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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

MARLON E. ROJAS,	)	No. ED CV 09-01971-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's ("ALJ") finding at

1 step two that Plaintiff's mental impairments are not  
2 legally severe is based on a proper evaluation of evidence  
3 from treating, consulting, and non-examining sources;

4 2. Whether the ALJ's finding that Plaintiff's prescribed  
5 medications do not impose any functionally limiting side  
6 effects is based on a proper evaluation of treating  
7 physician evidence, medical expert testimony, and  
8 Plaintiff's subjective complaints.

9 (JS at 7.)

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

15  
16 I

17 **THE STEP TWO FINDING THAT PLAINTIFF DOES NOT HAVE A SEVERE**  
18 **MENTAL IMPAIRMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

19 In the ALJ's decision (AR 10-22), he concludes that the Plaintiff  
20 does not have a severe mental impairment:

21 "The [Plaintiff's] medically determinable mental  
22 impairments of an adjustment disorder and organic brain  
23 damage (due to a traumatic head injury) do not cause more  
24 than minimal limitation in the [Plaintiff's] ability to  
25 perform basic mental work activities and are therefore  
26 nonsevere." (AR 14.)

27  
28 Plaintiff challenges the adequacy of this determination.

1 Plaintiff primarily relies upon the consultative complete  
2 psychological evaluation ("CE") of November 21, 2006 performed by Dr.  
3 Colonna, at the request of the Department of Social Services (See AR  
4 at 405-10), along with the Psychiatric Review Technique ("PRT")  
5 conclusions of the State Agency psychiatrist (AR 497-510), in  
6 particular, the conclusions of the State Agency psychiatrist that  
7 Plaintiff has moderate limitations in maintaining concentration,  
8 persistence or pace. (AR 508.)

9  
10 **A. Applicable Law.**

11 In evaluating mental impairments, 20 C.F.R. §404.1520a(c)(3)(4)  
12 and §416.920a(c)(3)(4) mandate that consideration be given, among  
13 other things, to activities of daily living ("ADLs"), social  
14 functioning; concentration, persistence, or pace; and episodes of  
15 decompensation. These factors are generally analyzed in a Psychiatric  
16 Review Technique Form ("PRTF"). The PRTF is used at Step Three of the  
17 sequential evaluation to determine if a claimant is disabled under the  
18 Listing of Impairments; however, the same data must be considered at  
19 subsequent steps unless the mental impairment is found to be not  
20 severe at Step Two. See SSR 85-16.

21 20 C.F.R. §§404.1520a(c)(1) and 416.920a(c)(1) require  
22 consideration of "all relevant and available clinical signs and  
23 laboratory findings, the effects of your symptoms, and how your  
24 functioning may be affected by factors including, but not limited to,  
25 chronic mental disorders, structured settings, medication and other

1 treatment."<sup>1</sup>

2 SSR 85-16 suggests the following as relevant evidence:

3 "History, findings, and observations from medical  
4 sources (including psychological test results), regarding  
5 the presence, frequency, and intensity of hallucinations,  
6 delusions or paranoid tendencies; depression or elation;  
7 confusion or disorientation; conversion symptoms or phobias;  
8 psycho-physiological symptoms, withdrawn or bizarre  
9 behavior; anxiety or tension. Reports of the individual's  
10 activities of daily living and work activity, as well as  
11 testimony of third parties about the individual's  
12 performance and behavior. Reports from workshops, group  
13 homes, or similar assistive entities."

14  
15 It is also required under §404.1520a(c)(2) and §416.920a(c)(2)  
16 that the ALJ must consider the extent to which the mental impairment  
17 interferes with an "ability to function independently, appropriately,  
18 effectively, and on a sustained basis" including "such factors as the  
19 quality and level of [] overall functional performance, any episodic  
20 limitations [and] the amount of supervision or assistance []  
21 require[d]."

