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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CECELIA C. BUCHMULLER,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Case No. EDCV 07-1622-JTL

MEMORANDUM OPINION AND ORDER

PROCEEDINGS

On December 17, 2007, Cecelia C. Buchmuller (“plaintiff”) filed a Complaint seeking review of the Social Security Administration’s denial of her application for Supplemental Security Income benefits and Disability Insurance Benefits. On December 31, 2007, plaintiff filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. On March 26, 2008, Michael J. Astrue, Commissioner of Social Security (“defendant”), filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. Thereafter, on June 19, 2008, defendant filed an Answer to the Complaint. On October 6, 2008, the parties filed their Joint Stipulation.

The matter is now ready for decision.

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BACKGROUND

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2 On August 30, 2004, plaintiff filed applications for Disability Insurance Benefits and
3 Supplemental Social Security Income benefits alleging an onset date of October 16, 2003.
4 (See Administrative Record ["AR"] at 15). The Commissioner denied plaintiff's application for
5 benefits both initially and upon reconsideration. (AR at 25, 26, 27-31, 35-40). Thereafter,
6 plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR at 41). On
7 February 28, 2006, the ALJ conducted a hearing in San Bernardino, California. (See AR at
8 397-451). Plaintiff appeared at the hearing with counsel and testified. (AR at 400-25, 431-33,
9 439-50). William Soltz, Ph.D, a medical expert, and Joseph M. Mooney, a vocational expert,
10 also testified at the hearing. (AR at 421-35, 436-41).

11 On May 19, 2006, the ALJ issued a decision granting in part, and denying in part,
12 plaintiff's applications for benefits. (AR at 15-23). The ALJ determined that plaintiff had the
13 following severe combination of impairments at all times relevant to the decision: depressive
14 disorder, not otherwise specified, with anxiety features and history of post-traumatic disorder,
15 and degenerative changes in the cervical and lumbar spine with myofascial neck and low back
16 pain. (AR at 18). The ALJ determined that the severity of plaintiff's mental impairment met the
17 criteria of Section 12.06(A)(5), (B)(1-3) of 20 C.F.R. Part 404, Subpart P, Appendix 1 from
18 October 16, 2001 through January 31, 2004. (AR at 21). Accordingly, the ALJ concluded that
19 plaintiff was disabled from October 16, 2001 through January 31, 2004. (*Id.*).

20 The ALJ concluded that medical improvement related to plaintiff's ability to work
21 occurred as of February 1, 2004. The ALJ found that beginning on February 1, 2004, plaintiff
22 had the physical residual functional capacity to lift, carry, push or pull twenty pounds
23 occasionally and ten pounds frequently; stand or walk frequently with customary breaks; sit at
24 least frequently with customary breaks; and climb, stoop, kneel, crouch or crawl occasionally
25 while avoiding hazards such as unprotected heights. (AR at 21-22). With regard to plaintiff's
26 mental residual functional capacity, the ALJ concluded that as of February 1, 2004, plaintiff
27 could understand, remember and carry out simple, detailed and more complex instructions in
28 a setting involving frequent interaction with supervisors and coworkers and limited, occasional

1 interaction with the public with no fast-paced production work. (AR at 22). The ALJ concluded
2 that beginning on February 1, 2004, plaintiff was capable of performing her past relevant work
3 as a deputy court clerk. (AR at 22-23). Accordingly, the ALJ concluded that plaintiff's disability
4 ended on February 1, 2004 and that plaintiff was not disabled from February 1, 2004 through
5 May 18, 2006, the date of the decision. (AR at 23).

6 Plaintiff filed a timely request for review of the ALJ's decision with the Appeals Council
7 and submitted additional evidence - a letter from Rajendra B. Patel, M.D., dated May 22, 2006 -
8 to the Appeals Council in support of her application for benefits. (AR at 9, 10; see AR at 396).
9 The Appeals Council denied plaintiff's request for review. (AR at 6-8).

