

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ALICE DANIELS,)	No. SACV 09-1108 CW
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner’s denial of disability benefits. As discussed below, the court finds that the Commissioner’s decision should be reversed and this matter remanded for further proceedings.

I. BACKGROUND

Plaintiff Alice Daniels was born on October 23, 1956, and was fifty-one years old at the time of her administrative hearing. [Administrative Record (“AR”) 59, 65.] She has approximately two and a half years of college education and past relevant work experience as

1 an instructional aide and lead teacher. [AR 65, 80.] Plaintiff
2 alleges disability on the basis of pain in her lower back and left
3 shoulder due to arthritis, loss of cartilage in her knees, and mental
4 health problems. [AR 69-72.]

5 **II. PROCEEDINGS IN THIS COURT**

6 Plaintiff's complaint was lodged on September 25, 2009, and filed
7 on October 2, 2009. On April 16, 2010, Defendant filed an Answer and
8 plaintiff's Administrative Record ("AR"). On June 17, 2010, the
9 parties filed their Joint Stipulation ("JS") identifying matters not
10 in dispute, issues in dispute, the positions of the parties, and the
11 relief sought by each party. This matter has been taken under
12 submission without oral argument.

13 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

14 Plaintiff applied for a period of disability and disability
15 insurance benefits ("DIB") and supplemental security income ("SSI") on
16 March 23, 2006, alleging disability since November 1, 2000. [AR 90].
17 After the application was denied initially and on reconsideration,
18 Plaintiff requested an administrative hearing, which was held on March
19 18, 2008, before an Administrative Law Judge ("ALJ"). [AR 59.]
20 Plaintiff appeared without counsel, and testimony was taken from
21 Plaintiff and vocational expert Jeanine Metildi. [AR 90.] The ALJ
22 denied benefits in a decision dated June 27, 2008. [AR 87-97.]
23 Plaintiff sought review with the Appeals Council and submitted
24 additional evidence. [AR 6.] When the Appeals Council denied review
25 on August 25, 2009, the ALJ's decision became the Commissioner's final
26 decision. [AR 1.]

27 **IV. STANDARD OF REVIEW**

28 Under 42 U.S.C. § 405(g), a district court may review the

1 Commissioner's decision to deny benefits. The Commissioner's (or
2 ALJ's) findings and decision should be upheld if they are free of
3 legal error and supported by substantial evidence. However, if the
4 court determines that a finding is based on legal error or is not
5 supported by substantial evidence in the record, the court may reject
6 the finding and set aside the decision to deny benefits. See Aukland
7 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
8 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
9 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
10 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
11 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
12 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

13 "Substantial evidence is more than a scintilla, but less than a
14 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
15 which a reasonable person might accept as adequate to support a
16 conclusion." Id. To determine whether substantial evidence supports
17 a finding, a court must review the administrative record as a whole,
18 "weighing both the evidence that supports and the evidence that
19 detracts from the Commissioner's conclusion." Id. "If the evidence
20 can reasonably support either affirming or reversing," the reviewing
21 court "may not substitute its judgment" for that of the Commissioner.
22 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

23 **V. DISCUSSION**

24 **A. THE FIVE-STEP EVALUATION**

25 To be eligible for disability benefits a claimant must
26 demonstrate a medically determinable impairment which prevents the
27 claimant from engaging in substantial gainful activity and which is
28 expected to result in death or to last for a continuous period of at

1 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
2 721; 42 U.S.C. § 423(d)(1)(A).

3 Disability claims are evaluated using a five-step test:

4 Step one: Is the claimant engaging in substantial
5 gainful activity? If so, the claimant is found not
6 disabled. If not, proceed to step two.

7 Step two: Does the claimant have a "severe" impairment?
8 If so, proceed to step three. If not, then a finding of not
9 disabled is appropriate.

