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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH WARREN,	}	Case No. EDCV 10-670 JC
Plaintiff,	}	MEMORANDUM OPINION AND ORDER OF REMAND
v.	}	
MICHAEL J. ASTRUE, Commissioner of Social Security,	}	
Defendant.	}	

I. SUMMARY

On May 14, 2010, plaintiff Kenneth Warren (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; May 19, 2010 Case Management Order ¶ 5.

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is REVERSED AND REMANDED for further proceedings
3 consistent with this Memorandum Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On December 5, 2007, plaintiff filed an application for Supplemental
7 Security Income benefits. (Administrative Record (“AR”) 125-27). Plaintiff
8 asserted that he became disabled on August 31, 2006, due to paranoia,
9 schizophrenia, blurred vision, arthritis, high blood pressure and trouble with his
10 big toes. (AR 125, 135).

11 On November 24, 2009, the Administrative Law Judge (“ALJ”) determined
12 that plaintiff was not disabled through the date of the decision. (AR 9-20).
13 Specifically, the ALJ found: (1) plaintiff suffers from the following severe
14 impairments: psychotic disorder, not otherwise specified; anxiety disorder, not
15 otherwise specified; and borderline intellectual functioning (AR 11); (2) plaintiff
16 does not have an impairment or combination of impairments that meet or
17 medically equal one of the listed impairments (AR 12); (3) plaintiff retains the
18 residual functional capacity to perform a full range of work at all exertional levels
19 with certain nonexertional limitations¹ (AR 14); (4) plaintiff cannot perform his
20 past relevant work (AR 18); and (5) there are jobs that exist in significant numbers
21 in the national economy that plaintiff could perform, such as dishwasher, cleaner
22 and landscape worker (AR 19).

23 The Appeals Council denied plaintiff’s application for review. (AR 1-3).

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27 ¹The ALJ determined that plaintiff is limited to simple repetitive tasks, is precluded from
28 contact with the public, is limited to only occasional non-intense contact with the public, is
limited to only occasional non-intense contact with co-workers and supervisors and is precluded
from work that includes responsibility for the safety of others. (AR 14).

1 **III. APPLICABLE LEGAL STANDARDS**

2 **A. Sequential Evaluation Process**

3 To qualify for disability benefits, a claimant must show that he is unable to
4 engage in any substantial gainful activity by reason of a medically determinable
5 physical or mental impairment which can be expected to result in death or which
6 has lasted or can be expected to last for a continuous period of at least twelve
7 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.
8 § 423(d)(1)(A)). The impairment must render the claimant incapable of
9 performing the work he previously performed and incapable of performing any
10 other substantial gainful employment that exists in the national economy. Tackett
11 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

12 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
13 sequential evaluation process:

- 14 (1) Is the claimant presently engaged in substantial gainful activity? If
15 so, the claimant is not disabled. If not, proceed to step two.
- 16 (2) Is the claimant’s alleged impairment sufficiently severe to limit
17 his ability to work? If not, the claimant is not disabled. If so,
18 proceed to step three.
- 19 (3) Does the claimant’s impairment, or combination of
20 impairments, meet or equal an impairment listed in 20 C.F.R.
21 Part 404, Subpart P, Appendix 1? If so, the claimant is
22 disabled. If not, proceed to step four.
- 23 (4) Does the claimant possess the residual functional capacity to
24 perform his past relevant work?² If so, the claimant is not
25 disabled. If not, proceed to step five.

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

1 (5) Does the claimant’s residual functional capacity, when
2 considered with the claimant’s age, education, and work
3 experience, allow him to adjust to other work that exists in
4 significant numbers in the national economy? If so, the
5 claimant is not disabled. If not, the claimant is disabled.

6 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
7 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920). The claimant has the burden
8 of proof at steps one through four, and the Commissioner has the burden of proof
9 at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001)
10 (citing Tackett); see also Burch, 400 F.3d at 679 (claimant carries initial burden of
11 proving disability).

12 **B. Standard of Review**

13 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
14 benefits only if it is not supported by substantial evidence or if it is based on legal
15 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
16 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
17 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
18 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
19 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
20 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
21 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

22 To determine whether substantial evidence supports a finding, a court must
23 “consider the record as a whole, weighing both evidence that supports and
24 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
25 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
26 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
27 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
28 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

1 **IV. DISCUSSION**

2 Plaintiff asserts, among other things, that the ALJ erred in concluding that
3 his mental impairments did not meet or equal the listings for mental retardation at
4 20 C.F.R., Part 404, Subpart P, App. 1, § 12.05C to establish presumptive
5 disability. More specifically, plaintiff challenges the ALJ’s conclusion that all of
6 plaintiff’s significant work related limitations of function would result from
7 borderline intellectual functioning alone and that there were no additional
8 limitations caused by his other mental impairments. (Plaintiff’s Motion at 3).

9 A claimant meets Listing 12.05C if he has “[a] valid verbal, performance, or
10 full scale IQ of 60 through 70 and a physical or other mental impairment imposing
11 an additional and significant work-related limitation of function . . . ” 20 C.F.R.,
12 Part 404, Subpart P, App. 1, § 12.05C.

13 Here, the ALJ recognized that plaintiff had received a verbal IQ score of 66
14 and a full scale IQ score of 70 when tested by the psychological consultative
15 examiner. (AR 14) (citing Ex. 8F, p. 4 [AR 207]). Though not entirely clear from
16 the decision, it does not appear that the ALJ questioned the validity of such IQ
17 tests. (AR 14). The ALJ concluded, however, that all of plaintiff’s significant
18 work related limitations of function would result from borderline intellectual
19 functioning alone and that there were no additional limitations caused by his other
20 mental impairments. (AR 14). Based upon such conclusions, the ALJ found that
21 plaintiff did not meet Listing 12.05C.

22 This Court concludes that a remand is appropriate for the ALJ to resolve an
23 apparent inconsistency in his decision. As noted above, the ALJ concluded that
24 plaintiff does not have a physical or other mental impairment imposing an
25 additional significant work-related limitation of function, as required by the
26 second prong of § 12.05C. The regulations provide that in determining whether a
27 claimant’s impairments satisfy the second prong of § 12.05C “[the Commissioner]
28 will assess the degree of functional limitation the additional impairment(s)

1 imposes to determine if it significantly limits the claimant’s physical or mental
2 ability to do basic work activities, i.e., is a ‘severe’ impairment(s), as defined in
3 [20 C.F.R.] §§ 404.1520(c) and 416.920(c).” 20 C.F.R., Pt. 404, Subpt. P, App. 1,
4 § 12.00(A).³ The Ninth Circuit has held that “[a]n impairment . . . may be found
5 ‘not severe only if the evidence establishes a slight abnormality that has no more
6 than a minimal effect on an individual's ability to work.’” Webb v. Barnhart, 433
7 F.3d 683, 686 (9th Cir.2005) (quoting Smolen v. Chater, 80 F.3d 1273, 1290 (9th
8 Cir.1966)); see also Fanning v. Bowen, 827 F.2d 631, 633 (9th Cir.1987) (“An
9 impairment imposes a significant work-related limitation of function” according to
10 the second prong of § 12.05C “when its effect on a claimant’s ability to perform
11 basic work activities is more than slight or minimal.”). Here, the ALJ determined
12 that in addition to borderline intellectual functioning, plaintiff suffered from two
13 additional severe mental impairments: a psychotic disorder, not otherwise
14 specified and an anxiety disorder, not otherwise specified. (AR 11) (citing
15 20 C.F.R. § 416.920(c)). As such, based on the ALJ’s own findings at step two of
16 the sequential evaluation process, it appears that plaintiff’s other mental
17 impairments satisfy the second prong of § 12.05C of the Listing because he has
18 severe mental impairments that are distinct from his qualifying IQ score. See
19 Gomez v. Astrue, 695 F. Supp. 2d 1049, 1061-62 (C.D. Cal. 2010); see also Rhein
20 v. Astrue, 2010 WL 4877796, *10 (E.D. Cal. Nov. 23, 2010) (step two finding of
21 other severe impairment necessarily determines that the second prong of Listing
22 12.05C is satisfied). To the extent the ALJ found that plaintiff’s other mental
23 impairments do not satisfy the second prong of § 12.05C, remand is warranted to
24 address this apparent inconsistency in the ALJ’s decision. See Rhein, 2010 WL
25 4877796, at **10-11; Schuler v. Astrue, 2010 WL 1443892, *5 (C.D. Cal. Apr.
26 2010).

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28 ³20 C.F.R. §§ 404.1520(c) and 416.920(c) define a “severe impairment” as “any
impairment or combination of impairments which significantly limits [a claimant's] physical or
mental ability to do basic work activities.” See 20 C.F.R. §§ 404.1520(c), 416.920(c).

1 **V. CONCLUSION**

2 For the foregoing reasons, the decision of the Commissioner of Social
3 Security is reversed in part, and this matter is remanded for further administrative
4 action consistent with this Opinion.⁴

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: February 14, 2011

7 /s/

8 Honorable Jacqueline Chooljian
9 UNITED STATES MAGISTRATE JUDGE

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⁴The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's decision, except insofar as to determine that a reversal and remand for immediate payment of benefits would not be appropriate.