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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JAMES McGAUGHEY, SR.,)	No. ED CV 08-01706-VBK
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER
v.)	
)	(Social Security Case)
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") properly

1 developed the record;

2 2. Whether the ALJ properly determined that Plaintiff's
3 condition meets or equals a Listing;

4 3. Whether the ALJ properly considered Plaintiff's testimony;
5 and

6 4. Whether the ALJ properly considered the mental and physical
7 demands of Plaintiff's past relevant work. (JS at 2-3.)

8 This Memorandum Opinion will constitute the Court's findings of
9 fact and conclusions of law. After reviewing the matter, the Court
10 concludes that for the reasons set forth, the decision of the
11 Commissioner must be reversed.

12
13 I

14 **THE ALJ HAD A DUTY TO DEVELOP THE RECORD, BUT DID NOT ERR**
15 **IN HIS DETERMINATION THAT PLAINTIFF'S CONDITION**
16 **DOES NOT MEET OR EQUAL A LISTING**

17 Addressing Plaintiff's first two issues, he contends that the
18 absence in the original record of a January 31, 2006 consultative
19 examination ("CE") by Dr. Taylor, a clinical psychologist, rendered
20 the ALJ unable to properly analyze Dr. Taylor's findings. Plaintiff
21 contends that the ALJ should have developed the record by obtaining
22 and addressing Dr. Taylor's CE report. Related to this is Plaintiff's
23 second issue, in which he argues that the ALJ failed to find that he
24 meets Listing 12.05 (mental retardation). (See 20 C.F.R. Part 404,
25 subpart P, Appendix I, section 1205C.)

26 As to the first issue, Dr. Taylor's CE report is in the
27 supplemental record at AR 164-168. Accepting Plaintiff's contention
28 that the ALJ failed to review Dr. Taylor's report, and should have

1 obtained it, the Court notes that the ALJ did examine the following
2 psychiatric evaluations:

- 3 1. Dr. Kikani, on June 15, 2006 (AR 143-146);
- 4 2. Dr. Smith, on April 19, 2007 (AR 123-129).

5
6 Further, Dr. Kikani had reviewed Dr. Taylor's report, and
7 essentially concurred with his findings. (AR 146.) Dr. Smith, on the
8 other hand, found a lesser level of impairments (as will be discussed
9 below) than did Dr. Taylor.

10 Dr. Taylor diagnosed that Plaintiff had methamphetamine
11 dependence in early remission, marijuana abuse, and borderline
12 intellectual functioning. (AR 168.) He found mild impairment in
13 Plaintiff's ability to understand, remember or complete job
14 instructions; mild impairment in adapting to day-to-day work
15 activities; and moderate impairment both in his ability to maintain
16 attention, concentration, persistence and pace, and in his ability to
17 interact with supervisors, coworkers, and the public. (AR 168.) The
18 ALJ found only mild restrictions in Plaintiff's ability to maintain
19 attention, concentration, persistence and pace, and in his ability to
20 interact with supervisors, coworkers, and the public. (AR 14-15.)¹ As
21 to Dr. Kikani's opinion, his concurrence with Dr. Taylor's opinion is,
22 again, reflected in his report (see AR at 146), and therefore, to the
23 extent that Dr. Kikani found moderate difficulties in Plaintiff's
24 ability to relate and interact with supervisors, coworkers and the
25 public, and with concentration on persistence, and pace, his opinion

26
27 ¹ In this regard, the Commissioner is incorrect in his
28 assertion that Dr. Taylor's opinion is consistent with the functional
limitations found by the ALJ in his decision. (See JS at 5.)

1 is, to that extent, inconsistent with that of the ALJ.

2 This leaves Dr. Smith's evaluation of April 19, 2007. Dr. Smith
3 found no impairment in Plaintiff's ability to understand, remember or
4 complete simple commands, and mild impairment in the other four areas.
5 (AR 129.)

6 Finally, the State Agency physician, who reviewed the medical
7 record, concluded that, consistent with Dr. Smith's findings,
8 Plaintiff has no impairment in his ability to understand, remember or
9 complete simple commands, and only mild impairments in the remaining
10 areas of mental functioning. (AR 105-106, 109-122.)

