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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

ROBERTO EUGENE FANT, JR.,	)	No. ED CV 12-02041-VBK
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	AND ORDER
v.	)	
	)	(Social Security Case)
CAROLYN W. COLVIN, Acting	)	
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 ("ALJ") erred in

1 failing to acknowledge or grant any weight to the mental  
2 function assessments of treating psychiatrist, Dr. Kim,  
3 consultative examiner Dr. Griffin, or the VA assessment of  
4 total mental disability; and

- 5 2. Whether the finding that Plaintiff retains the residual  
6 physical capacity to perform a reduced range of light work  
7 is based on a legally proper disregard of the opinions of  
8 occupational medicine specialist Dr. Guo.

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 and the matter remanded.

15  
16 I

17 **THE ALJ'S ASSESSMENT OF PLAINTIFF'S MENTAL RESIDUAL FUNCTIONAL**  
18 **CAPACITY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

19 Plaintiff filed his applications for Disability Insurance  
20 Benefits and Supplemental Security Income on February 9, 2007 alleging  
21 an onset date of January 4, 1995. After administrative denials, a  
22 hearing was held on April 14, 2009 before ALJ Radensky. (AR at 34-79,  
23 180-181.) On July 1, 2009, the ALJ found Plaintiff to be not  
24 disabled. (AR 122-130.)

25 By an Order dated February 18, 2011, the Appeals Council vacated  
26 the Decision and remanded the matter. (AR 131-135.) In its Remand  
27 Order, the Appeals Council ordered that Plaintiff have a new hearing,  
28 and that evidence of his Veterans Administration ("VA") finding of

1 total disability, the State Agency psychiatric consultant's opinions,  
2 and assessments of treating physician Huang be considered. The  
3 breadth of the remand order is encompassed in the following language  
4 in the Remand Order:

5 "To give further consideration to claimant's maximum  
6 residual functional capacity during the entire period at  
7 issue and provide rationale with specific references to  
8 evidence of record in support of assessed limitations ... in  
9 so doing, evaluate the treating and non-treating non-source  
10 opinions pursuant to the provisions of [applicable  
11 regulations and Social Security rulings] and explain the  
12 weight given to such opinion evidence." (AR 134, emphasis  
13 added.)  
14

15 The Remand Order resulted in a new hearing on September 16, 2011  
16 before the same ALJ, at which time Plaintiff was represented by a non-  
17 attorney representative. (AR 80-114.) Thereafter, in a Decision dated  
18 October 21, 2011, the ALJ found Plaintiff to be not disabled. A  
19 request for review to the Appeals Council was denied and thus the  
20 ALJ's Decision became the final decision of the Commissioner, and  
21 resulted in this litigation.

22 The ALJ found severe impairments as follows: morbidly obese, neck  
23 trauma, subjective left sided weakness not confirmed by objective  
24 findings, left shoulder impingement, depressive disorder NOS, and  
25 post-traumatic stress disorder. (AR 24.) After considering certain  
26 evidence (but not all evidence in the record), the ALJ determined a  
27 residual functional capacity which, with regard to mental limitations,  
28 only restricted Plaintiff to performing moderately complex tasks with

1 up to 4-5 step instructions. (AR 26.)

2 Plaintiff's treating psychiatrist, beginning on December 6, 2005,  
3 is William Kim of the VA. (AR 495-497.) This record contains  
4 chronological treatment notes from Plaintiff's visits to the VA  
5 Psychiatric Unit. (See AR 474, 489, 482, 492-493, 496.) Plaintiff  
6 characteristically was viewed as suffering from some paranoid thinking  
7 during these visits, with anxious mood and affect. (See, e.g., AR  
8 471.) Dr. Kim was treating Plaintiff for post-traumatic stress  
9 disorder ("PTSD"), as evidenced in a letter of January 24, 2008. (AR  
10 295.) Plaintiff adhered to a medication and treatment regimen, but  
11 Dr. Kim still found him to be very symptomatic and emotionally  
12 unstable, suffering from frequent depression and anxiety, becoming  
13 easily irritable, angry or fearful and reactive to triggers. (Id.)

14 On April 14, 2008, Dr. Kim completed a Psychiatric/Psychological  
15 Impairment Questionnaire reflecting his treatment of Plaintiff over  
16 two years. (AR 505-512.) Various clinical findings and symptoms were  
17 noted, and of particular interest is Dr. Kim's assessment on a rating  
18 scale from no evidence of limitation, to mildly limited, moderately  
19 limited, and markedly limited, in 20 discrete areas. Marked  
20 limitations were found in functional areas pertaining to sustained  
21 concentration and persistence, social interactions, and adaptation.  
22 (Id.) Dr. Kim was of the opinion that Plaintiff would be incapable of  
23 tolerating a "low stress" work environment. (AR 510-511.)

24 In his first Decision, the ALJ rejected, apparently entirely, the  
25 assessments of Dr. Kim as "inconsistent with substantial evidence of  
26 record." This conclusion was based upon the ALJ's reliance on the  
27 testimony of a medical expert ("ME"), Dr. Stolz, and a one-time  
28 psychiatric consultative examination ("CE") by Dr. Parikh on August 5,

1 2007. (AR 127-128.)

2 In the second Decision following remand, the ALJ fails to even  
3 mention Dr. Kim, apparently relying upon his evaluation of Dr. Kim's  
4 reports from two years before. The ALJ, however, ignored the fact  
5 that Dr. Kim had continued treating Plaintiff, and had rendered an  
6 updated Psychiatric/Psychological Impairment Questionnaire on October  
7 7, 2010. (AR 605-612.) In that Questionnaire, Dr. Kim again found  
8 marked limitations in areas involving understanding and memory; marked  
9 limitations in several areas concerning sustained concentration and  
10 persistence; and marked limitations in several areas involving social  
11 interactions. (AR 608-610.) Dr. Kim assessed that Plaintiff is not a  
12 malingerer. (AR 611.) He again concluded that Plaintiff cannot  
13 tolerate even a low-stress work environment. (Id.)

14 In the Commissioner's portion of the JS, he asserts that the ALJ  
15 properly considered Dr. Kim's diagnoses and conclusions. (JS at 17, et  
16 seq.) Again, what is ignored is the fact that the ALJ failed to  
17 mention Dr. Kim's treatment and diagnoses in the period subsequent to  
18 the issuance of the first Decision. Moreover, there is no indication  
19 in the testimony of the mental health ME at the hearing (AR 89-92)  
20 that he even reviewed or considered this evidence.

21 Plaintiff was also the recipient of a consultative psychological  
22 examination by Dr. Griffin on December 8, 2010. (AR 614-619.) After  
23 conducting a clinical interview and administering standardized tests,  
24 Dr. Griffin also assessed marked limitations in critical areas (see  
25 Discussion of Applicable Law, infra) in Plaintiff's ability to make  
26 judgments on simple work-related decisions; interact appropriately  
27 with the public; interact appropriately with supervisors; interact  
28 appropriately with co-workers; respond appropriately to work pressures

1 in a usual work setting; and respond appropriately to changes in a  
2 routine work setting. (AR 618.) Despite the Commissioner's insistence  
3 that Dr. Griffin's conclusions are diluted by some of Plaintiff's  
4 activities of daily living, such as attending weekly group meetings  
5 for PTSD (see JS at 19), and Dr. Griffin's indication of test results  
6 which "may indicate a broad tendency to magnify the level of  
7 experience to illness or a characterological inclination to complain  
8 or be self-pitying" (AR 617) (which the Commissioner characterizes as  
9 "malingering"), the fact is that Dr. Griffin rendered specific  
10 findings on critical areas of mental limitations which are highly  
11 relevant in the Social Security context to the evaluation of  
12 disability. The fact that the ALJ does not even mention Dr. Griffin's  
13 report in the Decision renders it unreliable. The Commissioner's  
14 invitation to the Court to determine that this omission is harmless  
15 error is rejected, in large part because Dr. Griffin's findings  
16 corroborate those of Dr. Kim, which that doctor rendered on two  
17 occasions, concerning Plaintiff's mental functional limitations. The  
18 importance of these assessments is highlighted by the law concerning  
19 assessment of mental limitations, which the Court will set out at this  
20 point.

21  
22 **A. Applicable Law.**

23 In evaluating mental impairments, 20 C.F.R. §404.1520a(c)(3)(4)  
24 and §416.920a(c)(3)(4) mandate that consideration be given, among  
25 other things, to activities of daily living ("ADLs"), social  
26 functioning; concentration, persistence, or pace; and episodes of  
27 decompensation. These factors are generally analyzed in a Psychiatric  
28 Review Technique Form ("PRTF"). The PRTF is used at Step Three of the

1 sequential evaluation to determine if a claimant is disabled under the  
2 Listing of Impairments; however, the same data must be considered at  
3 subsequent steps unless the mental impairment is found to be not  
4 severe at Step Two. See SSR 85-16.

5 20 C.F.R. §§404.1520a(c)(1) and 416.920a(c)(1) require  
6 consideration of "all relevant and available clinical signs and  
7 laboratory findings, the effects of your symptoms, and how your  
8 functioning may be affected by factors including, but not limited to,  
9 chronic mental disorders, structured settings, medication and other  
10 treatment."<sup>1</sup>

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

12 "History, findings, and observations from medical  
13 sources (including psychological test results), regarding  
14 the presence, frequency, and intensity of hallucinations,  
15 delusions or paranoid tendencies; depression or elation;  
16 confusion or disorientation; conversion symptoms or phobias;  
17 psycho-physiological symptoms, withdrawn or bizarre  
18 behavior; anxiety or tension. Reports of the individual's  
19 activities of daily living and work activity, as well as  
20 testimony of third parties about the individual's  
21 performance and behavior. Reports from workshops, group  
22 homes, or similar assistive entities."

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25 <sup>1</sup> 20 C.F.R. §404.1545(c) and §416.945(c) also require  
26 consideration of "residual functional capacity for work activity on a  
27 regular and continuing basis" and a "limited ability to carry out  
28 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           It is also required under §404.1520a(c)(2) and §416.920a(c)(2)  
2 that the ALJ must consider the extent to which the mental impairment  
3 interferes with an "ability to function independently, appropriately,  
4 effectively, and on a sustained basis" including "such factors as the  
5 quality and level of [] overall functional performance, any episodic  
6 limitations [and] the amount of supervision or assistance []  
7 require[d]."

8           Pursuant to the September 2000 amendments to the regulations  
9 which modify 20 C.F.R. §404.1520a(e)(2) and §416.920a(e)(2), the ALJ  
10 is no longer required to complete and attach a PRTF. The revised  
11 regulations identify five discrete categories for the first three of  
12 four relevant functional areas: activities of daily living; social  
13 functioning; concentration, persistence or pace; and episodes of  
14 decomposition. These categories are None, Mild, Moderate, Marked, and  
15 Extreme. (§404.1520a(c)(3), (4).) In the decision, the ALJ must  
16 incorporate pertinent findings and conclusions based on the PRTF  
17 technique. §404.1520a(e)(2) mandates that the ALJ's decision must show  
18 "the significant history, including examination and laboratory  
19 findings, and the functional limitations that were considered in  
20 reaching a conclusion about the severity of the mental impairment(s).  
21 The decision must include a specific finding as to the degree of  
22 limitation in each of the functional areas described in paragraph (c)  
23 of this section."

24           The Step Two and Three analyses (see Decision at AR 53-54) are  
25 intended to determine, first, whether a claimant has a severe mental  
26 impairment (Step Two), and if so, whether it meets or equals any of  
27 the Listings (Step Three). It is also required under §404.1520a(c)(2)  
28 and §416.920a(c)(2) that the ALJ must consider the extent to which the



1 mental impairment interferes with an "ability to function  
2 independently, appropriately, effectively, and on a sustained basis"  
3 including "such factors as the quality and level of [] overall  
4 functional performance, any episodic limitations [and] the amount of  
5 supervision or assistance [] require[d]."

6 These findings and conclusions are relevant to the Step Two and  
7 Three analysis of whether a claimant has a severe mental impairment,  
8 and if so, whether it meets or equals any of the Listings. (See 20  
9 C.F.R. Part 4, subpart p, App. 1.) The discussion in Listing 12.00,  
10 "Mental Disorders," is relevant:

11 "The criteria in paragraphs B and C describe  
12 impairment-related functional limitations that are  
13 incompatible with the ability to do any gainful activity.  
14 The functional limitations in paragraphs B and C must be the  
15 result of the mental disorders described in the diagnostic  
16 description, that is manifested by the medical findings in  
17 paragraph A.

18 In Listing 12.00C, entitled 'Assessment of Severity,'  
19 it is stated that, 'we assess functional limitations using  
20 the four criteria in paragraph B of the Listings: Activities  
21 of daily living; social functioning; concentration;  
22 persistence, or pace; and episodes of decompensation. Where  
23 we use 'marked' as a standard for measuring the degree of  
24 limitation, it means more than moderate but less than  
25 extreme."

26  
27 Social Security Ruling ("SSR") 96-8p makes the same point in  
28 distinguishing evidence supporting a rating of mental severity at Step

1 Two, a Listing level impairment at Step Three, and the determination  
2 of an individual's MRFC at Step Four.

3 In addition to the foregoing deficiencies in the ALJ's evaluation  
4 of the mental health evidence, although the VA assessed that Plaintiff  
5 is 100% disabled, in his Decision, based on the testimony of the  
6 mental health ME at the hearing, the ALJ interpreted the VA evidence  
7 as demonstrating that "the VA treatment notes show no cognitive  
8 problems, generally stable to normal mental status exams, and so the  
9 VA rating is given little weight." (AR 28.) For reasons which have  
10 already been discussed, the Court rejects this characterization of the  
11 VA mental health treatment notes and diagnoses, which in fact do not  
12 indicate a stable or unremarkable mental condition. Moreover, the ALJ  
13 failed to discharge the instructions of the Appeals Council to  
14 evaluate the VA disability rating as it applies to the Social Security  
15 context. The Ninth Circuit has clearly held that a VA rating of  
16 disability, while it does not necessarily compel the Social Security  
17 Administration to reach an identical conclusion, must be given great  
18 weight by an ALJ in the disability determination process. See McLeod  
19 v. Astrue, 640 F.3d 881, 886 (9th Cir. 2011).

20 The Court will not devote substantial attention to Issue Two,  
21 which concerns the assessment as to Plaintiff's RFC in the physical  
22 arena. Since this matter will be remanded for a new hearing, this  
23 evidence will be reevaluated, and if necessary, new evidence will be  
24 adduced to make a determination of this issue.

25 In remanding this matter, the Court will take the rare step of  
26 ordering that it be assigned to a new ALJ. The Court does not have  
27 confidence that the present ALJ will give a fair and neutral  
28 evaluation to the evidence, in view of the nature of the deficiencies

