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

MOHAMMAD HASAN ALSYOUF,)
)
Plaintiff,)
)
v.)
)
MICHAEL J. ASTRUE,)
Commissioner of the Social)
Security Administration,)
)
Defendant.)
_____)

NO. EDCV 09-01828 SS

MEMORANDUM DECISION AND ORDER

INTRODUCTION

Plaintiff ("Plaintiff") is seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying his application for Supplemental Security Income. Alternatively, he asks for a remand. The parties have consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. Pursuant to the Court's Case Management Order, the parties filed a joint stipulation ("Jt. Stip.") on October 17, 2007. For the reasons stated below, the decision of

1 the Commissioner is REVERSED and the case is REMANDED for further
2 proceedings consistent with this decision.

3
4 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

5
6 To qualify for disability benefits, a claimant must
7 demonstrate a medically determinable physical or mental impairment
8 that prevents him from engaging in substantial gainful activity¹
9 and that is expected to result in death or to last for a continuous
10 period of at least twelve months. Reddick v. Chater, 157 F.3d 715,
11 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The
12 impairment must render the claimant incapable of performing the
13 work he previously performed and incapable of performing any other
14 substantial gainful employment that exists in the national economy.
15 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42
16 U.S.C. § 423(d)(2)(A)).

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

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

25
26
27 ¹ 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 (2) Is the claimant's impairment severe? If not, the
2 claimant is found not disabled. If so, proceed to
3 step three.

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

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

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

15
16 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262
17 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. §§
18 404.1520(b)-(g)(1) & 416.920(b)-(g)(1).

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

1 ("RFC"),² age, education, and work experience. Tackett, 180 F.3d
2 at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§
3 404.1520(g)(1), 416.920(g)(1). The Commissioner may do so by the
4 testimony of a vocational expert or by reference to the Medical-
5 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,
6 Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel,
7 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both
8 exertional (strength-related) and nonexertional limitations, the
9 Grids are inapplicable and the ALJ must take the testimony of a
10 vocational expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir.
11 2000).

12 13 **STANDARD OF REVIEW** 14

15 Under 42 U.S.C. § 405(g), a district court may review the
16 Commissioner's decision to deny benefits. The court may set aside
17 the Commissioner's decision when the ALJ's findings are based on
18 legal error or are not supported by substantial evidence in the
19 record as a whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th
20 Cir. 2001) (citing Tackett, 180 F.3d at 1097); Smolen v. Chater,
21 80 F.3d 1273, 1279 (9th Cir. 1996) (citing Fair v. Bowen, 885 F.2d
22 597, 601 (9th Cir. 1989)).
23
24
25

26 ² Residual functional capacity is "what [one] can still do
27 despite [his] limitations" and represents an "assessment based upon
28 all of the relevant evidence." 20 C.F.R. §§ 404.1545(a),
416.945(a).

1 "Substantial evidence is more than a scintilla, but less than
2 a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v.
3 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
4 evidence which a reasonable person might accept as adequate to
5 support a conclusion." Id. (citing Jamerson, 112 F.3d at 1066;
6 Smolen, 80 F.3d at 1279). To determine whether substantial
7 evidence supports a finding, the court must "'consider the record
8 as a whole, weighing both evidence that supports and evidence that
9 detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d
10 at 1035 (citing Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.
11 1993)). If the evidence can reasonably support either affirming or
12 reversing that conclusion, the court may not substitute its
13 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21
14 (citing Flaten v. Sec'y, 44 F.3d 1453, 1457 (9th Cir. 1995)).

15
16 **DISCUSSION**
17

18 **A. The ALJ Erred By Concluding At Step Two That**
19 **Plaintiff's Mental Impairment Was "Non-Severe"**
20

21 Plaintiff argues that the ALJ erred by failing to properly
22 assess Plaintiff's residual functional capacity. (Jt. Stip. at 2-
23 3). In particular, Plaintiff contends that the ALJ ignored records
24 regarding Plaintiff's mental impairment. (Id. at 2-5). For the
25 reasons discussed below, the Court finds that the ALJ failed to
26 properly assess Plaintiff's mental health impairment.
27
28

1 By its own terms, the evaluation at step two is a de minimis
2 test intended to weed out the most minor of impairments. See Bowen
3 v. Yuckert, 482 U.S. 137, 153-154, 107 S. Ct. 2287, 96 L. Ed. 2d
4 119 (1987); Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir.
5 2001) (stating that the step two inquiry is a de minimis screening
6 device to dispose of groundless claims) (quoting Smolen, 80 F.3d at
7 1290). An impairment is not severe only if the evidence
8 establishes "a slight abnormality that has no more than a minimal
9 effect on an individual's ability to work." Smolen, 80 F.3d at
10 1290 (internal quotations and citations omitted).

11
12 The ALJ here applied more than a de minimis test when he
13 determined that Plaintiff's mental impairment was not severe.
14 Moreover, he failed to follow the Secretary's own regulations
15 governing the evaluation of mental impairments, as described below.

16
17 Where there is evidence of a mental impairment that allegedly
18 prevents the plaintiff from working, the Agency has supplemented
19 the five-step sequential evaluation process with additional
20 regulations.³ Maier v. Comm'r of the Soc. Sec. Admin., 154 F.3d
21 913, 914-15 (9th Cir. 1998) (citing 20 C.F.R. § 416.920a) (per
22 curiam). First, the ALJ must determine the presence or absence of
23 certain medical findings relevant to the plaintiff's ability to
24 work. 20 C.F.R. § 416.920a(b)(1). Second, when the plaintiff

25
26 ³These additional steps are intended to assist the ALJ in
27 determining the severity of mental impairments at steps two and
28 three. 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 establishes these medical findings, the ALJ must rate the degree of
2 functional loss resulting from the impairment by considering four
3 areas of function: (a) activities of daily living; (b) social
4 functioning; (c) concentration, persistence, or pace; and (d)
5 episodes of decompensation. 20 C.F.R. § 416.920a(c)(2)-(4).
6 Third, after rating the degree of loss, the ALJ must determine
7 whether the claimant has a severe mental impairment. 20 C.F.R. §
8 416.920a(d). Fourth, when a mental impairment is found to be
9 severe, the ALJ must determine if it meets or equals a listing in
10 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §
11 416.920a(d)(2). Finally, if a listing is not met, the ALJ must
12 then assess the plaintiff's RFC, and the ALJ's decision "must
13 incorporate the pertinent findings and conclusions" regarding he
14 plaintiff's mental impairment, including "a specific finding as to
15 the degree of limitation in each of the functional areas described
16 in [§ 416.920a(c)(3)]." 20 C.F.R. § 416.920a(d)(3), (e)(2).

17
18 The regulations describe an impairment as follows:

19
20 A physical or mental impairment must result from
21 anatomical, physiological, or psychological abnormalities
22 which can be shown by medically acceptable clinical and
23 laboratory diagnostic techniques. A physical or mental
24 impairment must be established by medical evidence
25 consisting of signs, symptoms, and laboratory findings,
26 not only by [a plaintiff's] statements of symptoms.

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

6
7 In a March 2004 report, Marilyn Neudeck-Dicken, a psychologist
8 and a Board Certified expert in Traumatic Stress, evaluated
9 Plaintiff's posttraumatic stress disorder. (AR 234). She
10 concluded that Plaintiff's condition was not "permanent and
11 stationary" and that he would need therapeutic support over the
12 course of many years. (AR 236). On May 29, 2003, Dr. Neudeck-
13 Dicken assessed Plaintiff with a GAF of 41-50, indicative of
14 serious symptomatology and limitations. (AR 238-243). In 2004,
15 Dr. McDaniel, a psychiatrist, completed an evaluation and report of
16 Plaintiff. Dr. McDaniel noted that Plaintiff's treating doctor had
17 prescribed the antidepressant Remeron, anti-anxiety medication,
18 i.e., Xanax, as well as Gabitril and Effexor, another
19 antidepressant. (Id. at 338). Dr. McDaniel concluded that
20 Plaintiff's psychiatric disability was "minimal to very slight",
21 unless Plaintiff returned to retail position which would cause it
22 to rise to a moderate to severe level. (Id. at 350-351).

23
24 Dr. Joel Frank, a psychiatrist, evaluated Plaintiff on May 17,
25 2005, with the assistance of psychologist Gale J. Schuler. (AR
26 396). Dr. Frank diagnosed Plaintiff with Post-Traumatic Stress
27 Disorder, Chronic. Notably, Dr. Frank did not conclude that this
28 disorder was resolved. Dr. Frank also diagnosed Plaintiff with a

1 depressive disorder. (AR 406). Although Dr. Frank concluded that
2 Plaintiff's limitations were "slight to moderate", he also found
3 that Plaintiff would require access to future psychiatric treatment
4 and should have access to psychotropic medication management.

5
6 These objective medical findings indicate that Plaintiff
7 suffered from a mental health impairment. See 20 C.F.R. §
8 416.927(a)(2) ("Medical opinions . . . that reflect judgments about
9 the nature and severity of [a plaintiff's] impairment(s), including
10 symptoms, diagnosis and prognosis," are evidence that a plaintiff
11 may submit in support of his disability claim). The ALJ, however,
12 failed to follow the Secretary's regulations for evaluating mental
13 impairments. Moreover, although the step-two analysis has been
14 recognized as a de minimis test designed to identify and dismiss
15 only frivolous claims, the ALJ found that Plaintiff's mental
16 impairment was not severe based in part on the fact that Plaintiff
17 had not suffered any psychiatric hospitalizations. (AR 49). A
18 claimant may suffer from a mental impairment without having been
19 hospitalized for that limitation. Thus, it appears that the ALJ
20 applied more than a de minimis test and his conclusion at step two
21 that Plaintiff does not suffer from a severe mental impairment was
22 error. See 20 C.F.R. § 416.920a(b)(1).

23
24 Remand for further proceedings is appropriate where additional
25 proceedings could remedy defects in the Commissioner's decision.
26 See Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000); Kail v.
27 Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984). Because the ALJ

1 improperly evaluated Plaintiff's mental health impairment at step
2 two, the case must be remanded to remedy this defect.

3
4 Upon remand, the ALJ must conduct the supplemental evaluation
5 of mental impairment evidence. Normally, the ALJ must first
6 determine the presence or absence of certain medical findings
7 relevant to the plaintiff's ability to work. 20 C.F.R. §
8 416.920a(b)(1). However, this Court has determined that there is
9 objective medical evidence that Plaintiff suffers from a mental
10 impairment relevant to his ability to work. Thus, the ALJ need not
11 address this question. Accordingly, the ALJ must only complete the
12 remaining inquiries required in the supplemental evaluation of
13 mental impairment evidence.⁴

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18 _____
19 ⁴Specifically, the ALJ must rate the degree of functional loss
20 resulting from the impairment by considering four areas of
21 function: (a) activities of daily living; (b) social functioning;
22 (c) concentration, persistence, or pace; and (d) episodes of
23 decompensation. 20 C.F.R. § 416.920a(c)(2)-(4). Next, after
24 rating the degree of loss, the ALJ must determine whether the
25 claimant has a severe mental impairment. 20 C.F.R. § 416.920a(d).
26 If the mental impairment is found to be severe, the ALJ must
27 determine if it meets or equals a listing in 20 C.F.R. Part 404,
28 Subpart P, Appendix 1. 20 C.F.R. § 416.920a(d)(2). Finally, if a
listing is not met, the ALJ must then assess the plaintiff's RFC,
and the ALJ's decision "must incorporate the pertinent findings and
conclusions" regarding the plaintiff's mental impairment, including
"a specific finding as to the degree of limitation in each of the
functional areas described in [§ 416.920a(c)(3)]." 20 C.F.R. §
416.920a(d)(3), (e)(2).

1 **B. The ALJ Erred By Relying Solely On The Grids**
2 **To Determine Whether Plaintiff Is Disabled**
3

4 To determine if substantial gainful work exists for the
5 claimant, an ALJ may use the Medical-Vocational Guidelines
6 ("grids") to consider claimants with substantially uniform levels
7 of impairment. Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.
8 1988). When the grids do not completely describe the claimant's
9 abilities and limitations, such as when the claimant has both
10 exertional and significant nonexertional limitations (as is the
11 case in the instant claim), the grids are inapplicable and the ALJ
12 must take the testimony of a VE. Id.; see also Cooper v. Sullivan,
13 880 F.2d 1152, 1155 (9th Cir. 1989).

14
15 Examples of non-exertional limitations where use of the Grids
16 may be inappropriate are: poor vision, see Tackett v. Apfel, 180
17 F.3d 1094, 1101-02 (9th Cir. 1999); pain, see Permitter v .Heckler,
18 765 F.2d 870, 872, (9th Cir. 1985); and "mental, sensory,
19 postural, manipulative, or environmental (e.g., inability to
20 tolerate dust or fumes) limitations.'" Burkhart v. Bowen, 856 F.2d
21 1335, 1340-41 (9th Cir. 1988) (quoting Desrosiers v. Secretary of
22 Health and Human Services, 846 F.2d 573, 579 (9th Cir. 1988)).
23 When a claimant has "significant non-exertional limitations," the
24 ALJ cannot rely solely on the grids. Hoopai v. Astrue, 499 F.3d
25 1071, 1075 (9th Cir. 2007); see also Burkhart, 856 F.2d at 1340
26 ("the grids are inapplicable [w]hen a claimant's non-exertional
27 limitations are sufficiently severe so as to significantly limit
28

1 the range of work permitted by the claimant's exertional
2 limitations.")(internal quotations omitted).

3
4 In Dr. Adeyemo's report, analyzing Plaintiff's mental
5 impairments, the doctor concluded:

6
7 Claimant has difficulty understanding, retaining and
8 executing simple instructions because of moderate
9 impairment of his concentration and short term memory .
10 . . He will have difficulty responding appropriately to
11 co-workers, supervisors and the public because of the
12 significant Depressive and Anxiety Spectrum symptoms.
13 For the same reason [h]e will have difficulty responding
14 appropriately to usual work situations.

15
16 (AR 30) .

17
18 In Dr. McDaniel's 2004 report, the doctor stated:

19
20 I would preclude this individual from returning to his
21 usual and customary job as returning to a retail position
22 would cause his symptomatology to rise to a moderate to
23 severe level creating incapacity for working in a retail
24 situation. Outside a retail situation, his
25 symptomatology would be considered minimal to very
26 slight.

27
28 (AR 350-351) .

1 The ALJ, after consulting the grids, found that Plaintiff
2 could perform the "full range of sedentary work." (AR 56).
3 However, given the significant non-exertional limitations described
4 above, it was error for the ALJ to rely solely on the grids. Upon
5 remand, in addition to reevaluating Plaintiff's RFC with the
6 finding that Plaintiff's mental impairment is severe, at step two,
7 the ALJ must obtain testimony from a vocational expert, who can
8 consider the record evidence concerning both exertional and non-
9 exertional limitations of Plaintiff.

10
11 **C. The ALJ Failed To Provide Clear And Convincing**
12 **Reasons To Reject Plaintiff's Subjective Pain**
13 **Testimony**

14
15 The ALJ may reject a plaintiff's testimony if he or she makes
16 an explicit credibility finding that is "supported by a specific,
17 cogent reason for the disbelief." Rashad v. Sullivan, 903 F.2d
18 1229, 1231 (9th Cir. 1990) (internal citations omitted). Unless
19 there is affirmative evidence showing that the plaintiff is
20 malingering, the ALJ's reasons for rejecting the plaintiff's
21 testimony must be "clear and convincing." Lester, 81 F.3d at 834.
22 Moreover, the ALJ may not discredit a claimant's testimony of pain
23 and deny disability benefits solely because the degree of pain
24 alleged by the claimant is not supported by objective medical
25 evidence. Bunnell v. Sullivan, 947 F.2d 341, 346-47 (9th Cir.
26 1991).

1 Plaintiff provided testimony regarding his symptoms and pain.
2 (AR 550-561). Plaintiff testified that he has concentration
3 problems (AR 550-51); pain in his neck, low back and left leg (AR
4 551-52); must lay down for 4-6 hours each day (AR 552-53);
5 decreased memory, concentration, and fear of people (AR 557); he
6 suffers from nightmares and flashbacks of the shooting (AR 558);
7 and that after 3 hours of sitting/standing/walking, he has to lay
8 down for 1-2 hours. (AR 560). The ALJ relied solely on the reason
9 that Plaintiff's daily activities were inconsistent with his
10 statements regarding his limitations. (AR 50). This single reason
11 for rejecting Plaintiff's testimony was insufficient to reject the
12 entirety of Plaintiff's subjective complaints and does not qualify
13 as a "clear and convincing reason." The evidence regarding
14 Plaintiff's daily activities was inconsistent and not a convincing
15 reason, on its own, to reject his testimony. Accordingly, the
16 action must be remanded on this ground as well.

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CONCLUSION

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

DATED: January 21, 2011

/S/

 SUZANNE H. SEGAL
 UNITED STATES MAGISTRATE JUDGE