10 Step three: Does the claimant's impairment or
11 combination of impairments meet or equal an impairment
12 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
13 so, the claimant is automatically determined disabled. If
14 not, proceed to step four.

15 Step four: Is the claimant capable of performing his
16 past work? If so, the claimant is not disabled. If not,
17 proceed to step five.

18 Step five: Does the claimant have the residual
19 functional capacity to perform any other work? If so, the
20 claimant is not disabled. If not, the claimant is disabled.

21 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
22 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
23 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
24 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
25 "not disabled" at any step, there is no need to complete further
26 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

27 Claimants have the burden of proof at steps one through four,
28 subject to the presumption that Social Security hearings are non-
adversarial, and to the Commissioner's affirmative duty to assist
claimants in fully developing the record even if they are represented
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a prima facie case of disability is
made, and the burden shifts to the Commissioner (at step five) to

1 prove that, considering residual functional capacity ("RFC")¹, age,
2 education, and work experience, a claimant can perform other work
3 which is available in significant numbers. Tackett, 180 F.3d at 1098,
4 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

5 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

6 Here, the ALJ found that Plaintiff had not engaged in substantial
7 gainful activity since her alleged disability onset date (step one);
8 that Plaintiff had "severe" impairments, namely obesity, arthritis and
9 epilepsy (step two); and that Plaintiff did not have an impairment or
10 combination of impairments that met or equaled a "listing" (step
11 three). [AR 92-93.] The ALJ found that Plaintiff had an RFC to
12 perform light work generally; with occasional postural limitations; no
13 ladders, no heights, no dangerous or fast moving machinery; and no
14 open pools of water. [AR 93.] The vocational expert testified that a
15 person with Plaintiff's RFC could perform Plaintiff's past relevant
16 work as an instructional aid and lead teacher (step four). [AR 96.]
17 Accordingly, Plaintiff was found not "disabled" as defined by the
18 Social Security Act. [AR 97.]

19 **C. ISSUES IN DISPUTE**

20 The parties' Joint Stipulation raises the following disputed
21 issues:

- 22 1. Whether the ALJ failed to properly consider the testimony of

23
24 ¹ Residual functional capacity measures what a claimant can
25 still do despite existing "exertional" (strength-related) and
26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
28 work without directly limiting strength, and include mental, sensory,
postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 Ms. Daniels;

2 2. Whether the ALJ failed to completely and properly consider
3 the assessment of Dr. Bruce Applebaum;

4 3. Whether the ALJ failed to properly consider Ms. Daniels'
5 Mental Impairment;

6 4. Whether the ALJ failed to properly consider the lay witness
7 statement of Forrest Best; and

8 5. Whether the Appeals Counsel failed to properly consider the
9 new and material evidence.

10 [JS 2-3.]

11 As discussed below, Issues One, Two, and Three are dispositive.

12 **D. BACKGROUND: DR. APPLEBAUM'S TREATMENT RECORDS**

13 Following the ALJ's decision denying Plaintiff's claim for
14 benefits, filed on June 27, 2008, Plaintiff requested review before
15 the Appeals Council on August 27, 2008, and submitted additional
16 evidence, including treatment and examination records by Dr.
17 Applebaum. [AR 6-7, Exhibit 1.] The records indicate that Plaintiff
18 received treatment from Dr. Applebaum from December 3, 2004, to
19 approximately June 6, 2008. [Exhibit 1-2, 1-20.] They also indicate
20 that Dr. Applebaum noted that Plaintiff suffers from major depression,
21 recurrent with moderate psychosis, and exhibits deficits in
22 significant social and occupational functioning. [Exhibit 1-18.] In
23 addition, Dr. Applebaum noted that Plaintiff has a Global Assessment
24 of Functioning ("GAF") score of 42, which is consistent with "serious
25 symptoms OR serious impairment in social, occupational function."
26 [Exhibit 1-22.]

27 On August 25, 2009, the Appeals Council issued an Order stating
28 that "we considered the reasons you disagree with the decision and the

1 additional evidence [provided]." [AR 1.] The Appeals Council
2 concluded that "this information does not provide a basis for changing
3 the Administrative Law Judge's decision" and denied Plaintiff's
4 request for review. [AR 2.] Plaintiff asserts that this evidence
5 requires reversal of the Commissioner's decision. Plaintiff's claim
6 has merit, particularly as the evidence pertains to Issues One, Two,
7 and Three.

8 **E. ISSUE TWO: FAILURE TO CONSIDER MEDICAL EVIDENCE ON THE WHOLE**

9 In the Ninth Circuit, the district court's review of the
10 Commissioner's decision requires consideration of "the rulings of both
11 the ALJ and the Appeals Council." Ramirez v. Shalala, 8 F.3d 1449,
12 1451 (9th Cir. 1993). Even in instances, such as in this case, where
13 the Appeals Council "declines to review" the decision of the ALJ, "it
14 reached this ruling after considering the case on the merits;
15 examining the entire record, including the additional material; and
16 concluding that the ALJ's decision was proper and that the additional
17 material failed to 'provide a basis for changing the hearing
18 decision.' For these reasons, we consider on appeal both the ALJ's
19 decision and the additional material submitted to the Appeals
20 Council." Id. (citing Bates v. Sullivan, 894 F.2d 1059, 1063-64 (9th
21 Cir. 1990)).

22 The Commissioner's decision must be reversed if it was based on
23 legal error or unsupported by substantial evidence. Id. Here, the
24 evidence that Plaintiff submitted for the first time to the Appeals
25 Council, including the records attributable to her treatment with Dr.
26 Applebaum, was significant and probative to the disability
27 determination and therefore, should have been considered and addressed
28 by the Commissioner. Id. at 1454 (reversing Commissioner's decision

1 when Appeals Council disregarded relevant medical evidence); see also
2 Booz v. Secretary, 734 F.2d 1378, 1380 (9th Cir. 1984)(remanding for
3 reconsideration by the ALJ where there is a "reasonable possibility"
4 that new evidence would have changed the outcome of the case).
5 Accordingly, reversal is required.

6 **F. ISSUE THREE: MENTAL IMPAIRMENT**

7 In a letter dated February 14, 2007, Dr. Applebaum stated that he
8 has treated Plaintiff since December 2004, and that Plaintiff has
9 major depression, recurrent with moderate psychosis [AR 308-309.] The
10 ALJ considered this evidence and rejected Dr. Applebaum's assessment
11 as not credible, since he "provide[d] no objective basis for his
12 diagnosis" and "offer[ed] no treatment notes and no actual mental
13 status examination." [AR 96.] Instead, the ALJ relied on the opinion
14 of Dr. Ahmad Riahinejad, who examined Plaintiff on June 23, 2006. [AR
15 268-272.] Dr. Riahinejad's report stated that Plaintiff was capable of
16 managing her own funds, able to carry out simple and complex
17 instructions, accept instructions from supervisors and relate to
18 coworkers, and has no difficulty with pace. [AR 272.]

19 The ALJ, in reference to Dr. Riahinejad's opinion, determined
20 that Plaintiff's "medically determinable mental impairment of
21 depression does not cause more than minimal limitation in the
22 claimant's ability to perform basic mental work activities and is
23 therefore nonsevere." [AR 92.] However, as noted above, Plaintiff
24 then submitted additional evidence which included Dr. Applebaum's
25 treatment notes and actual mental status examinations. [Exhibit 1.]
26 These records support Dr. Applebaum's assertions in his previous
27 letter. [AR 308-309.]

