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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUDITH JIMENEZ,)	NO. EDCV 08-01298 SS
)	
Plaintiff,)	MEMORANDUM DECISION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

INTRODUCTION

Judith Jimenez ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying her application for Supplemental Security Income ("SSI"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. This matter is before the Court on the parties' Joint Stipulation ("Jt. Stip.") filed on July 14, 2009. For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED for further proceedings.

1 **FACTUAL HISTORY**

2
3 **A. Generally**

4
5 Plaintiff was born on March 6, 1969. (AR 116). Plaintiff claims
6 disability as a result of “[irregular] heart beat, depression, stress,
7 chest pain, high [blood sugar] levels, blur[r]ed vision, [weakness], .
8 . . enlarged liver, [and] enlarge[d] heart.” (AR 132).
9

10 **B. Relevant Medical History**

11
12 **1. Mental Health Condition**

13
14 James A. Grishom, M.F.T.², R.N.³, assessed Plaintiff on April 29,
15 2004. (AR 350-51). Mr. Grishom diagnosed Plaintiff with non-specific
16 depressive disorder and post-traumatic stress disorder. (AR 350). Mr.
17 Grishom noted that Plaintiff had mild suicidal ideation. (Id.).
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26 _____
27 ² A M.F.T. is a Marriage and Family Therapist.

28 ³ A R.N. is a Registered Nurse.

1 On August 11, 2004, J.N. Allison, M.D., indicated that Plaintiff
2 reported "seeing people who are not there [and] hearing noises when
3 nobody is there." (AR 348). Dr. Allison noted that Plaintiff
4 experienced "crying spells." (Id.). Plaintiff was prescribed
5 twenty milligrams of Lexapro⁴, zero to five milligrams of Risperdal⁵ and
6 fifty milligrams of Trazodone⁶. (Id.)

7
8 On September 8, 2004, Dr. Allison found that Plaintiff "remain[ed]
9 depressed." (Id.). Dr. Allison indicated that Plaintiff suffered from
10 insomnia. (Id.) Dr. Allison continued Plaintiff on the same dosage of
11 Lexapro and Risperdal, but increased the Trazodone to one hundred
12 milligrams. (AR 348).

13
14 On October 6, 2004, Dr. Allison indicated that Plaintiff "state[d]
15 [she is] less depressed" and noted that Plaintiff's "crying spells" had
16 become less frequent. (AR 347). Dr. Allison prescribed Plaintiff
17 thirty milligrams of Lexapro and the same dosages of Risperdal and
18 Trazodone. (Id.).

19
20
21 _____
22 ⁴ Lexapro is a trade name for Escitalopram, which is prescribed to
23 treat depression and generalized anxiety disorder. See
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a603005.html> (last
24 accessed July 30, 2009).

25 ⁵ Risperdal is a trade name for Risperidone, which is an anti-
26 psychotic drug prescribed to treat symptoms of schizophrenia, mania and
other behavioral problems. See [http://www.nlm.nih.gov/medlineplus/
27 druginfo/meds/a694015.html](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694015.html) (last accessed July 30, 2009).

28 ⁶ Trazodone is prescribed to treat depression. See
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a681038.html> (last
accessed July 30, 2009).

1 Records on October 20, 2004 and November 10, 2004 indicate that
2 Plaintiff did not appear for her psychiatric appointments. (AR 346).
3 Dr. Allison indicated that Plaintiff's case was "closed" on December 23,
4 2004. (Id.).

5
6 John Lavey, L.C.S.W.⁷, treated Plaintiff on February 5, 2007. (AR
7 336-38). Mr. Lavey found that Plaintiff suffered from paranoia, mood
8 swings, and suicidal ideation. (AR 337). Mr. Lavey indicated
9 Plaintiff's current mood was "depressed." (Id.). Mr. Lavey found that
10 Plaintiff had a Global Assessment of Functioning ("GAF") of 50. (AR
11 336). Mr. Lavey diagnosed Plaintiff with non-specific depressive
12 disorder and post-traumatic stress disorder. (AR 338).

13 14 **2. Consultative Psychiatric Evaluation**

15
16 Kent Jordan, M.D., a Diplomate of the American Board of Psychiatry
17 and Neurology, evaluated Plaintiff for the Disability Determination
18 Service ("DDS") on December 1, 2007. (AR 314-20). Dr. Jordan diagnosed
19 Plaintiff with polysubstance abuse and dependence, amphetamine-induced
20 auditory and visual hallucinations and personality disorder with
21 manipulative trends. (AR 318). Dr. Jordan concluded that "[Plaintiff]
22 cannot responsibly handle funds because of her substance abuse history
23 and also manipulative personality." (AR 319).

24 \\

25 \\

26 \\

27
28 ⁷ A L.C.S.W. is a Licensed Clinical Social Worker.

1 404, Subpart P, Appendix 1? If so, the claimant is
2 found disabled. If not, proceed to step four.

3 (4) Is the claimant capable of performing her past work? If
4 so, the claimant is found not disabled. If not, proceed
5 to step five.

6 (5) Is the claimant able to do any other work? If not, the
7 claimant is found disabled. If so, the claimant is
8 found not disabled.

9
10 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
11 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. §§
12 404.1520(b)-(g)(1), 416.920(b)-(g)(1).

13
14 The claimant has the burden of proof at steps one through four, and
15 the Commissioner has the burden of proof at step five. Bustamante, 262
16 F.3d at 953-54. If, at step four, the claimant meets his burden of
17 establishing an inability to perform the past work, the Commissioner
18 must show that the claimant can perform some other work that exists in
19 "significant numbers" in the national economy, taking into account the
20 claimant's residual functional capacity, age, education and work
21 experience. Tackett, 180 F.3d at 1100; 20 C.F.R. § 416.920(g)(1). The
22 Commissioner may do so by the testimony of a VE or by reference to the
23 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart
24 P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240
25 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
26 (strength-related) and nonexertional limitations, the Grids are
27 inapplicable and the ALJ must take the testimony of a VE. Moore v.
28 Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

1 At step five, the ALJ determined that Plaintiff could perform the
2 jobs of hand packager, assembler and table worker. (AR 22-23). The ALJ
3 posed the following hypothetical to vocational expert ("VE") Joseph
4 Mooney:

5
6 [C]onsider a person of [Plaintiff's] background, her
7 age, education and work experience and I would like you to
8 consider her residual functional capacity ("RFC") that was
9 assessed by the specialist in internal medicine who saw
10 [Plaintiff] on December 12 of 2007 . . . [c]onsidering that
11 assessment of functional capacity and reducing the work
12 because of [Plaintiff's] basic lack of past work, to work
13 which is simple, routine, repetitive, and non-public.

14
15 (AR 97-98).

16
17 The VE responded that Plaintiff could perform "a broad range of
18 simple jobs like hand packagers . . . a variety of different types of
19 assemblers . . . [and] table workers" (AR 98).

20
21 The ALJ found the following RFC for Plaintiff:

22
23 [T]o perform medium work as defined in 20 CFR 416.967(c)
24 except [Plaintiff] is limited to frequent reaching in all
25 directions, handling, fingering, feeling, pushing, and
26 pulling, bilaterally, and she is limited to frequent
27 balancing, stooping, crouching, and climbing ramps and
28 stairs. [Plaintiff] is limited to occasional kneeling,

1 crawling, and climbing ladders, ropes, and scaffolds.
2 [Plaintiff] is able to perform frequent work at unprotected
3 heights, operating a motor vehicle, and vibrations, but she
4 is limited to occasional work around moving mechanical parts,
5 dusts, odors, fumes, pulmonary irritants, extreme cold, and
6 extreme heat. [Plaintiff] is limited to work in moderate
7 (office) noise. [Plaintiff] is able to perform routine,
8 repetitive, nonpublic work tasks.

9
10 (AR 16).

11
12 Based on this RFC and the VE's response to the hypothetical, the
13 ALJ concluded that Plaintiff was not disabled because she could perform
14 the work as a hand packager, assembler and table worker. (AR 22-23).

15
16 **STANDARD OF REVIEW**

17
18 Under 42 U.S.C. § 405(g), a district court may review the
19 Commissioner's decision to deny benefits. The court may set aside the
20 Commissioner's decision when the ALJ's findings are based on legal error
21 or are not supported by substantial evidence in the record as a whole.
22 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
23 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

24
25 "Substantial evidence is more than a scintilla, but less than a
26 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
27 which a reasonable person might accept as adequate to support a
28 conclusion." Id. To determine whether substantial evidence supports

1 a finding, the court must “consider the record as a whole, weighing
2 both evidence that supports and evidence that detracts from the
3 [Commissioner’s] conclusion.” Aukland, 257 F.3d at 1035 (quoting Penny
4 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can
5 reasonably support either affirming or reversing that conclusion, the
6 court may not substitute its judgment for that of the Commissioner.
7 Reddick, 157 F.3d at 720-21.

