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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TANIEKA L. HARRIS,)	NO. EDCV 09-199 SS
)	
Plaintiff,)	MEMORANDUM DECISION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

I.
INTRODUCTION

Tanieka L. Harris ("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 applications for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is REVERSED and the action is remanded for further proceedings consistent with this decision.

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3 **II.**

4 **PROCEDURAL HISTORY**

5
6 Plaintiff protectively filed applications for SSI and DIB on May
7 30, 2006. (Administrative Record ("AR") 8, 34-37, 99-101, 103).¹ She
8 alleged a disability onset date of October 1, 2005 (AR 8, 125) due to
9 asthma, headaches, seizures, and side effects from a stroke. (AR 125).
10 The Agency denied Plaintiff's claims for SSI and DIB initially on
11 December 28, 2006. (AR 8, 38-42). This denial was upheld upon
12 reconsideration on April 26, 2007. (AR 8, 44-48).
13

14 On August 13, 2008, a hearing was held before Administrative Law
15 Judge ("ALJ") Joseph D. Schloss.² (AR 18-27). The ALJ denied benefits
16 in a written decision dated October 3, 2008. (AR 5-16). On October 10,
17 2008, Plaintiff sought review of the unfavorable decision. (AR 4). The
18 Appeals Council declined review on December 11, 2008. (AR 1-3).
19 Plaintiff commenced the instant action on February 4, 2009.

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24 _____
25 ¹ Plaintiff previously filed an application for disability benefits
26 in 2004, which was denied. (AR 26).

27 ² The ALJ held a prior hearing on June 26, 2008. (AR 28-33). It
28 was continued after Plaintiff informed the ALJ that she had hired an
attorney to represent her. (Id.).

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III.

FACTUAL BACKGROUND

A. Generally

Plaintiff was born on May 30, 1972, and was 36 years old at the time of the hearing. (AR 18, 99, 392). She has three years of college education and past relevant work experience as a rural route carrier. (AR 126, 129).

B. Relevant Medical History

1. Treating Physicians

On September 19, 2000, Plaintiff presented at a Kaiser Permanente clinic with complaints of headaches. (AR 281). She reported that she had taken Vicodin earlier at home but that it did not relieve her pain. (Id.). Dr. Sugimoto noted that a recent MRI of Plaintiff's brain was normal. (Id.). Dr. Sugimoto diagnosed Plaintiff with migraine headaches and prescribed Stadol and Phenergan. (Id.).

On August 19, 2002, Dr. John Sharpe, Plaintiff's primary care physician, treated Plaintiff for complaints of wheezing at night. (AR 327). He diagnosed sinusitis and asthma. (Id.).

On January 8, 2003, Plaintiff presented with complaints of difficulty speaking (i.e., stuttering), headaches on the left side of the head, weakness in the left extremities, and numbness in the left

1 face, arm, and leg. (AR 336). An MRI of the brain and physical and
2 neurological examinations were all normal. (AR 337-39, 341-42). Dr.
3 Thomas Miller, a neurologist, commented that Plaintiff had "suggestion
4 of medication rebound-type headache" and symptoms suggesting a migraine
5 with impaired speech and paresthesia. (AR 341). He opined that
6 Plaintiff should limit her narcotic analgesic medications. (AR 341-42).

7
8 On January 17, 2003, Plaintiff reported that her headaches were
9 frequent and that she could not talk properly. (AR 343). Dr. Miller
10 referred Plaintiff for a speech therapy evaluation. (Id.). On June 4,
11 2003, Dr. Viera Striez, a speech and language pathologist, observed that
12 Plaintiff's scores from the Stuttering Severity Instrument examination
13 suggested a "moderate degree of stuttering." (AR 347). Dr. Striez also
14 noted that Plaintiff had severe facial dystonia, eye blinking, and
15 involuntary facial and throat muscle ticks and twitches during reading
16 and spontaneous speech. (Id.). Dr. Striez recommended that Dr. Miller
17 conduct further evaluation to determine the underlying cause of
18 Plaintiff's facial dystonia and speech dysfluencies. (Id.). On June
19 11, 2003, Dr. Miller noted that Plaintiff was speaking "better" and that
20 she did "better when she speaks slowly." (AR 348).