28 At step two of the five-step disability evaluation, an impairment

1 or combination of impairments may be found "not severe" only if the
2 evidence establishes a "slight abnormality that has no more than a
3 minimal effect on an individual's ability to work." Webb v. Barnhart,
4 433 F.3d 683, 686 (9th Cir. 2005)(quoting Smolen v. Chater, 80 F.3d
5 1273, 1290 (9th Cir. 1996)); see also Yuckert v. Bowen, 841 F.2d 303,
6 306 (9th Cir. 1988). If an ALJ is "unable to determine clearly the
7 effect of an impairment or combination of impairments on the
8 individual's ability to do basic work activities, the sequential
9 evaluation should not end with the not severe evaluation step." Webb,
10 433 F.3d at 687 (quoting SSR 85-28, 1985 WL 56856 at *4). Step two,
11 then, involves a "de minimis screening device used to dispose of
12 groundless claims, and an ALJ may find that a claimant lacks a
13 medically severe impairment or combination of impairments only when
14 his conclusion is clearly established by the medical evidence." Webb,
15 433 F.3d at 687 (citations omitted); see also Yuckert, 841 F.2d at 306
16 ("Despite the deference usually accorded to the Secretary's
17 application of regulations, numerous appellate courts have imposed a
18 narrow construction upon the severity regulation applied here.").

19 Under this narrow standard for step two evaluations, the finding
20 that Plaintiff did not have a severe mental impairment is not clearly
21 established by the medical evidence. The record does show that
22 Plaintiff received regular and continuous mental health treatment,
23 takes medication for depression such as Alprazolam and Citalopram [AR
24 157], and has individual sessions with a psychologist. Moreover, none
25 of the treatment record evidence was discussed or evaluated in the
26 administrative decision, nor did it appear to be taken into account by
27 Dr. Riahinejad. Based on the existing record, the evidence of
28 Plaintiff's claim of mental impairment "is sufficient to pass the de

1 minimis threshold of step two." Webb, 433 F.3d at 687. Although the
2 court "do[es] not intimate that [plaintiff] will succeed in proving
3 that [s]he is disabled," the ALJ should continue the sequential
4 evaluation beyond step two "because there was not substantial evidence
5 to show that [plaintiff's] claim was groundless." Webb, 433 F.3d at
6 688. Accordingly, the ALJ's finding that the Plaintiff did not suffer
7 from a severe mental impairment should be reversed, and the matter
8 should be remanded for further proceedings.

9 **G. ISSUE ONE: PLAINTIFF'S TESTIMONY AND CREDIBILITY**

10 At the administrative hearing, Plaintiff testified, among other
11 things, that she has arthritis and pain in her low back [AR 69], loss
12 of cartilage in her knees, degenerative arthritis in her left shoulder
13 [AR 71], difficulty sitting for more than 25-30 minutes [AR 75],
14 inability to stand or walk for more than 10-15 minutes [AR 76], and
15 need of a cane for support [AR 71]. She also testified that she
16 suffers from depression, wants to sleep all day, procrastinates, and
17 gets emotional and cries [AR 72].

18 The ALJ referenced this portion of Plaintiff's testimony in the
19 administrative decision and noted that Plaintiff "has offered little
20 objective medical evidence of a medically determinable impairment or
21 impairment related limitations." [AR 96.] The ALJ also determined,
22 based on a number of reasons including inconsistencies in the
23 Plaintiff's testimony, that Plaintiff's testimony "although appearing
24 sincere, is not fully credible" regarding her symptoms and functional
25 limitations. [Id.] Plaintiff asserts that this determination
26 constituted reversible error because it was not "legally sufficient",
27 and each basis the ALJ relied on is "either false or does not reflect
28 poorly on [Plaintiff's] credibility." [JS 3.]

1 The standard in the Ninth Circuit for evaluations of subjective
2 symptom testimony in Social Security disability cases requires, first,
3 that the claimant produce medical evidence of an underlying impairment
4 which is reasonably likely to be the cause of the alleged symptom;
5 when this evidence is produced, the Commissioner may not reject a
6 claimant's credibility without specifically making findings which
7 support that conclusion. Bunnell v. Sullivan, 947 F.2d 341, 345 (9th
8 Cir. 1991)(en banc)(affirming standard of Cotton v. Bowen, 799 F.2d
9 1403, 1407 (1986), for review of ALJ evaluations of pain and
10 subjective symptom testimony). The credibility determination must
11 state "clear and convincing" reasons that includes a specific
12 statement of which symptom testimony is not credible and what facts in
13 the record lead to that conclusion. Smolen v. Chater, 80 F.3d 1273,
14 1284 (9th Cir. 1996)(citing Dodrill v. Shalala, 12 F.3d 915, 918 (9th
15 Cir. 1993)); see also Lester v. Chater, 81 F.3d at 834 ("For the ALJ
16 to reject the claimant's complaints, [the ALJ] must provide specific,
17 cogent reasons for the disbelief"). A claimant's pain does not need to
18 be affirmed by objective medical evidence, as long as the pain is
19 "associated with such an impairment." Magallanes v. Bowen, 881 F.2d
20 747, 755 (9th Cir. 1989). On the other hand, evidence of conservative
21 treatment is "sufficient to discount a claimant's testimony regarding
22 severity of an impairment." Parra v. Astrue, 481 F.3d 742, 750-751
23 (9th Cir. 2007).

24 Here, Plaintiff satisfied the initial requirement of producing
25 medical evidence of an underlying impairment to warrant such an
26 evaluation. The pain that Plaintiff is experiencing is reasonably
27 associated with such impairments. On the other hand, there is
28 evidence that Plaintiff underwent conservative treatment. There are

1 also instances of inconsistencies between medical records and
2 Plaintiff's assertions. Nevertheless, the court notes that evidence
3 regarding Plaintiff's mental impairment had not been fully considered.
4 When a mental illness is involved, such as depression, the court must
5 be careful in evaluating conservative treatment, because such mental
6 conditions may affect the claimant's willingness to be treated in the
7 first place. See Regenitter v. Comm'r, Soc. Sec. Admin., 166 F.3d
8 1294, 1299-1300 (9th Cir. 1999). Since the ALJ dismissed the mental
9 illness findings due to lack of a full medical record at the time [AR
10 96] and did not consider the record as a whole, the determination of
11 credibility itself may have been affected. Hence a more comprehensive
12 determination of credibility is necessary in light of the new
13 evidence. Accordingly, the matter should be reversed and remanded for
14 further proceedings.

15 **E. REMAND FOR FURTHER PROCEEDINGS**

16 The decision whether to remand for further proceedings is within
17 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
18 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
19 further proceedings, or where the record has been fully developed, it
20 is appropriate to exercise this discretion to direct an immediate
21 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
22 remand for further proceedings turns upon their likely utility).
23 However, where there are outstanding issues that must be resolved
24 before a determination can be made, and it is not clear from the
25 record that the ALJ would be required to find the claimant disabled if
26 all the evidence were properly evaluated, remand is appropriate. Id.
27 Here, as set out above in Issues One, Two, and Three, outstanding
28

1 issues remain before a finding of disability can be made.²

2 Accordingly, remand is appropriate.

3 **VI. ORDERS**

4 Accordingly, **IT IS ORDERED** that:

5 1. The decision of the Commissioner is **REVERSED**.

6 2. This action is **REMANDED** to defendant, pursuant to Sentence
7 Four of 42 U.S.C. § 405(g), for further proceedings as discussed
8 above.

9 3. The Clerk of the Court shall serve this Decision and Order
10 and the Judgment herein on all parties or counsel.

11
12 DATED: October 1, 2010



13 CARLA M. WOEHRLE
14 United States Magistrate Judge

15
16
17
18
19
20
21
22
23
24
25
26
27

² The remaining issues raised by Plaintiff in the Joint
28 Stipulation would not direct a finding of disability on the basis of
the current record.