22 Pursuant to the September 2000 amendments to the regulations  
23 which modify 20 C.F.R. §404.1520a(e)(2) and §416.920a(e)(2), the ALJ

24  
25 \_\_\_\_\_  
26 <sup>1</sup> 20 C.F.R. §404.1545(c) and §416.945(c) also require  
27 consideration of "residual functional capacity for work activity on a  
28 regular and continuing basis" and a "limited ability to carry out  
certain mental activities, such as limitations in understanding,  
remembering, and carrying out instructions, and in responding  
appropriately to supervision, co-workers, and work pressures in a work  
setting."

1 is no longer required to complete and attach a PRTF. The revised  
2 regulations identify five discrete categories for the first three of  
3 four relevant functional areas: activities of daily living; social  
4 functioning; concentration, persistence or pace; and episodes of  
5 decomposition. These categories are None, Mild, Moderate, Marked, and  
6 Extreme. (§404.1520a(c)(3), (4).) In the decision, the ALJ must  
7 incorporate pertinent findings and conclusions based on the PRTF  
8 technique. §404.1520a(e)(2) mandates that the ALJ's decision must show  
9 "the significant history, including examination and laboratory  
10 findings, and the functional limitations that were considered in  
11 reaching a conclusion about the severity of the mental impairment(s).  
12 The decision must include a specific finding as to the degree of  
13 limitation in each of the functional areas described in paragraph (c)  
14 of this section."

15 The Step Two and Three analyses (see Decision at AR 53-54) are  
16 intended to determine, first, whether a claimant has a severe mental  
17 impairment (Step Two), and if so, whether it meets or equals any of  
18 the Listings (Step Three). It is also required under §404.1520a(c)(2)  
19 and §416.920a(c)(2) that the ALJ must consider the extent to which the  
20 mental impairment interferes with an "ability to function  
21 independently, appropriately, effectively, and on a sustained basis"  
22 including "such factors as the quality and level of [] overall  
23 functional performance, any episodic limitations [and] the amount of  
24 supervision or assistance [] require[d]."

25 These findings and conclusions are relevant to the Step Two and  
26 Three analysis of whether a claimant has a severe mental impairment,  
27 and if so, whether it meets or equals any of the Listings. (See 20  
28 C.F.R. Part 4, subpart p, App. 1.) The discussion in Listing 12.00,

1 "Mental Disorders," is relevant:

2 "The criteria in paragraphs B and C describe  
3 impairment-related functional limitations that are  
4 incompatible with the ability to do any gainful activity.  
5 The functional limitations in paragraphs B and C must be the  
6 result of the mental disorders described in the diagnostic  
7 description, that is manifested by the medical findings in  
8 paragraph A.

9 In Listing 12.00C, entitled 'Assessment of Severity,'  
10 it is stated that, 'we assess functional limitations using  
11 the four criteria in paragraph B of the Listings: Activities  
12 of daily living; social functioning; concentration;  
13 persistence, or pace; and episodes of decompensation. Where  
14 we use 'marked' as a standard for measuring the degree of  
15 limitation, it means more than moderate but less than  
16 extreme."

17  
18 Social Security Ruling ("SSR") 96-8p makes the same point in  
19 distinguishing evidence supporting a rating of mental severity at Step  
20 Two, a Listing level impairment at Step Three, and the determination  
21 of an individual's MRFC at Step Four.

22  
23 **B. Analysis.**

24 Both the ALJ, and the Commissioner in this litigation, rely upon  
25 the reports of Dr. Colonna, the CE, to substantiate the conclusion  
26 that Plaintiff does not have severe mental impairments. Indeed, the  
27 ALJ interpreted Dr. Colonna's report as indicating that, "The  
28 [Plaintiff] is not significantly limited by any mental illness,

1 consistent with her detailed clinical findings and the objective test  
2 results." (AR at 15, citing Dr. Colonna's report [erroneously referred  
3 to as Exhibit ["Ex."] 12F], and Social Security Ruling ["SSR"] 96-2p.)  
4 The ALJ concluded that Plaintiff's mental impairments are considered  
5 not severe because they "cause no more than 'mild' limitation in any  
6 of the first three functional areas ..." (Id.)