8
9 **DISCUSSION**

10
11 **A. The ALJ Erred In His Evaluation Of Plaintiff’s Mental Impairment**

12
13 Plaintiff contends that the ALJ erred because he “failed to
14 consider the severity of [Plaintiff’s] mental impairment, which clearly
15 indicates significant ramifications for [Plaintiff’s] ability to work.”
16 (Jt. Stip. at 13). Plaintiff asserts that the record contains “evidence
17 of a mental impairment that has more than a minimal effect on
18 [Plaintiff’s] ability to do basic work activities.” (Jt. Stip. at 14).
19 This Court agrees.

20
21 The ALJ noted the following regarding Plaintiff’s mental
22 impairments:

23
24 [Plaintiff’s] medically determinable mental impairments
25 of polysubstance abuse and dependence with personality
26 disorder with manipulative trends, considered singly and in
27 combination, do not cause more than minimal limitation in
28

1 [Plaintiff's] ability to perform basic mental work activities
2 and are therefore nonsevere.

3
4 (AR 16)

5
6 By its own terms, the evaluation at step two is a de minimis test
7 intended to weed out the most minor of impairments. See Bowen v.
8 Yuckert, 482 U.S. 137, 153-154, 107 S. Ct. 2287, 96 L. Ed. 2d 119
9 (1987); Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001)(stating
10 that the step two inquiry is a de minimis screening device to dispose
11 of groundless claims)(quoting Smolen, 80 F.3d at 1290). An impairment
12 is not severe only if the evidence establishes "a slight abnormality
13 that has no more than a minimal effect on an individuals ability to
14 work." Smolen, 80 F.3d at 1290 (internal quotations and citations
15 omitted).

16
17 The ALJ here applied more than a de minimis test when he determined
18 that Plaintiff's mental impairment was not severe. Moreover, he failed
19 to follow the Secretary's own regulations governing the evaluation of
20 mental impairments, as described below.

21
22 Where there is evidence of a mental impairment that allegedly
23 prevents the plaintiff from working, the Agency has supplemented the
24 five-step sequential evaluation process with additional regulations.⁹

25 _____
26 ⁹ These additional steps are intended to assist the ALJ in
27 determining the severity of mental impairments at steps two and three.
28 The mental RFC assessment used at steps four and five of the evaluation
process, on the other hand, require a more detailed assessment. Social
Security Ruling 96-8P, 1996 WL 374184 at * 4.

1 Maier v. Comm'r of the Soc. Sec. Admin., 154 F.3d 913, 914-15 (9th Cir.
2 1998)(citing 20 C.F.R. § 416.920a)(per curiam). First, the ALJ must
3 determine the presence or absence of certain medical findings relevant
4 to the plaintiff's ability to work. 20 C.F.R. § 416.920a(b)(1).
5 Second, when the plaintiff establishes these medical findings, the ALJ
6 must rate the degree of functional loss resulting from the impairment
7 by considering four areas of function: (a) activities of daily living;
8 (b) social functioning; (c) concentration, persistence, or pace; and (d)
9 episodes of decompensation. 20 C.F.R. § 416.920a(c)(2)-(4). Third,
10 after rating the degree of loss, the ALJ must determine whether the
11 claimant has a severe mental impairment. 20 C.F.R. § 416.920a(d).
12 Fourth, when a mental impairment is found to be severe, the ALJ must
13 determine if it meets or equals a listing in 20 C.F.R. Part 404, Subpart
14 P, Appendix 1. 20 C.F.R. § 416.920a(d)(2). Finally, if a listing is
15 not met, the ALJ must then assess the plaintiff's RFC, and the ALJ's
16 decision "must incorporate the pertinent findings and conclusions"
17 regarding he plaintiff's mental impairment, including "a specific
18 finding as to the degree of limitation in each of the functional areas
19 described in [§ 416.920a(c)(3)]." 20 C.F.R. § 416.920a(d)(3), (e)(2).

20
21 The regulations describe an impairment as follows:

22
23 A physical or mental impairment must result from anatomical,
24 physiological, or psychological abnormalities which can be
25 shown by medically acceptable clinical and laboratory
26 diagnostic techniques. A physical or mental impairment must
27 be established by medical evidence consisting of signs,
28

1 symptoms, and laboratory findings, not only by [a
2 plaintiff's] statements of symptoms.

3
4 20 C.F.R. § 416.908; see also Ukolov v. Barnhart, 420 F.3d 1002, 1005
5 (9th Cir. 2005) (noting that the existence of a medically determinable
6 physical or mental impairment may only be established with objective
7 medical findings) (citing Social Security Ruling 96-4p, 1996 WL 374187
8 at *1-2).

9
10 Here, sufficient evidence existed to satisfy the de minimis test.
11 Mr. Grishom diagnosed Plaintiff with depressive disorder and post-
12 traumatic stress disorder. (AR 350). Dr. Allison noted that Plaintiff
13 complained of "seeing people who are not there [and] hearing noises when
14 nobody is there" and suffered from "crying spells." (AR 348). Dr.
15 Allison also prescribed Plaintiff with Lexapro, Trazodone and Risperdal,
16 medications for the treatment of mental disorders. (Id.). Mr. Lavey
17 found that Plaintiff suffered from paranoia, mood swings, and suicidal
18 ideation. (AR 337). Mr. Lavey assessed Plaintiff with a Global
19 Assessment of Functioning ("GAF") of 50 and diagnosed her with non-
20 specific depressive disorder and post-traumatic stress disorder. (AR
21 336-38). Dr. Jordan, the consultative psychiatrist, indicated that
22 Plaintiff's "manipulative personality" made her incapable of managing
23 finances. (AR 319).

24
25 Plaintiff's medical records indicate that she suffered from a
26 mental impairment that interfered with and affected her ability to
27 function. Plaintiff's mental impairment is not "a slight abnormality
28 that has no more than a minimal effect on an individuals ability to

1 work." Smolen, 80 F.3d at 1290 (internal quotations and citations
2 omitted). The ALJ's conclusion at step-two of the evaluation process
3 was erroneous and in conflict with the record. Moreover, it cannot be
4 considered harmless as it impacted the remainder of the five-step
5 process. Remand is required.

6
7 **B. Because The ALJ Erred At Step Two, His Finding That Plaintiff Can**
8 **Perform The Jobs Of Hand Packager And Assembler Are Error**

9
10 Plaintiff argues that the ALJ erred by determining that Plaintiff
11 could perform work that did not comport with her RFC. (Jt. Stip. at 3).
12 Specifically, Plaintiff asserts that the Dictionary of Occupation Titles
13 ("DOT") indicates that the occupation of hand packager and assembler
14 require "an employee to [work in] a loud working environment." (Id.)
15 (emphasis in original). Plaintiff contends that because the ALJ
16 restricted Plaintiff to an environment with moderate noise, (AR 16),
17 determining Plaintiff could perform work as a hand packager and
18 assembler was error. (Jt. Stip. at 4). This Court agrees.

19
20 The ALJ assessed the following RFC for Plaintiff:

21
22 [T]o perform medium work as defined in 20 CFR 416.967(c)
23 except [Plaintiff] is limited to frequent reaching in all
24 directions, handling, fingering, feeling, pushing, and
25 pulling, bilaterally, and she is limited to frequent
26 balancing, stooping, crouching, and climbing ramps and
27 stairs. [Plaintiff] is limited to occasional kneeling,
28 crawling, and climbing ladders, ropes, and scaffolds.

1 [Plaintiff] is able to perform frequent work at unprotected
2 heights, operating a motor vehicle, and vibrations, but she
3 is limited to occasional work around moving mechanical parts,
4 dusts, odors, fumes, pulmonary irritants, extreme cold, and
5 extreme heat. [Plaintiff] is limited to work in moderate
6 (office) noise. [Plaintiff] is able to perform routine,
7 repetitive, nonpublic work tasks.

8
9 (AR 16).

10
11 Residual functional capacity is what a claimant can still do
12 despite existing exertional and nonexertional limitations. Cooper v.
13 Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). SSR 96-8p provides
14 in relevant part: "RFC [residual functional capacity] is an assessment
15 of an individual's ability to do sustained work-related physical and
16 mental activities in a work setting on a regular and continuing basis."
17 SSR 96-8p, 1996 WL 374184, at *1 (SSA July 2, 1996). At Step 5, "[a]
18 'regular and continuing basis' means 8 hours a day, for 5 days a week,
19 or an equivalent work schedule." Id. at *2 (footnote omitted).

20
21 Here, the ALJ erroneously determined that Plaintiff did not have
22 a severe mental impairment. This error affects the ALJ's RFC
23 determination because the ALJ failed to include all of Plaintiff's
24 severe impairments in the RFC assessment. As a result, Plaintiff's RFC
25 assessment is incomplete and thus an inaccurate portrayal of her
26 performance abilities and limitations.

1 Additionally, Plaintiff is correct that the ALJ incorrectly
2 determined that she could perform the work of hand packager and
3 assembler. The DOT list the noise level for a hand packager and
4 assembler, small products I as loud. See DOT code 920.587-018; DOT code
5 706.684-022.

6
7 The DOT is part of the record for review in social security cases.
8 The regulations provide that DOT classifications provide a rebuttable
9 presumption regarding certain jobs and require that the ALJ take notice
10 of DOT's classifications. 20 C.F.R. § 404.1566(d)(2)-(5)(e). Here, the
11 ALJ limited Plaintiff to a work environment with moderate noise. (AR
12 16). This contrasts with the definition of the occupation in the DOT.
13 The ALJ did not offer an explanation as to the deviation. Thus, the
14 ALJ's determination that Plaintiff could work as a hand packager and
15 assembler is not supported by substantial evidence.

16
17 Because the ALJ incorrectly found that Plaintiff did not have a
18 severe mental impairment, Plaintiff's RFC is inaccurate. Furthermore,
19 the ALJ failed select occupations that comport with Plaintiff's
20 established limitations. If the ALJ departs from the DOT, the ALJ must
21 definitively explain this departure. See Pinto v. Massanari, 249 F.3d
22 840, 847 (9th Cir. 2001) (citing Johnson v. Shalala, 60 F.3d 1428, 1435
23 (9th Cir. 1995)). Remand is required.

1 **C. Because The ALJ Erred In His Evaluation of Plaintiff's Mental**
2 **Impairment, His Hypothetical Was Erroneous**

3
4 Plaintiff contends that the ALJ erred by failing provide a complete
5 hypothetical to the VE. (Jt. Stip. at 17). Specifically, Plaintiff
6 notes that the ALJ's hypothetical "did not include [Plaintiff's]
7 episodes of decompensation" (Id.). This Court agrees.

8
9 In order for the vocational expert's testimony to constitute
10 substantial evidence, the hypothetical question posed must "consider all
11 of the claimant's limitations." Andrews v. Shalala, 53 F.3d 1035, 1044
12 (9th Cir. 1995). However, the ALJ is not required to include
13 limitations for which there was no evidence. See Osenbrock v. Apfel,
14 240 F.3d 1157, 1164-65 (9th Cir. 2001) (ALJ not bound to accept as true
15 the restrictions set forth in hypothetical if they were not supported
16 by substantial evidence).

17
18 The ALJ posed the following hypothetical to the VE:

19
20 [C]onsider a person of [Plaintiff's] background, her
21 age, education and work experience and I would like you to
22 consider her residual functional capacity ("RFC") that was
23 assessed by the specialist in internal medicine who saw
24 [Plaintiff] on December 12 of 2007 . . . [c]onsidering that
25 assessment of functional capacity and reducing the work
26
27
28

1 because of [Plaintiff's] basic lack of past work, to work
2 which is simple, routine, repetitive, and non-public.

3
4 (AR 97-98).

5
6 Here, the ALJ erroneously concluded that Plaintiff did not have a
7 severe mental impairment. Accordingly, ALJ did not set forth any
8 limitations stemming from Plaintiff's mental impairment in his
9 hypothetical. Thus, the ALJ's hypothetical failed to "consider all of
10 the claimant's limitations." Andrews, 53 F.3d at 1044. Remand is
11 necessary.

12
13 **CONCLUSION**

14
15 The ALJ erred at his step-two evaluation of Plaintiff's mental
16 impairment. The record contains sufficient evidence to satisfy the de
17 minimis test for severity. Because the ALJ did not properly consider
18 this evidence, the ALJ's hypothetical was incomplete and his RFC
19 assessment was inaccurate.

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1 Consistent with the foregoing, and pursuant to sentence four of 42
2 U.S.C. § 405(g),¹⁰ IT IS ORDERED that judgment be entered REVERSING the
3 decision of the Commissioner and REMANDING this matter for further
4 proceedings consistent with this decision. IT IS FURTHER ORDERED that
5 the Clerk of the Court serve copies of this Order and the Judgment on
6 counsel for both parties.

7
8 DATED: August 6, 2009.

9 /S/

10
11 SUZANNE H. SEGAL
12 UNITED STATES MAGISTRATE JUDGE
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26 _____
27 ¹⁰ This sentence provides: "The [district] court shall have power
28 to enter, upon the pleadings and transcript of the record, a judgment
affirming, modifying, or reversing the decision of the Commissioner of
Social Security, with or without remanding the cause for a rehearing."