21
22 On September 8, 2003, Dr. Sharpe referred Plaintiff to Dr.
23 Francisco Torres for neurology consultation. (AR 362). Plaintiff
24 complained of stuttering and chronic headaches. (Id.). Dr. Torres
25 noted that Plaintiff's neurologic examination was normal but that, at
26 times, Plaintiff's speech had a "stuttering quality to it" and that she
27 suffered from a "chronic headache problem." (AR 366).

1 On September 12, 2003, Dr. Sharpe referred Plaintiff to Dr. Joey
2 Gee for another neurology consultation. (AR 364). Dr. Gee opined that
3 Plaintiff's headaches were "consistent with migraine without aura" and
4 that she had "lots of features in the initial headache secondary to
5 medication overuse." (AR 365). Dr. Gee observed that Plaintiff's
6 headaches transformed into "a daily continued, daily phenomenon
7 headache." (Id.). Dr. Gee recommended that Plaintiff discontinue the
8 use of Robaxin, Flexeril, Propranolol, Elavil, Reglan. (Id.). He
9 further recommended that Plaintiff "taper down" the use of Ambien and
10 "significantly cut down" the use of Vicodin. (Id.). Dr. Gee commented
11 that he hoped that Plaintiff would eventually stop using Vicodin.
12 (Id.). He then prescribed Depakote and Nortriptyline. (Id.). On
13 October 8, 2003, however, Plaintiff reported that she had taken five
14 Vicodin pills that day. (AR 377).

15
16 On February 20, 2004, Dr. Gee noted that Plaintiff was still
17 receiving Vicodin and Darvocet. (AR 399). He commented that he wanted
18 Plaintiff to completely discontinue the use of narcotic medications, "as
19 this is only worsening her headache overall, causing rebound." (Id.).
20 Dr. Gee "highly recommended" that Dr. Sharpe "withhold any further
21 prescriptions of the narcotics medications." (Id.). He administered
22 a series of botulinum injections over the course of the next several
23 months to relieve Plaintiff's headaches. (AR 399, 401, 412, 414-17,
24 421, 423, 426-27).

25
26 On April 16, 2004, Plaintiff reported that she suffered a syncopal
27 episode and injured her head and lower back. (AR 402, 406). A CT scan
28

1 of the brain and x-rays of the back were negative. (AR 405, 408). Dr.
2 Pierre Assaf prescribed Vicodin and discharged Plaintiff. (AR 407).

3
4 On June 1, 2004, Dr. Gee discontinued Plaintiff's Depakote
5 medication and prescribed Topiramate. (AR 412). He commented that
6 Plaintiff was using an excessive amount of Acetaminophen and Excedrin
7 and advised her to discontinue them "at all costs." (Id.).

8
9 On July 14, 2004, Plaintiff again complained of severe headaches.
10 (AR 413). She noted that she could not tolerate Topiramate because of
11 her history of "borderline glaucoma on a previous trial." (Id.). Dr.
12 Gee discontinued Plaintiff's Topiramate medication and prescribed
13 Indomethacin. (Id.). He commented:

14
15 I do feel that we are on the brink of stating that
16 [Plaintiff] may be one of these patients who just do not
17 respond to any available medication that we have tried. This
18 patient may have to be placed on chronic long term analgesic
19 medications such as a longer acting opiate compounds just to
20 control her headache.

21 (Id.).

22
23 On August 30, 2004, Dr. Gee noted that Plaintiff was "very
24 difficult" to treat because she had been unable to tolerate many
25 medications. (AR 414). On April 6, 2005, Plaintiff complained of
26 experiencing a syncopal episode. (AR 223). An echocardiogram revealed
27 mild mitral valve prolapse changes with minimal to mild regurgitation
28

1 and mild tricuspid valve regurgitation changes. (AR 239-40). An EEG
2 and a CT of the head were normal. (AR 241-44).

3
4 On May 5, 2005, Plaintiff reported that she had experienced four
5 blackouts since discontinuing Topiramate. (AR 418). She noted that she
6 did not have any blackouts when she was on Topiramate. (Id.). Dr. Gee
7 noted that an EEG and CT of the head were both normal. (Id.). Although
8 Plaintiff noted that she experienced vision problems with Topiramate,
9 she was willing to go back on the medication. (Id.). Dr. Gee
10 represcribed Topiramate at a lower dose. (Id.).

11
12 An MRI of the brain taken on August 2, 2005 was unremarkable. (AR
13 428). On September 9, 2005, Plaintiff complained of eye irritation and
14 burning. (AR 420). On January 30, 2006, Plaintiff complained of
15 insomnia, depression, anxiety, and frequent headaches. (AR 424). Dr.
16 Gee prescribed Effexor.

17
18 On September 12, 2006, Plaintiff complained of headaches. (AR
19 475). Dr. Sharpe observed that there were no focal deficits. (Id.).
20 He noted that Plaintiff was still taking narcotic pain medication such
21 as OxyContin and Vicodin. (Id.). Dr. Sharpe prescribed Toradol.
22 (Id.). On November 13, 2006, Dr. Gee noted that Plaintiff was
23 tolerating Topiramate. (AR 465).

24
25 On December 15, 2006, Dr. Sharpe noted that an individual named
26 Reggie Jones, who purported to be Plaintiff's husband, called to tell
27 him that Plaintiff was selling her OxyContin pills. (AR 464).
28 Plaintiff denied that she sold her medication or that Jones was her

1 husband. (Id.). Dr. Sharpe assessed migraine headaches and refilled
2 Plaintiff's prescription for OxyContin. (Id.).
3

4 On January 23, 2007, Dr. Gee noted that Plaintiff "has maximized
5 her current treatment option and is as stable as she is going to be in
6 regard to her chronic migraine and epilepsy." (AR 505). Dr. Gee opined
7 that Plaintiff was not adequate to perform any significant job duties.
8 (Id.). He indicated that he would continue to treat Plaintiff with
9 Topiramate and Botulinum injections. (Id.).
10

11 On September 2, 2008, Dr. Sharpe submitted a letter indicating that
12 Plaintiff had "chronic migraines and . . . continuous headaches 24 hours
13 a day, 7 days a week, with exacerbations that are disabling." (AR 504).
14 He also noted that Plaintiff had "epilepsy (a seizure disorder)."
15 (Id.). Dr. Sharpe concluded that Plaintiff "may be able to sit, stand,
16 or walk from 5 minutes to 1 hour" and could not be employed "in any type
17 of work due to the severity of her constant headaches." (Id.).
18

19 **2. Consultative Examining Physicians**

20

21 On December 8, 2004, Dr. Gabriel Fabella conducted an internal
22 medicine evaluation of Plaintiff. (AR 202-07). Plaintiff complained
23 of headaches and asthma. (AR 202). Plaintiff stated that she passed
24 out in January 2002. (Id.). Plaintiff stated that she had to have
25 speech therapy and learn how to read again. (Id.). She reported that
26 her asthma was well controlled. Plaintiff noted that her asthma attacks
27 occurred only once a month and were relieved by an inhaler. (Id.).
28

1 Dr. Fabella noted that Plaintiff's physical examination was
2 unremarkable except for her speech. (AR 204-06). Specifically, he
3 observed that Plaintiff "spoke very slowly as if she was mentally slow
4 and grouping for words." (AR 202). Dr. Fabella opined that Plaintiff's
5 only limitations were that she should avoid temperature extremes, dusts,
6 fumes, and strong chemicals due to her asthma. (AR 206).

7
8 On December 8, 2004, Dr. Louis Fontana performed a psychiatric
9 evaluation of Plaintiff. (AR 208-12). Plaintiff complained that he had
10 "[p]roblems with depression since [her] stroke." (AR 208). She
11 reported that on January 6, 2002, she was taken to a hospital after
12 having a severe headache. (AR 209). Plaintiff noted that she has never
13 had any definitive diagnosis of a stroke but has had problems with
14 speech since the incident. (Id.). She asserted that she had to relearn
15 how to read. (Id.). Plaintiff reported that she stopped working in
16 2000, after she suffered her possible stroke. (AR 210).

17
18 After conducting a mental status examination, Dr. Fontana diagnosed
19 Plaintiff with adjustment disorder with depressed mood. (AR 210-11).
20 He opined that Plaintiff should be able to: perform "simple and
21 repetitive tasks, as well as more detailed and complex tasks"; accept
22 instructions from supervisors; interact appropriately with coworkers and
23 the public; perform work activities on a consistent basis, without
24 additional supervision; maintain regular attendance in the workplace;
25 and complete a normal workday/workweek. (AR 211).

26
27 On February 11, 2006, Dr. Jason Yang conducted another psychiatric
28 evaluation of Plaintiff. (AR 434-37). Plaintiff complained of

1 depression and anxiety for the past several years. (AR 434). She
2 stated that she also suffered from severe headaches. (Id.). Plaintiff
3 reported that she last worked in 2003. (AR 436). Dr. Yang noted that
4 a mental status examination revealed no evidence of cognitive deficits,
5 perceptual disturbances, or delusional disorders. (AR 436-37). He
6 diagnosed Plaintiff with depressive disorder, not otherwise specified.
7 (AR 436). Dr. Yang opined that Plaintiff should be able to: adequately
8 remember and complete simple and complex tasks; tolerate the stress
9 inherent in the work environment; maintain regular attendance; work
10 without supervision; and interact appropriately with supervisors,
11 coworkers, and the public. (AR 437).

12 13 **3. Medical Experts**

14
15 At the hearing, Dr. DeBolt testified that, based on his review of
16 the medical records, Plaintiff did not have any severe medically
17 determinable impairment. (AR 21). In particular, he stated that there
18 were no objective findings to support any neurological impairment or
19 diagnosis related to Plaintiff's headaches. (AR 21-22). Dr. DeBolt
20 also testified that the medical records did not demonstrated that
21 Plaintiff ever suffered a seizure or stroke. (AR 21-25). He stated
22 that the medical evidence did not reflect any need for Plaintiff to take
23 OxyContin. (AR 22). Dr. DeBolt also indicated that there was evidence
24 of stuttering, which he believed was caused by nervousness and not by
25 an organic disease of the brain. (AR 25).

1 **C. Third Party Letters**

2
3 In an anonymous letter dated August 7, 2006, a person reported that
4 Plaintiff was committing social security disability fraud by
5 underreporting her assets. (AR 95). The person explained that
6 Plaintiff owned a house and two cars, which were registered under her
7 mother's name. (Id.). The person also reported that Plaintiff was
8 selling her OxyContin and Vicodin pills. (Id.).
9

10 In another anonymous letter dated June 25, 2007, a person reported
11 that Plaintiff was committing social security disability fraud. (AR
12 96). The person noted that, despite Plaintiff's claim of inability to
13 work due to illness, she worked for a company named Tiny Tours. (Id.).
14 The person also stated that Plaintiff had been selling her OxyContin and
15 Vicodin pills and had applied for county aid. (Id.). In support of the
16 letter, the person submitted a copy of a May 1, 2007 check in the amount
17 of \$632 from Tiny Tours made payable to Plaintiff. (AR 98). The person
18 also submitted a copy of a Disability Benefit Activation Form signed by
19 Plaintiff on April 10, 2007 and by her treating physician, Dr. Gee, on
20 April 19, 2007. (AR 97). On the form, Plaintiff reported that she last
21 worked on March 13, 2007, and both she and Dr. Gee reported that she
22 became disabled on March 16, 2007. (Id.).
23

24 Another anonymous letter, which is undated, states that the prior
25 anonymous letter(s) was written by family members who were bent on
26 destroying Plaintiff's life. (AR 503).
27
28

1 IV.

2 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

3
4 To qualify for disability benefits, a claimant must demonstrate
5 a medically determinable physical or mental impairment that prevents him
6 from engaging in substantial gainful activity³ and that is expected to
7 result in death or to last for a continuous period of at least twelve
8 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
9 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
10 incapable of performing the work he previously performed and incapable
11 of performing any other substantial gainful employment that exists in
12 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
13 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

14
15 To decide if a claimant is entitled to benefits, an ALJ conducts
16 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are as
17 follows:

18
19 (1) Is the claimant presently engaged in substantial gainful
20 activity? If so, the claimant is found not disabled.
21 If not, proceed to step two.

22
23 (2) Is the claimant's impairment severe? If not, the
24 claimant is found not disabled. If so, proceed to step
25 three.

26
27 ³ Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 (3) Does the claimant's impairment meet or equal one of a
2 list of specific impairments described in 20 C.F.R. Part
3 404, Subpart P, Appendix 1? If so, the claimant is
4 found disabled. If not, proceed to step four.

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

9
10 (5) Is the claimant able to do any other work? If not, the
11 claimant is found disabled. If so, the claimant is
12 found not disabled.

13
14 Tackett, 180 F.3d at 1098-99; see also 20 C.F.R. §§ 404.1520(b)-(g)(1),
15 416.920(b)-(g)(1); Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th
16 Cir. 2001) (citations omitted).

17
18 The claimant has the burden of proof at steps one through four, and
19 the Commissioner has the burden of proof at step five. Bustamante, 262
20 F.3d at 953-54. If, at step four, the claimant meets his burden of
21 establishing an inability to perform past work, the Commissioner must
22 show that the claimant can perform some other work that exists in
23 "significant numbers" in the national economy, taking into account the
24 claimant's residual functional capacity ("RFC"),⁴ age, education, and

25
26 _____
27 ⁴ Residual functional capacity is "the most [one] can still do
28 despite [one's] limitations" and represents an assessment "based on all
the relevant evidence in [one's] case record." 20 C.F.R. §§
404.1545(a), 416.945(a).

1 work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
2 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may
3 do so by the testimony of a vocational expert or by reference to the
4 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart
5 P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240
6 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
7 (strength-related) and nonexertional limitations, the Grids are
8 inapplicable and the ALJ must take the testimony of a VE. Moore v.
9 Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

10
11 **V.**

12 **THE ALJ'S DECISION**

13
14 At step one, the ALJ found that Plaintiff had not engaged in
15 substantial gainful activity since the alleged disability onset date.
16 (AR 10).

17
18 At step two, the ALJ determined that Plaintiff had medically
19 determinable impairments of headaches and asthma. (Id.). However, he
20 found that Plaintiff's impairments were not severe. (Id.). Therefore,
21 the ALJ concluded that Plaintiff was not disabled at any time through
22 the date of the decision. (AR 16).

23
24 **VI.**

25 **STANDARD OF REVIEW**

26
27 Under 42 U.S.C. § 405(g), a district court may review the
28 Commissioner's decision to deny benefits. The court may set aside the

1 Commissioner's decision when the ALJ's findings are based on legal error
2 or are not supported by substantial evidence in the record as a whole.
3 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
4 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

5
6 "Substantial evidence is more than a scintilla, but less than a
7 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
8 which a reasonable person might accept as adequate to support a
9 conclusion." Id. To determine whether substantial evidence supports
10 a finding, the court must "'consider the record as a whole, weighing
11 both evidence that supports and evidence that detracts from the
12 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny
13 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can
14 reasonably support either affirming or reversing that conclusion, the
15 court may not substitute its judgment for that of the Commissioner.
16 Reddick, 157 F.3d at 720-21.

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1 VII.

2 DISCUSSION

3
4 The ALJ's Finding That Plaintiff's Headaches Were Not Severe At
5 Step Two Was Error
6

7 Plaintiff argues that the ALJ improperly found that Plaintiff's
8 headaches and asthma were not severe.⁵ (Jt. Stip. at 18-21). The
9 evidence demonstrates that Plaintiff satisfies the very low standard for
10 a step-two finding of severity as to her headaches, but not her asthma.
11 The Court remands this action for reevaluation of Plaintiff's claim
12 based upon her headaches after step-two.
13

14 By its own terms, the evaluation at step two is a de minimis test
15 intended to weed out the most minor of impairments. See Bowen v.
16 Yuckert, 482 U.S. 137, 153-154, 107 S. Ct. 2287, 96 L. Ed. 2d 119
17 (1987); Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001)
18 (stating that the step two inquiry is a de minimis screening device to
19 dispose of groundless claims) (quoting Smolen, 80 F.3d at 1290).
20 According to the Commissioner's regulations, "an impairment is not
21 severe if it does not significantly limit [the claimant's] physical
22 ability to do basic work activities." Smolen, 80 F.3d at 1290. A
23 severe impairment must have lasted or be expected to last for a
24
25

26 ⁵ To the extent Plaintiff contends that the ALJ erred in finding
27 that Plaintiff's asthma was not severe, the claim similarly fails. The
28 record clearly demonstrates that Plaintiff's asthma was well controlled.
(AR 202, 277, 282, 288).

1 continuous period of not less than twelve months. 20 C.F.R. §§
2 404.1509, 416.909.

3
4 An impairment or combination of impairments can be found "not
5 severe" only if the evidence establishes a slight abnormality or a
6 combination of slight abnormalities which have "no more than a minimal
7 effect on an individual's ability to work." SSR 85-28. Only those
8 claimants with slight abnormalities that do not significantly limit any
9 "basic work activity" can be denied benefits at step two. Bowen, 482
10 U.S. at 158). If the evidence presented by the claimant presents more
11 than a "slight abnormality," the step two requirement of "severe" is
12 met, and the sequential evaluation process should continue. Smolen, 80
13 F.3d at 1290. "Reasonable doubts on severity are to be resolved in
14 favor of the claimant." Newell v. Comm. of Social Security, 347 F.3d
15 541, 547 (3rd Cir. 2003).

16
17 The ALJ erred when he concluded that Plaintiff's headaches were not
18 severe. (AR 10-16). The extent and duration of Plaintiff's medical
19 treatment, including multiple MRIs, neurological tests, examinations and
20 a variety of treatment approaches (i.e., medications and Botox
21 injections), demonstrate that her headaches were on-going and
22 significant. Plaintiff was admitted to the hospital for treatment of
23 her headaches on at least two occasions. (AR 223, 215). The medical
24 evidence demonstrates that Plaintiff consistently and regularly sought
25 treatment for her migraines from 2003 through 2006. (AR 363, 200, 223,
26 229, 230, 214, 215).

1 Plaintiff's evidence regarding her headaches demonstrates more than
2 a "slight abnormality." Accordingly, it was error for the ALJ to find
3 that her headaches were not severe at step two. Remand is required to
4 remedy this error.

5
6 **VIII.**

7 **CONCLUSION**

8
9 Because the Court finds that remand is required due to the step two
10 error, the Court declines to reach the remaining issues raised by
11 Plaintiff. The Court notes that the ALJ appeared to rely, in part, on
12 evidence in the record that Plaintiff was possibly employed during the
13 period of alleged disability or that she was engaged in the unlawful
14 sale of her narcotic prescriptions. The degree to which the ALJ based
15 his denial of benefits on these two facts was unclear from the ALJ's
16 decision. If the ALJ intends to rely on certain evidence to support his
17 denial of benefits, then he must indicate which evidence he is relying
18 upon (and the source and/or reliability of that evidence).

19
20 If Plaintiff was engaged in substantial gainful employment during
21 the alleged period of disability, then the record should be developed
22 on that issue. Furthermore, the Court notes that there is ample
23 evidence in the record that Plaintiff was prescribed narcotic
24 medications. The ALJ should determine whether or not side effects from
25 those medications would have an impact on Plaintiff's ability to work.
26 Finally, if the ALJ rejects the treating physician's opinions, the ALJ
27 must provide clear and convincing reasons for rejecting those opinions.

1 Consistent with the foregoing, and pursuant to sentence four of 42
2 U.S.C. § 405(g),⁶ IT IS ORDERED that judgment be entered REVERSING the
3 decision of the Commissioner and REMANDING this action 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: October 20, 2009.

9 /S/

10
11 SUZANNE H. SEGAL
12 UNITED STATES MAGISTRATE JUDGE
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26 _____
27 ⁶ 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."