7 The ALJ acknowledged the findings of the State Agency  
8 psychiatrist, who concluded, based upon utilization of the PRT, that  
9 Plaintiff has moderate restrictions in concentration. (Id.) The ALJ  
10 discounted this finding, instead giving "significant weight" to Dr.  
11 Colonna's assessments because they were more "consistent with the  
12 medical and other evidence." (Id.) As to the State Agency  
13 psychiatrist's assessment of moderate restrictions on one area of  
14 functioning, this was discounted because it was "not well established,  
15 in light of the detailed exam findings and the psychological test  
16 results and the claimant's presentation upon evaluation." (Id.)  
17 Presumably, the exam findings refer to those of Dr. Colonna, as do the  
18 psychological test results, and "claimant's presentation upon  
19 evaluation" is also presumably based upon Dr. Colonna's report.

20 The ALJ's conclusions fail to meet the substantial evidence test  
21 because Dr. Colonna's report cannot be read as consistent with a  
22 conclusion that Plaintiff has only "mild" limitations in the relevant  
23 mental functional areas of activities of daily living; social  
24 functioning; and concentration, persistence or pace as set forth in 20  
25 C.F.R. §404.1520a(c)(4). As indicated in 20 C.F.R. §404.1520a(d)(1),  
26 a conclusion that an individual has either "none" or "mild"  
27 limitations in the first three functional areas will generally  
28 substantiate a finding of a non-severe impairment. Very clearly,

1 | however, Dr. Colonna's report does not substantiate such conclusions.  
2 | Essentially, the conclusions drawn by Dr. Colonna in the "Prognostic  
3 | Impressions and Medical Source Statement" area of her report are not  
4 | readily translatable into the precise findings required by the  
5 | regulations. For example, as to the evaluation of Plaintiff's  
6 | concentration, persistence or pace, Dr. Colonna offers her conclusion  
7 | that Plaintiff would be able to "understand, remember and carry out  
8 | short, simplistic instructions without difficulty," and that he has  
9 | "mild inability to understand, remember and carry out detailed  
10 | instructions. He would be able to make simplistic work-related  
11 | decisions without special supervision." Whether this in fact  
12 | translates into only a "mild" limitation in Plaintiff's concentration,  
13 | persistence or pace cannot be divined from these descriptions.  
14 | Similarly, in the area of social functioning, Dr. Colonna concludes  
15 | that Plaintiff is "socially appropriate with the examiner and he  
16 | presents with the ability to interact appropriately with supervisors,  
17 | coworkers and peers." (AR 409.) Again, one cannot immediately  
18 | conclude that this translates into only a "mild" deficiency in social  
19 | functioning. These ratings are specific, and should be made by an  
20 | appropriate, qualified medical professional utilizing the exact  
21 | terminology required by the regulations. Finally, as to activities of  
22 | daily living, there is no finding in Dr. Colonna's report. The ALJ  
23 | noted that Plaintiff "reported that he had difficulty interacting with  
24 | others and needs assistance with his daily activities of living," (AR  
25 | 13, citing Plaintiff's Disability Report - Adult, dated April 18,  
26 | 2007. (AR 162-70.) The ALJ further noted that with respect to  
27 | Plaintiff's activities of daily living, Plaintiff reported that he is  
28 | "unable to care for my personal needs." (AR 19, citing Plaintiff's

1 Disability Report - Appeals, dated February 6, 2008 [AR 217-22].)  
2 Plaintiff's credibility with respect to these assertions is rejected  
3 by the ALJ who found that "there is no objective medical basis for the  
4 wholesale limitations he has alleged." (AR 19.) But, the Court notes  
5 that Plaintiff's anxiety and depression concerning his seizures have  
6 been consistently reported by him to medical professionals. For  
7 example, he received a Disability Neurological Evaluation from Dr.  
8 Gluckman on May 7, 2009 (AR 579-87), and reported that he "stays at  
9 home because he is afraid of having a seizure." (AR 579.) Dr.  
10 Gluckman diagnosed anxiety disorder secondary to seizures. (AR 586.)  
11 It appears that there is a medical basis for Plaintiff's anxiety in  
12 that his medications to control seizures have not been properly  
13 balanced since he received his cranial injury from being hit by a  
14 baseball bat. (See Dr. Gluckman's conclusions at AR 587.) As Dr.  
15 Gluckman noted, per Plaintiff's father's history, Plaintiff's anti-  
16 seizure medications "cause him, at times, to appear drunk ..." (AR  
17 586.) All in all, this evidence is quite relevant to an assessment of  
18 an individual's limitations with regard to his activities of daily  
19 living, one of the functional areas which must be mandatorily  
20 evaluated with regard to an assessment of an individual's mental  
21 impairments.

22 Finally, the Court is not satisfied with the ALJ's rejection of  
23 the findings of the State Agency psychiatrist performed pursuant to  
24 the PRT, which indicate moderate limitations in certain areas  
25 involving understanding and memory; sustained concentration and  
26 persistence; social interaction; and adaptation. (See AR at 497-98.)  
27 If the ALJ depreciated the findings of the State Agency psychiatrist  
28 based upon the reports of Dr. Colonna, such a finding is not based

1 upon substantial evidence, for the reasons the Court has discussed.

2 For the foregoing reasons, the Court concludes that the ALJ's  
3 finding of non-severe mental impairment at Step Two of the sequential  
4 evaluation process is not supported by substantial evidence, and must  
5 be reviewed de novo on remand.

6 Similarly, as to Plaintiff's second issue, concerning side  
7 effects of medications, this will be reexamined de novo on remand.  
8 The Court does not agree with the Commissioner that side effects of  
9 medications have been objectively undocumented in the record. As the  
10 Court has noted with regard to its discussion of the first issue, it  
11 is clear from the medical records that Plaintiff's anti-seizure  
12 medications have been adjusted and readjusted on numerous occasions,  
13 apparently due to their inability to consistently control his  
14 seizures, and/or side effects from them. Plaintiff father told Dr.  
15 Gluckman that, sometimes, Plaintiff appears to be "drunk" from these  
16 medications. Plaintiff asserted that he suffers from frequent  
17 headaches which may well be attributed to the medications. The ALJ's  
18 conclusion that Plaintiff has been noncompliant with medication was  
19 apparently based upon the testimony of the ME at the hearing, however,  
20 on cross-examination by Plaintiff's attorney, the ME conceded that  
21 based on the metabolism of certain individuals, and other factors,  
22 there may be a fluctuation in medication levels which "may not be the  
23 patient's fault per se." (AR 39.) The ME testified that one of the  
24 drugs Plaintiff takes, Topamax, "does impair thinking unlike  
25 Dilantin." (AR 44.) He also testified that "Topamax can cloud  
26 people's ability to remember things." (AR 40.) Although the ME  
27 believed that notations in the medical records that Plaintiff was  
28 taking 400 mg twice a day of Topamax must be incorrect (characterized

1 by him as "a 'typo'") the Court is not necessarily convinced that it  
2 is the case, or in any event, it may be the case that even lesser  
3 doses of Topamax may cause such side effects. The ALJ's conclusion,  
4 therefore, that there is no objective evidence to support the side  
5 effects of which Plaintiff complains, is highly problematic. Basing  
6 the credibility assessment, which would include side effects of  
7 medications, the finding that Plaintiff was noncompliant with his  
8 medications is simply not substantiated by the record presented to the  
9 Court. Further, the issue is not solely whether side effects from  
10 medication disable Plaintiff from employment. Instead, the question  
11 is also whether, if such side effects exist, they substantiate non-  
12 exertional limitations relevant to an assessment of Plaintiff's  
13 residual functional capacity. Side effects of medication need not be  
14 totally disabling to be relevant in the Social Security evaluation  
15 process.

16 This matter will be remanded for further hearing consistent with  
17 this Memorandum Opinion.

18 **IT IS SO ORDERED.**

19  
20 DATED: September 13, 2010

\_\_\_\_\_/s/  
VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE