
15 Accordingly, no consultative psychiatric examination was ordered.
16 Plaintiff argues that the ALJ failed to fully develop the record on
17 this issue. [JS 14.]

18 The ALJ has a "special duty to fully and fairly develop the
19 record and to assure that the claimant's interests are considered
20 . . . even when the claimant is represented by counsel." Celaya v.
21 Halter, 332 F.3d 1177, 1183 (9th Cir. 2003) (ellipsis in original)
22 (quoting Brown v. Heckler, 713 F.2d 441, 443 (9th Cir.1983); Smolen v.
23 Chater, 80 F.3d 1273, 1288 (9th Cir. 1996). "Social Security
24 proceedings are inquisitorial rather than adversarial. It is the
25 ALJ's duty to investigate the facts and develop the arguments both for
26 and against granting of benefits." Sims v. Apfel, 530 U.S. 103,
27 110-111, 120 S. Ct. 2080, 147 L. Ed 2d 80 (2000); see also Widmark v.
28 Barnhart, 454 F.3d 1063, 1068 (9th Cir. 2006)("it is incumbent upon

1 the ALJ to scrupulously and conscientiously probe into, inquire of,
2 and explore for all the relevant facts" and to remain "especially
3 diligent in ensuring that favorable as well as unfavorable facts and
4 circumstances are elicited" (quoting Cox v. Califano, 487 F.2d 988,
5 991 (9th Cir. 1978)). "Ambiguous evidence, or the ALJ's own finding
6 that the record is inadequate to allow for proper evaluation of the
7 evidence, triggers the ALJ's duty to 'conduct an appropriate
8 inquiry.'" Id. (citing Smolen, 80 F.3d at 1288).

9 In this case, the record should have been developed further with
10 regard to plaintiff's alleged mental impairments. The existing
11 evidence indicates that plaintiff had complained of recurring
12 depression, reported her complaints to a physician, and received
13 medication for it. Under these circumstances, the record was
14 ambiguous as to whether plaintiff has a medically determinable mental
15 impairment, triggering the need for further development of an adequate
16 record. See Hilliard v. Barnhart, 442 F. Supp. 2d 813, 817 (N.D. Cal.
17 2006) (finding independent duty to develop record when plaintiff merely
18 "raised a suspicion" concerning an alleged mental impairment). To the
19 extent that defendant argues that there was no duty to develop the
20 record because plaintiff failed to satisfy her burden of proving
21 disability and furnishing supporting evidence [JS 15], this "confuses
22 the burden of proof, which is clearly on the claimant at step two,
23 with the ALJ's independent duty to develop the record, which is
24 triggered by ambiguous evidence." Id. (citing Tonapetyan, 424 F.3d at
25 1151); see also Widmark, 454 F.3d 1063 (finding duty to develop record
26 when record was ambiguous even when plaintiff failed to specifically
27 allege impairment in connection with disability claim). Accordingly,
28 remand for further proceedings is appropriate.