10 Thereafter, plaintiff appealed to the United States District Court.

11 12 **PLAINTIFF'S CONTENTIONS**

13 Plaintiff makes the following claims:

- 14 1. The Appeals Council failed to properly consider the opinion of Rajendra B. Patel,
15 M.D., plaintiff's treating psychiatrist.
- 16 2. The ALJ failed to consider the type, dosage, effectiveness and side effects of
17 plaintiff's medications.
- 18 3. The ALJ failed to fully develop the record with regard to plaintiff's mental
19 impairment.

20 **STANDARD OF REVIEW**

21 Under 42 U.S.C. Section 405(g), this Court reviews the ALJ's decision to determine
22 whether the ALJ's findings are supported by substantial evidence and whether the proper legal
23 standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial
24 evidence means "more than a mere scintilla" but less than a preponderance. Richardson v.
25 Perales, 402 U.S. 389, 401 (1971); Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996).

26 Substantial evidence is "such relevant evidence as a reasonable mind might accept as
27 adequate to support a conclusion." Richardson, 402 U.S. at 401. This Court must review the
28 record as a whole and consider adverse as well as supporting evidence. Morgan v. Comm'r,

1 169 F.3d 595, 599 (9th Cir. 1999). Where evidence is susceptible to more than one rational
2 interpretation, the ALJ's decision must be upheld. Robbins v. Soc. Sec. Admin., 466 F.3d 880,
3 882 (9th Cir. 2006).

4 5 **DISCUSSION**

6 **A. The Sequential Evaluation**

7 A claimant is disabled under Title II of the Social Security Act if he or she is unable "to
8 engage in any substantial gainful activity by reason of any medically determinable physical or
9 mental impairment which can be expected to result in death or . . . can be expected to last for
10 a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Commissioner
11 has established a five-step sequential process to determine whether a claimant is disabled. 20
12 C.F.R. §§ 404.1520, 416.920.

13 The first step is to determine whether the claimant is presently engaging in substantially
14 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging
15 in substantially gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S.
16 137, 141 (1987). Second, the ALJ must determine whether the claimant has a severe
17 impairment. Parra, 481 F.3d at 746. Third, the ALJ must determine whether the impairment
18 is listed, or equivalent to an impairment listed, in Appendix I of the regulations. Id. If the
19 impediment meets or equals one of the listed impairments, the claimant is presumptively
20 disabled. Bowen, 482 U.S. at 141. Fourth, the ALJ must determine whether the impairment
21 prevents the claimant from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45
22 (9th Cir. 2001). If the claimant cannot perform his or her past relevant work, the ALJ proceeds
23 to the fifth step and must determine whether the impairment prevents the claimant from
24 performing any other substantially gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir.
25 2000).

26 The claimant bears the burden of proving steps one through four, consistent with the
27 general rule that at all times, the burden is on the claimant to establish his or her entitlement
28 to disability insurance benefits. Parra, 481 F.3d at 746. Once this prima facie case is

1 established by the claimant, the burden shifts to the Commissioner to show that the claimant
2 may perform other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir.
3 2006).

4 **B. ALJ's Duty to Develop the Record**

5 In the decision, the ALJ noted that on October 16, 2001, while working as a bank teller,
6 the bank was robbed and plaintiff was violently assaulted and threatened with a gun by bank
7 robbers. (AR at 19 (citing AR at 243-44); see also AR at 401-403). The ALJ noted that plaintiff
8 underwent "psychological and psychiatric treatment for what was primarily diagnosed as post
9 traumatic stress disorder and was involved in a complicated workers' compensation claim
10 involving physical and mental injuries with findings of psychophysiological reaction and neck
11 and low back strain." (AR at 19). The ALJ determined that "[i]t is clear that the date of the
12 noted robbery is [the] disability onset date in this case and that [plaintiff] was markedly limited
13 . . . in terms of the performance of daily activities and social functioning as well as her ability
14 to maintain concentration, pace and persistence due to her emotional treatment and the
15 intensive treatment of her condition." (Id.).

16 In June 2003, plaintiff underwent a comprehensive clinical evaluation by Donald J.
17 Feldman, M.D., in connection with plaintiff's worker's compensation claim. (AR at 240-62). Dr.
18 Feldman stated that he had over two hours of face-to-face contact with plaintiff and spent over
19 three hours reviewing her medical records. (AR at 240). The ALJ gave weight to Dr. Feldman's
20 findings and noted that Dr. Feldman recommended plaintiff receive biweekly psychiatric
21 treatment for six months and monthly treatments for another two years. (AR at 19; see AR at
22 260-61).

23 The ALJ found that medical improvement occurred in plaintiff's condition and determined
24 that plaintiff was not disabled as of February 1, 2004.¹ (AR at 21). The ALJ found that plaintiff
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27 ¹ Medical improvement is related to a claimant's ability to work if there has been a decrease in
28 the severity of the impairment or impairments present at the time of the most recent favorable
20 C.F.R. § 416.994(b)(1).

1 did not receive any mental health treatment from October 2003 through September 2005 and
2 took no prescribed psychotropic medications during that time. (AR at 19). The ALJ noted that
3 plaintiff alleged that she could not afford to continue her treatment, but discounted plaintiff's
4 allegation based on the proceeds of her October 2003 worker's compensation claim settlement.
5 (AR at 19).

6 The ALJ cited to the findings of Louis A. Fontana, M.D., a board-certified psychiatrist
7 who performed a complete psychiatric evaluation of plaintiff in November 2004, in support of
8 his determination that plaintiff's condition improved as of February 1, 2004. (AR at 20; see AR
9 at 339-344). The ALJ noted that Dr. Fontana documented a brief history of emotional problems
10 that was consistent with the detailed history outlined by Dr. Feldman, except Dr. Fontana's
11 report minimized the relationship between plaintiff's emotional problems and her inability to
12 work. (AR at 20; see AR at 339-41). The ALJ noted that Dr. Fontana's findings were within
13 normal limits, except for dysphoric mood and "much tearfulness[,] but that her affect was
14 described as full and appropriate. (AR at 20; see AR at 341). The ALJ went on to note that Dr.
15 Fontana diagnosed plaintiff with post traumatic stress disorder, chronic, and considered the
16 possibility of a major depressive disorder, moderate. The ALJ noted that despite this diagnosis,
17 Dr. Fontana rated the severity of plaintiff's condition as marginally moderate; assigned her a
18 Global Assessment of Functioning ("GAF")² score of 59; and concluded that plaintiff was able
19 to perform simple and more complex tasks, deal with supervisors, coworkers and the public,
20 attend work without additional supervision on a sustained full-time basis. (AR at 20; see AR
21 at 342). The ALJ noted that the medical expert who testified at the hearing concurred in this
22 assessment and opined that plaintiff would have problems only with fast paced work. (AR at
23 20; see AR at 432-34).

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26 ² "A GAF score is a rough estimate of an individual's psychological, social, and occupational
27 functioning used to reflect the individual's need for treatment." Vargas v. Lambert, 159 F.3d 1161,
28 1164 n.2 (9th Cir. 1998). A GAF score between 51 to 60 indicates "[m]oderate symptoms (e.g., flat
affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social,
occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers)."
Diagnostic and Statistical Manual of Mental Disorders 34 (4th. ed, rev. 2000).

1 The ALJ also noted that plaintiff testified that she had been depressed since January of
2 2004. He noted that she testified that she was afraid to go to banks, had nightmares involving
3 bank robbery, although they were not as vivid as they had been in the past, and that she
4 currently had panic attacks and trouble sleeping that stemmed from a recent transient domestic
5 problem. (AR at 20; see AR at 409, 418-20).

6 Based on the information in the record, the ALJ concluded that medical improvement
7 occurred as of February 1, 2004. (AR at 21). The ALJ cited to the following evidence in
8 support of this conclusion:

9 [Plaintiff] stopped receiving treatment for her mental and
10 physical impairments in October 2003 and received no
11 treatment for the mental impairment until September 2005.
12 The medical [expert] at the hearing and the agreed medical
13 examiner in [plaintiff's] workers' compensation case disagreed
14 on when [plaintiff] had recovered from her initial injury in 2001,
15 but it occurred at least by the close of January 2003 since the
16 findings in October 2003 and early 2004 were at most mild to
17 moderate severity. Indeed, [plaintiff] admitted her condition
18 might have improved in 2004 and she did admit her nightmares
19 about the noted bank robbery were not as vivid and disturbing
20 as they had been shortly after the incident.

21 (AR at 21). The ALJ determined that as a result of the medical improvement in plaintiff's
22 condition, plaintiff could perform her past relevant work as a deputy court clerk. Accordingly,
23 the ALJ concluded that plaintiff was not disabled as of February 1, 2004.

24 Earlier in the decision, the ALJ noted that plaintiff "has a long history of depression with
25 hospitalization twice in 1987." (AR at 18). The ALJ noted that the treatment notes "from Dr.
26 Patel submitted after the hearing note the history of hospitalization for suicidal ideation in early
27 2006, but the report of the hospitalization was not submitted." (AR at 20). The ALJ found that
28 the submitted treatment notes from Dr. Patel include "no significant clinical findings and a

1 diagnosis of major depressive disorder,” indicate that plaintiff’s “complaints of panic attacks
2 were in fact episodes of increased anxiety[.]” The ALJ also noted that Dr. Patel’s treatment
3 notes did not include a GAF score and stated little more than that plaintiff was “clinically stable.”
4 (AR at 20; see AR at 390-95).

5 Plaintiff alleges that the ALJ failed to fully develop the record regarding plaintiff’s mental
6 impairments. (Joint Stipulation at 12-13). Plaintiff argues that her history of hospitalization is
7 significant and probative and that, in failing to re-contact Dr. Patel and develop the record
8 regarding plaintiff’s hospitalization for suicidal ideation in February 2006, the ALJ failed to meet
9 his duty to fully develop the record. (Joint Stipulation at 13). Defendant argues that the ALJ
10 properly considered plaintiff’s intense domestic problems and her resulting hospitalization in
11 February 2006. (Joint Stipulation at 15). Defendant notes that the ALJ had a duty to develop
12 the record, not create the record, and argues that the ALJ properly fulfilled this duty. (Id.).

13 In Social Security cases, an ALJ has an affirmative "duty to fully and fairly develop the
14 record and to assure that the claimant's interests are considered . . . even when the claimant
15 is represented by counsel." Celaya v. Halter, 332 F.3d 1177, 1183 (9th Cir. 2003) (quoting
16 Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983)). When the evidence is ambiguous, or if
17 the ALJ finds that the record is inadequate to allow for proper evaluation of disability, the ALJ's
18 duty to develop the record is triggered and he or she must "conduct an appropriate inquiry."
19 Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996); see also Sims v. Apfel, 530 U.S. 103,
20 110-11 (2000) ("Social Security proceedings are inquisitorial rather than adversarial. It is the
21 ALJ's duty to investigate the facts and develop the arguments both for and against granting
22 benefits . . ."); 20 C.F.R. § 416.1444. "In cases of mental impairments, this duty is especially
23 important." DeLorme v. Sullivan, 924 F.2d 841, 849 (9th Cir.1991); see Tonapetyan v. Halter,
24 242 F.3d 1144, 1150 (9th Cir. 2001) (an ALJ's duty to develop the record fully is heightened
25 where the claimant may be mentally ill and thus unable to protect his or her own interests).

26 An ALJ can discharge his or her duty to develop the record "in several ways, including:
27 subpoenaing the claimant's physicians, submitting questions to the claimant's physicians,
28 continuing the hearing, or keeping the record open after the hearing to allow supplementation

1 of the record." Tonapetyan, 242 F.3d at 1150; see also Smolen, 80 F.3d at 1288. The ALJ has
2 a duty "to scrupulously and conscientiously probe into, inquire of, and explore all the relevant
3 facts" by procuring the necessary, relevant treatment records. Higbee v. Sullivan, 975 F.2d
4 558, 561 (9th Cir. 1992) (quoting Cox v. Califano, 587 F.2d 988, 991 (9th Cir. 1978)).

5 Here, in a treatment note dated February 13, 2006, Dr. Patel states that plaintiff was
6 hospitalized "on a 5150 as she was distraught and was having suicidal thoughts after fighting
7 with [her husband.]"³ (AR at 391). At the hearing, plaintiff testified that she was hospitalized
8 from January 24, 2006 to January 26, 2006 after a domestic dispute with her husband. (AR at
9 416-17). Plaintiff testified that she was taken to a mental hospital because "[t]hey thought I was
10 going to hurt myself," and further testified that she had thought about hurting herself at the time,
11 and still thinks about it. (AR at 417). After the hearing, plaintiff submitted a letter from Dr. Patel
12 dated May 22, 2006. (AR at 396). In the letter, Dr. Patel states that he first saw plaintiff in the
13 mid-eighties for depression and has "seen her on and off for the last twenty years." (Id.). Dr.
14 Patel stated that he began to see plaintiff on a regular basis as of September 15, 2006. He
15 opined that plaintiff "suffers from ongoing chronic depression and has difficulty concentrating
16 and functioning because of her illness." (AR at 396).

17 In the decision, the ALJ noted that the treatment notes "from Dr. Patel submitted after
18 the hearing note the history of hospitalization for suicidal ideation in early 2006, but the report
19 of the hospitalization was not submitted." (AR at 20). An ALJ has a responsibility to develop
20 "a complete medical history" and to "make every reasonable effort to help [the claimant] get
21 medical reports." 20 C.F.R. §§ 404.1512(d), 416.912(d). While the ALJ noted that the
22 hospitalization report was not submitted, there is no indication that the ALJ re-contacted Dr.
23 Patel regarding plaintiff's hospitalization report, or made any other efforts to obtain additional
24 information about it. The ALJ was aware of plaintiff's hospitalization in early 2006: plaintiff
25 testified about her hospitalization at the hearing and the treatment notes submitted by Dr. Patel

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27 ³ California Welfare and Institutions Code Section 5150 allows an authorized peace officer to
28 confine for up to 72 hours any person who, as a result of mental disorder, is a danger to others or to
himself or herself, or gravely disabled.

1 before the hearing also referenced plaintiff's hospitalization in January 2006. Plaintiff's
2 hospitalization was a significant event in light of her history of psychiatric hospitalization and
3 the ALJ's finding that plaintiff did, in fact, suffer from a disabling mental impairment from
4 October 16, 2001 through January 31, 2004. The ALJ's duty to develop the record is
5 heightened when the claimant suffers from a mental impairment and the ALJ failed to meet his
6 duty to investigate the facts surrounding plaintiff's hospitalization and further develop the
7 record. See Tonapetyan, 242 F.3d at 1150.

8 **C. Remand is Required to Remedy Defects in the ALJ's Decision**

9 The choice of whether to reverse and remand for further administrative proceedings, or
10 to reverse and simply award benefits, is within the discretion of the Court. McAlister v. Sullivan,
11 888 F.2d 599, 603 (9th Cir. 1989). Remand is appropriate where additional proceedings would
12 remedy defects in the ALJ's decision, and where the record should be developed more fully.
13 Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990).

14 Here, the Court finds remand appropriate. The ALJ failed to fully develop the record
15 regarding plaintiff's mental impairment and her hospitalization in 2006. The ALJ's failure to
16 develop the record constitutes error. On remand, the ALJ must develop the record by
17 contacting Dr. Patel to obtain the records documenting plaintiff's hospitalization and make an
18 effort to investigate the facts surrounding her hospitalization.⁴

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25 ⁴ In the Joint Stipulation, plaintiff also contends that the ALJ erred in failing to consider the type,
26 dosage, effectiveness and side effects of plaintiff's medications and that the Appeals Council failed
27 to properly consider Dr. Patel's opinion. As explained above, however, the ALJ's error in failing to
28 develop the record with regard to plaintiff's 2006 hospitalization constitutes sufficient reason to
remand this case. Moreover, depending on the outcome of the proceedings on remand, the ALJ will
have an opportunity to address plaintiff's other arguments again. In any event, the ALJ should
consider all the issues raised by plaintiff in the Joint Stipulation when determining the merits of
plaintiff's case on remand.

1 **ORDER**

2 The Court, therefore, VACATES the decision of the Commissioner of Social Security
3 Administration and REMANDS this action for further administrative proceedings consistent with
4 this Memorandum Opinion and Order.

5 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

6 DATED: November 21, 2008

7 /s/ Jennifer T. Lum
8 JENNIFER T. LUM
9 UNITED STATES MAGISTRATE JUDGE
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