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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

CHRISTOPHER MOSQUEDA,	)	NO. EDCV 09-1393 SS
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM DECISION AND ORDER</b>
	)	
MICHAEL J. ASTRUE,	)	
Commissioner of the Social	)	
Security Administration,	)	
	)	
Defendant.	)	
	)	

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**INTRODUCTION**

Plaintiff Christopher Mosqueda ("Plaintiff") brings this action seeking to reverse and remand the decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying his application for Supplemental Security Income ("SSI") benefits. 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 REMANDED for further proceedings.

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1 **PROCEDURAL HISTORY**

2  
3 On June 30, 2004, Plaintiff filed an application for SSI benefits  
4 alleging a disability beginning on August 1, 1998. (Administrative  
5 Record ("AR") 38-41). This application was denied on August 27, 2004,  
6 and again upon reconsideration on October 8, 2004. (AR 42, 49).  
7 Plaintiff then requested a hearing, which was held before Administrative  
8 Law Judge ("ALJ") F. Keith Varni on September 26, 2005. (AR 20, 54).  
9 Plaintiff appeared with counsel and testified. (AR 202-05). Mary  
10 Mosquda, Plaintiff's mother, also testified at the hearing. (AR 206-  
11 09).

12  
13 On December 9, 2005, the ALJ issued a decision denying benefits.  
14 (AR 17-25). Plaintiff sought and was granted review of this decision  
15 before the Appeals Council. (AR 16). On March 8, 2006, the Appeals  
16 Council remanded the case to the ALJ for further proceedings. (AR 12).  
17 The Appeals Council instructed the ALJ to evaluate Plaintiff's mental  
18 impairment "in accordance with the special technique described in 20  
19 C.F.R. § 416.920a," develop the record regarding Plaintiff's mental  
20 condition and give further consideration to Plaintiff's residual  
21 functional capacity ("RFC"). (AR 13-14).

22  
23 Thereafter, Plaintiff appeared and testified at a March 21, 2007  
24 hearing before the ALJ. (AR 364-79). Vocational Expert Troy Scott (the  
25 "VE") also testified. (AR 380-82). On April 4, 2007, the ALJ issued  
26 a decision denying benefits. (AR 215-24). Thereafter, Plaintiff  
27 requested a review of the hearing decision, which was denied by the  
28

1 Appeals Council on June 26, 2009. (AR 211-13). Plaintiff filed the  
2 instant action on July 29, 2009. Pursuant to the Court's Case  
3 Management Order, the parties filed a Joint Stipulation ("Jt. Stip.")  
4 on May 14, 2010.

5  
6 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**  
7

8 To qualify for disability benefits, a claimant must demonstrate a  
9 medically determinable physical or mental impairment that prevents him  
10 from engaging in substantial gainful activity<sup>1</sup> and that is expected to  
11 result in death or to last for a continuous period of at least twelve  
12 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing  
13 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant  
14 incapable of performing the work he previously performed and incapable  
15 of performing any other substantial gainful employment that exists in  
16 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.  
17 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

18  
19 To decide if a claimant is entitled to benefits, an ALJ conducts  
20 a five-step inquiry. 20 C.F.R. § 416.920. The steps are:

- 21  
22 (1) Is the claimant presently engaged in substantial gainful  
23 activity? If so, the claimant is found not disabled.  
24 If not, proceed to step two.  
25  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Substantial gainful activity means work that involves doing  
significant and productive physical or mental duties and is done for pay  
or profit. 20 C.F.R. § 416.910.

1 (2) Is the claimant's impairment severe? If not, the  
2 claimant is found not disabled. If so, proceed to step  
3 three.

4 (3) Does the claimant's impairment meet or equal the  
5 requirements of any impairment listed at 20 C.F.R. Part  
6 404, Subpart P, Appendix 1? If so, the claimant is  
7 found disabled. If not, proceed to step four.

8 (4) Is the claimant capable of performing his past work? If  
9 so, the claimant is found not disabled. If not, proceed  
10 to step five.

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

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

18  
19 The claimant has the burden of proof at steps one through four, and  
20 the Commissioner has the burden of proof at step five. Bustamante, 262  
21 F.3d at 953-54. If, at step four, the claimant meets his burden of  
22 establishing an inability to perform the past work, the Commissioner  
23 must show that the claimant can perform some other work that exists in  
24 "significant numbers" in the national economy, taking into account the  
25 claimant's RFC,<sup>2</sup> age, education and work experience. Tackett, 180 F.3d  
26 at 1100; 20 C.F.R. § 416.920(g)(1). The Commissioner may do so by the

27 \_\_\_\_\_  
28 <sup>2</sup> Residual functional capacity is "the most [one] can still do  
despite [his] limitations" and represents an assessment "based on all  
the relevant evidence." 20 C.F.R. § 416.945(a).