11 The issue, therefore, is whether the ALJ correctly assessed
12 Plaintiff's mental impairments according to applicable regulation.
13 The ALJ was tasked with evaluating three distinct opinions, each based
14 on independent testing, rendered by three different psychiatrists:
15 Drs. Kikani, Smith, and Taylor. He obviously opted to adopt Dr.
16 Smith's findings rather than Dr. Kikani's, and there is no evidence
17 that he ever reviewed Dr. Taylor's report.

18 The pertinent question, therefore, is whether the ALJ erred in
19 not developing the record so as to be able to examine Dr. Taylor's
20 report. As it is, the ALJ chose to adopt Dr. Smith's findings in lieu
21 of Dr. Kikani's, and the apparent basis for this choice, as set forth
22 in the decision, is that Dr. Smith's April 2007 report is more current
23 than Dr. Kikani's 2006 psychological test. (See AR at 15.) But, this
24 reasoning does not adequately support the ALJ's choice to reject the
25 conclusions of one examining physician in favor of another's,
26 particularly in view of the fact that Dr. Kikani's report was prepared
27 based upon an examination that occurred less than ten months before
28 Dr. Smith's, and Dr. Taylor's report only predated the others by

1 approximately a year. The Court does not perceive any apparent
2 staleness in the reports and examinations of Drs. Taylor and Kikani
3 which would serve as a reasonable basis to simply reject their
4 findings on significant issues of mental impairment. A mild
5 impairment is far from the same as a moderate impairment, and in the
6 latter case, having moderate limitations in various areas of mental
7 functioning may, as the Court will discuss, ultimately effect the
8 availability of jobs which a claimant can do.

9 Where examining physicians render conflicting opinions, each
10 based upon independent medical examinations, the requirements are
11 clear. In Lester v. Chater, 81 F.3d 821, 829-830 (9th Cir. 1995), the
12 Ninth Circuit discussed the manner in which the adjudicator must
13 address the opinions of examining physicians, and of non-examining
14 physicians:

15 "The opinion of an examining physician is, in turn,
16 entitled to greater weight than the opinion of a non-
17 examining physician. Pitzer v. Sullivan, 908 F.2d 502, 506
18 (9th Cir. 1990); Gallant v. Heckler, 753 F.2d 1450 (9th Cir.
19 1984). As is the case with the opinion of a treating
20 physician, the Commissioner must provide 'clear and
21 convincing' reasons for rejecting the uncontradicted opinion
22 of an examining physician. Pitzer, 908 F.2d at 506. And
23 like the opinion of a treating doctor, the opinion of an
24 examining doctor, even if contradicted by another doctor,
25 can only be rejected for specific and legitimate reasons
26 that are supported by substantial evidence in the record.
27 Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995)."

1 Therefore, the issue is simply whether the ALJ provided specific
2 and legitimate reasons supported by the record for rejecting Dr.
3 Kikani's (and, therefore, Dr. Taylor's) conclusions that Plaintiff has
4 moderate limitations in certain areas of mental functioning. The
5 Court cannot accept that "most recent examination prevails"
6 constitutes a specific and legitimate reason to reject slightly older
7 examinations and conclusions. The error would appear to be compounded
8 here because two qualified mental health professionals, Dr. Kikani and
9 Taylor, both observed moderate mental limitations in two areas of
10 functioning that Dr. Smith did not observe. This error in and of
11 itself necessitates a remand for reconsideration of these issues at a
12 new hearing.²

13 As to Plaintiff's argument that the ALJ erred in not finding that
14 he meets a Listing, the Court does not find error. Plaintiff's
15 argument is that he has established that he meets or equals Listing
16 12.05C, which requires findings of a valid verbal, performance, or
17 full-scale IQ of 60 through 70 and a physical or other mental
18 impairment which imposes an additional and significant work-related
19 limitation of function. First, as the Commissioner notes, in order to
20 meet a Listing for Mental Retardation, Plaintiff must first establish
21 a deficit in his adaptive functioning initially manifested before age
22 22. There is no evidence in the record that this evidence has been
23 produced. More importantly, there is no evidence that Plaintiff has
24 a physical or other mental impairment which imposes additional and
25 significant work-related limitations, as required by the second prong

26
27 ² These factors relate to assessment of the severity of the
28 mental impairment, and are distinct from determination of residual
functional capacity at Step Four. The former is what an individual
cannot do, while the latter is what he is capable of doing.

1 of Listing 12.05C. Plaintiff's argument that the existence of a mood
2 disorder satisfies this requirement is erroneous, because the fact
3 that a claimant has a severe impairment does not equate to a Listing
4 level or equivalent impairment. See Nieves v. Secretary of Health and
5 Human Services, 775 F.2d 12, 14 (1st Cir. 1985).

6
7 **II**

8 **THE ALJ'S CREDIBILITY ASSESSMENT IS BASED ON INSUFFICIENT REASONS**

9 In his decision, the ALJ depreciated Plaintiff's credibility as
10 to his subjective symptoms, finding that they are "not credible to the
11 extent they are inconsistent with the residual functional capacity
12 assessment for the reasons explained below." (AR 16.) Looking to the
13 language of the decision, it is difficult to find many reasons to
14 support this conclusion. The Commissioner finds a number of
15 legitimate reasons, including the following:

- 16 1. Plaintiff does not have a history of psychological
17 treatment, counseling, or medication commensurate with his
18 alleged disabling psychological symptoms. (JS at 19, citing
19 AR 16.)
- 20 2. While Plaintiff alleged suicidal ideation at the hearing,
21 the ALJ noted that there is no documentation in the medical
22 evidence to support the allegation. (JS at 19, citing AR 36,
23 38-39.)
- 24 3. While Plaintiff alleged suicidal ideation at the hearing, he
25 told each of the three consultative examiners, Drs. Taylor,
26 Smith and Kikani that he did not have such thoughts. (JS 19,
27 citing AR 124, 143, 165.)
- 28 4. While Plaintiff stated at the hearing that he could not read

1 or write, the consultative examiner noted that he filled out
2 a four-page questionnaire at his January 31, 2006
3 examination. (JS 19, citing AR at 164.)

4 5. Plaintiff's aggravating factor of a history of drug and
5 alcohol abuse appears to be in remission by his own
6 testimony.

7 6. Plaintiff told all three consultative examiners that he is
8 capable of performing normal activities of daily living. (JS
9 at 20.)

10
11 The applicable law regarding credibility assessment is based both
12 on regulation and statute. Subjective complaints of pain or other
13 symptomology in excess of what an impairment would normally be
14 expected to produce are subject to the credibility assessment of an
15 ALJ. Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir. 2001). An
16 ALJ's assessment of pain severity and claimant credibility is entitled
17 to "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir.
18 1989); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985). When
19 determining credibility, the ALJ "may not reject a claimant's
20 subjective complaints based solely on a lack of objective medical
21 evidence to fully corroborate the alleged severity." Bunnell v.
22 Sullivan, 947 F.2d 341, 345 (9th Cir. 1991); see also, Tonapetyan v.
23 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001). In order to find that a
24 claimant's subjective complaints are not credible, an ALJ "must
25 specifically make findings that support this conclusion," Bunnell, 947
26 F.2d at 345, and provide "clear and convincing reasons." Rollins, 261
27 F.3d at 857; see also Varney v. Secretary of Health & Human Services,
28 846 F.2d 581, 584 (9th Cir. 1988) (requiring the ALJ to put forward

1 "specific reasons" for discrediting a claimant's subjective
2 complaints).

3 The absence of objective evidence to corroborate a claimant's
4 subjective complaints, however, does not by itself constitute a valid
5 reason for rejecting her testimony. Tonapetyan v. Halter, 242 F.3d at
6 1147. However, weak objective support can undermine a claimant's
7 subjective testimony of excess symptomology. See e.g., Tidwell v.
8 Apfel, 161 F.3d 599, 602 (9th Cir. 1998).

9 Implementing regulations prescribe factors which should be
10 considered in determining credibility as to self-reported pain and
11 other symptoms. In 20 C.F.R. §404.1529(c)(3), the factors to be
12 considered are specified to include a claimant's daily activities
13 ("ADL"); the location, duration, frequency and intensity of pain or
14 other symptoms; precipitating and aggravating factors; the type,
15 dosage, effectiveness and side effects of any medication taken;
16 treatment received; and measures taken to relieve pain.

17 The regulations also specify that consideration should be given
18 to inconsistencies or contradictions between a claimant's statements
19 and the objective evidence:

20 "We will consider your statements about the intensity,
21 persistence, and limiting effects of your symptoms, and we
22 will evaluate your statements in relation to the objective
23 medical evidence and other evidence, in reaching a
24 conclusion as to whether you are disabled. We will consider
25 whether there are any inconsistencies in the evidence and
26 the extent to which there are any conflicts between your
27 statements and the rest of the evidence, including your
28 history, the signs and laboratory findings, and statements

1 by your treating or nontreating source or other persons
2 about how your symptoms affect you."

3 (20 C.F.R. §404.1529(c)(4).)

4
5 While the Commissioner has carefully searched the record for
6 possible reasons which would support a decreased credibility finding,
7 the problem is that most of the reasons cited by the Commissioner in
8 the JS are not contained in the decision, and are therefore not
9 cognizable on review. See Connett v. Barnhart, 340 F.3d 871, 874 (9th
10 Cir. 2003). For example, there is nothing in the decision which
11 indicated that the ALJ relied upon the lack of a commensurate history
12 of psychological treatment, counseling or medication to corroborate
13 Plaintiff's complaints. In fact, a fair reading of the decision
14 indicates just the opposite. While the ALJ acknowledged that
15 Plaintiff alleged he has been unable to work because of his mental
16 impairments and fluctuating mood disorder, he responded by stating
17 that, "if the [Plaintiff] receives counseling, treatment, and/or
18 medication, he may very well become another productive member of
19 society." (AR 16.) Indeed, as the Court has noted, two of the three
20 consulting mental health professionals found moderate impairments in
21 relevant areas of mental functioning, a matter which must be addressed
22 on remand.

23 With regard to Plaintiff's activities of daily living ("ADL"),
24 again, the Commissioner's argument that this issue was relevant to the
25 ALJ's credibility termination is simply not found in the decision. In
26 any event, the fact that Plaintiff may once have sold newspapers "on
27 the corner," (AR 125) does not constitute a level of daily activities
28 sufficient to support a depreciation in credibility, even if it were

1 found in the decision, which it is not. The same goes for allegations
2 of suicidal ideation, which, contrary to the Commissioner's argument,
3 does not form part of the ALJ's credibility determination. The same
4 goes, again, for the Commissioner's argument that Plaintiff stated at
5 the hearing that he could not read or write, in contrast to Dr.
6 Taylor's notation that Plaintiff completed a four-page intake history
7 questionnaire form.³

8 Finally, the Court will not address Plaintiff fourth issue in any
9 detail. Plaintiff asserts that the ALJ did not properly consider the
10 mental and physical demands of his past relevant work. Since
11 Plaintiff's mental RFC must be reevaluated on remand, it will be
12 necessary, after that determination is made, to both evaluate the
13 mental and physical demands of Plaintiff's past relevant work
14 according to proper standards, and to then determine whether
15 Plaintiff's RFC enables him to perform this work.

16 //

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18
19 ³ This part of Dr. Taylor's report does not seem sufficient,
20 in any event, to contradict Plaintiff's claims that he could not read
21 or write. It is seemingly undisputed that Plaintiff has a full scale
22 IQ of 65, and reads at a third grade level, spells at a second grade
23 level, and does arithmetic at a third grade level. (AR 128.)
24 Plaintiff's own evaluation that he does not know how to read or write
25 may, in fact, be simply his own psychological self-perception that
equates a third grade level of reading with an inability to read.

26 The Court need not further discuss this matter, because it is
27 clear that the credibility evaluation is insufficient and incomplete.
28 The Court declines to order that Plaintiff be accorded full
credibility for his symptoms at the rehearing, in view of the
incompleteness of the analysis. The ALJ will make this determination
de novo.

1 For the foregoing reasons, this matter will be remanded to the
2 Commissioner for further hearing consistent with this Memorandum
3 Opinion.

4 **IT IS SO ORDERED.**

5
6 DATED: September 30, 2009

/s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE

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