1 testimony of a vocational expert or by reference to the Medical-  
2 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,  
3 Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240  
4 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional  
5 (strength-related) and nonexertional limitations, the Grids are  
6 inapplicable and the ALJ must take the testimony of a vocational expert.  
7 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

8  
9 **THE ALJ'S DECISION**

10  
11 The ALJ employed the five-step sequential evaluation process. At  
12 step one, the ALJ found that Plaintiff had not engaged in substantial  
13 gainful employment since the alleged onset date of his disability. (AR  
14 220). At step two, the ALJ found that Plaintiff did not have any severe  
15 physical impairments. (Id.). However, the ALJ found that Plaintiff  
16 suffered from depression, a personality disorder, and a history of drug  
17 and alcohol abuse. (Id.). The ALJ noted Dr. Linda Smith's observations  
18 of Plaintiff, including her statement that Plaintiff was "far less than  
19 a reliable historian or credible in his presentation and in his  
20 complaints" and "not impaired from a psychiatric standpoint." (AR 222).  
21 The ALJ also stated that "there was no evidence at all of the amount of  
22 'severe' [mental] problems that are mentioned . . . [by] Dr. Kunan."  
23 (Id.). Nevertheless, the ALJ characterized Plaintiff's mental  
24 impairments as "severe" at step two. (AR 220).

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1 At step three, the ALJ found that Plaintiff's impairments, either  
2 singly or in combination, did not meet or equal the requirements of any  
3 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR  
4 220). At step four, the ALJ determined that Plaintiff had no past  
5 relevant work, a limited education, the ability to communicate in  
6 English, and, at 32, was a "younger individual." (AR 223).

7  
8 At step five, the ALJ found that based on Plaintiff's age,  
9 educational background, work experience, RFC, and testimony by a  
10 vocational expert, there are a significant number of jobs in the  
11 national economy that Plaintiff can perform, including work as an  
12 automobile cleaner, building cleaner, or dishwasher. (Id.).  
13 Accordingly, the ALJ found that Plaintiff was not disabled. (AR 215,  
14 224).

#### 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 Plaintiff contends that the ALJ failed to evaluate Plaintiff’s  
12 mental impairment using the special technique described in 20 C.F.R.  
13 § 416.920a. (Jt. Stip. at 3). Plaintiff further claims that the ALJ did  
14 not properly consider the findings of the State Agency psychiatrist and  
15 did not pose a complete hypothetical to the Vocational Expert. (Id. at  
16 9, 13). Finally, Plaintiff claims that the ALJ erred in finding that  
17 Plaintiff could perform work in the national economy. (Id. at 15).

18  
19 The Court agrees with Plaintiff’s first claim and therefore does  
20 not reach his other three claims. For the reasons discussed below, the  
21 Court finds that the ALJ’s decision should be reversed and this action  
22 remanded for further proceedings.

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1            The ALJ Failed To Follow The Regulations For Evaluating The  
2            Severity Of Mental Impairments

3  
4            Plaintiff claims that the ALJ failed to evaluate Plaintiff's mental  
5 impairment in accordance with the Social Security Regulations. (Jt.  
6 Stip. at 3). Specifically, Plaintiff contends that the ALJ erred by not  
7 applying the "special technique" described in 20 C.F.R. § 416.920a. Id.  
8 This Court agrees.

9  
10           When a plaintiff raises a colorable claim of mental impairment, the  
11 ALJ must follow a "special technique" to evaluate the plaintiff's  
12 limitations. 20 C.F.R. § 416.920a (2006) ("[W]e must follow a special  
13 technique at each level in the administrative review process"). The ALJ  
14 must evaluate the plaintiff's claims and incorporate the pertinent  
15 findings and conclusions into his decision. Id. ("The decision must  
16 show the significant history, including examination and laboratory  
17 findings, and the functional limitations that were considered in  
18 reaching a conclusion about the severity of the mental impairment(s).  
19 The decision must include a specific finding as to the degree of  
20 limitation in each of the functional areas."). If the claimant has a  
21 medically determinable impairment, the ALJ must "rate the degree of  
22 functional limitation resulting from the impairment(s)" for the four  
23 broad functional areas: activities of daily living; social functioning;  
24 concentration, persistence and pace; and episodes of decompensation.  
25 20 C.F.R. § 404.1520a(b) (2), (c) (3).

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1 An ALJ's failure to follow the required procedure mandates remand  
2 if the claimant has a "colorable claim of a mental impairment."  
3 Gutierrez v. Apfel, 199 F.3d 1048, 1051 (9th Cir. 2002) (holding that,  
4 where there is a colorable claim of mental impairment, the ALJ must  
5 strictly follow regulations for evaluating mental impairment); see also  
6 Selassie v. Barnhart, 203 Fed. App'x 174, 176 (9th Cir. 2006)  
7 ("Specifically, the regulation requires the ALJ's decision to 'include  
8 a specific finding as to the degree of limitation in each of the  
9 functional areas described' in the regulation") (citing 20 C.F.R.  
10 § 404.1520a(e)(2)); Behn v. Barnhart, 463 F. Supp. 2d 1043, 1047 (C.D.  
11 Cal. 2006) (remanding for the ALJ's failure to analyze the plaintiff's  
12 functional limitations). A colorable claim is one which is not "wholly  
13 insubstantial, immaterial, or frivolous." Cassim v. Bowen, 824 F.2d  
14 791, 795 (9th Cir. 1987). Amendments to the Social Security regulations  
15 since Gutierrez have given the ALJ greater discretion in deciding how  
16 to publish the mandated findings, but even the amended version requires  
17 the ALJ to follow the "special technique," "document application of the  
18 technique in the decision," and include specific findings "as to the  
19 degree of limitation in each of the functional areas." 20 C.F.R.  
20 § 404.1520a(e). This Court will only consider the ALJ's failure to do  
21 so harmless error if this failure is "inconsequential" to the ALJ's  
22 ultimate decision. Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050,  
23 1055 (9th Cir. 2006).

24  
25 Plaintiff has a colorable claim of mental impairment. Not only do  
26 two separate medical experts support Plaintiff's claim of mental  
27 impairment, (AR 164, 195-96) but the ALJ himself found that Plaintiff  
28 has "severe" mental impairments including depression, a personality

1 disorder, and "a history of substance abuse." (AR 220). The ALJ states  
2 that these mental impairments are severe enough to impede Plaintiff's  
3 "ability to perform all or substantially all of the requirements of work  
4 at any level." (AR 223). Because Plaintiff presents a colorable claim  
5 of mental impairment, the ALJ must follow the special technique to  
6 evaluate the degree of Plaintiff's limitation in each of the functional  
7 areas. Gutierrez, 199 F.3d at 1051.

8  
9 It is undisputed that the ALJ's decision does not include specific  
10 findings related to the four functional areas described in the  
11 regulations. (Jt. Stip. at 8) ("Admittedly, the ALJ did not specify the  
12 degree of Plaintiff's limitations in the four broad functional areas .  
13 . . ."). The Commissioner argues that this error was harmless, because  
14 even if the ALJ had applied the technique, he would have arrived at the  
15 same conclusion and found that Plaintiff did not meet a listing-level  
16 impairment. (Id.). The Commissioner cites Gunderson v. Astrue, 2010  
17 WL 1041443 at \*1 (9th Cir. March 22, 2010), to support this proposition,  
18 relying upon the Court's statement that "in certain circumstances, the  
19 failure to explicitly use the special technique may constitute harmless  
20 error." (Jt. Stip. at 9).

21  
22 However, the Commissioner's reliance upon this decision is  
23 misplaced. In Gunderson, the court specifically found remand necessary  
24 despite the Plaintiff's concession that even if the ALJ had adhered to  
25 the requirements of the special technique, the plaintiff could not meet  
26 a listing-level impairment at step three. Gunderson, 2010 WL 1041443  
27 at \*3. Remand was required because it was "not clear whether the ALJ  
28 would have arrived at the same conclusion regarding [the plaintiff's]

1 residual functional capacity (RFC) to perform work had the ALJ adhered  
2 to the requirements of section 404.1520a." Id. at \*1.

3  
4 In this case, it is similarly impossible to determine whether the  
5 ALJ would have arrived at the same conclusion regarding Plaintiff's RFC  
6 had the ALJ followed the special technique. See Gunderson, 2010 WL  
7 1041443 at \*3. Effective review by this Court is frustrated by the  
8 ALJ's failure to adhere to the regulations. Because the decision  
9 contains no specific findings regarding Plaintiff's degree of limitation  
10 in the four functional areas by which disabling conditions are rated,  
11 the Court "cannot determine whether there is substantial evidence for  
12 the ALJ's conclusion that [Plaintiff's] impairment, while severe, was  
13 not as severe as any listed disabling condition." Kohler v. Astrue, 546  
14 F.3d 260, 267-68 (2d Cir. 2008) (citing Gutierrez, 199 F.3d at 1051).  
15 Therefore, the failure to use the special technique was not harmless  
16 here.

17  
18 As a general rule, remand is warranted where additional  
19 administrative proceedings could remedy defects in the Commissioner's  
20 decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000).  
21 Here, remand will allow the ALJ to evaluate Plaintiff's mental  
22 impairment using the procedures set out in 20 C.F.R. § 1520a and perform  
23 the subsequent steps of the analytical process in light of the new  
24 mental impairment evaluation. See Gutierrez, 199 F.3d at 1051.

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**CONCLUSION**

Consistent with the foregoing, IT IS ORDERED that judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further proceedings consistent with this decision. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: June 30, 2010

----- /s/ -----  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE