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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KATHERINE SLACK,

Plaintiff,

No. CIV S-09-1107 FCD EFB (TEMP)

vs.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

FINDINGS AND RECOMMENDATIONS

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying her application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act. For the reasons discussed below, the court will recommend that plaintiff’s motion for summary judgment or remand be granted, that the Commissioner’s cross-motion for summary judgment be denied, and that this matter be remanded under sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff filed an application for disability benefits on February 18, 2005, alleging a disability onset date of September 2, 2003. Administrative Record (“AR”) 84-86. Her application was denied initially and upon reconsideration. *Id.* at 67-71, 56-60. A hearing was

1 held on February 28, 2008 before Administrative Law Judge (“ALJ”) Peter Belli. *Id.* at 413-460.

2 In a decision dated May 29, 2008, the ALJ determined plaintiff was not disabled.<sup>1</sup> *Id.* at 16-24.

3 The ALJ made the following specific findings:

4 1. The claimant has not engaged in substantial gainful activity  
5 since February 18, 2005, the application date (20 CFR 416.920(b)  
6 and 416.971 *et seq.*)

7 2. The claimant has the following severe impairments:  
8 degenerative joint disease and degenerative disc disease at L3-4,  
9 mild bilateral degenerative facet arthropathy at L4-5; degenerative  
10 changes at L5-S1; and history of Methicillin Resistant  
11 Staphylococcus aureus (MRSA) (20 CFR 416.920(c)).  
12 ...

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13 <sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the  
14 Social Security program, 42 U.S.C. §§ 401 *et seq.* Supplemental Security Income (“SSI”) is paid  
15 to disabled persons with low income. 42 U.S.C. §§ 1382 *et seq.* Under both provisions,  
16 disability is defined, in part, as an “inability to engage in any substantial gainful activity” due to  
17 “a medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) &  
18 1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. *See* 20 C.F.R.  
19 §§ 423(d)(1)(a), 416.920 & 416.971-76; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). The  
20 following summarizes the sequential evaluation:

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

24 Step two: Does the claimant have a “severe” impairment?  
25 If so, proceed to step three. If not, then a finding of not disabled is  
26 appropriate.

Step three: Does the claimant’s impairment or combination  
of impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
404, Subpt. P, App.1? If so, the claimant is automatically  
determined disabled. If not, proceed to step four.

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

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

27 *Lester v. Chater*, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

28 The claimant bears the burden of proof in the first four steps of the sequential evaluation  
29 process. *Bowen*, 482 U.S. at 146 n.5. The Commissioner bears the burden if the sequential  
30 evaluation process proceeds to step five. *Id.*

1 3. The claimant does not have an impairment or combination of  
2 impairments that meets or medically equals one of the listed  
3 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR  
416.920(d), 416.925 and 416.926).

3 ...

4 4. After careful consideration of the entire record, the undersigned  
5 finds that the claimant has the residual functional capacity to  
6 perform sedentary work as defined in 20 CFR 404.1567(a) and  
7 416.967(a) except lift/carry/push/and/or pull 20 pounds  
8 occasionally and ten pounds frequently; sit for 8/8 hours with  
9 normal work breaks; stand/walk for 6/8 hours with normal breaks;  
10 no climbing ladders, ropes or scaffolds; and occasionally stoop,  
11 kneel, crouch or kneel.

8 ...

9 5. The claimant is capable of performing past relevant work as a  
10 housekeeper (motel), food server, and companion (elder facility).  
11 This work does not require the performance of work-related  
12 activities precluded by the claimant's residual functional capacity  
(20 CFR 416.965).

12 ...

13 6. The claimant has not been under a disability, as defined in the  
14 Social Security Act, since February 18, 2005 (20 CFR 416.920(f)),  
15 the date the application was filed.

14 *Id.* at 17-24.

15 Plaintiff requested that the Appeals Council review the ALJ's decision. However, on  
16 February 23, 2009, the Appeals Council denied review, leaving the ALJ's decision as the final  
17 decision of the Commissioner of Social Security. *Id.* at 4-6.

18 This appeal followed. Among other assertions of error, plaintiff contends the ALJ  
19 improperly found that plaintiff's Methicillin Resistant Staphylococcus Aureus ("MRSA")  
20 infection was not a severe impairment at step two of the sequential analysis. Dckt. No. 22.  
21 Plaintiff further contends that because of this error, the ALJ improperly found she could perform  
22 her past relevant work as a companion in an elder facility. These contentions are dispositive and  
23 require remand.<sup>2</sup>

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24  
25 <sup>2</sup> With respect to plaintiff's other contentions, the court notes the following: The  
26 Commissioner's reliance on the opinion of a state agency physician (AR 19, 178, 188) that  
plaintiff's mental impairment did not meet the durational requirement, is misplaced in light of

1 II. LEGAL STANDARDS

2 The Commissioner's decision that a claimant is not disabled will be upheld if the findings  
3 of fact are supported by substantial evidence in the record and the proper legal standards were  
4 applied. *Schneider v. Comm'r of the Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000);  
5 *Morgan v. Comm'r of the Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Tackett v. Apfel*,  
6 180 F.3d 1094, 1097 (9th Cir. 1999).

7 The findings of the Commissioner as to any fact, if supported by substantial evidence,  
8 are conclusive. *See Miller v. Heckler*, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is  
9 more than a mere scintilla, but less than a preponderance. *Saelee v. Chater*, 94 F.3d 520, 521  
10 (9th Cir. 1996). "It means such evidence as a reasonable mind might accept as adequate to  
11 support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol.*  
12 *Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

13 "The ALJ is responsible for determining credibility, resolving conflicts in medical  
14 testimony, and resolving ambiguities." *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.  
15 2001) (citations omitted). "Where the evidence is susceptible to more than one rational  
16 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld."  
17 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

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20 the functional limitations assessed by examining psychologist Dr. Cormier in June 2005 and the  
21 subsequent references to mental impairment from anxiety in the medical record in August 2006  
22 and May 2007. AR 165-168, 230, 233, 286. A second psychological consultative examination  
23 would be warranted given this record and the fact that the state agency physicians were only  
24 estimating that plaintiff's mental impairment would not be severe by June 2006. AR 190. On  
25 remand, the ALJ should also develop the record with respect to plaintiff's seizure disorder in  
26 light of the repeated references in the medical record to prescriptions for Gabitril, an anti-seizure  
medication (AR 133, 205, 207, 236), plaintiff's history of unexplained falls and accidents (AR  
246, 263, 283, 340, 356, 359, 362, 365, 379, 383), and the ALJ's failure to provide any medical  
records to the examining internal medicine specialist. AR 170. Also, on remand, if the ALJ  
determines that plaintiff can perform light work, then the decision should so state, rather than  
setting forth contradictory statements in the decision regarding sedentary capacity while listing  
limitations that pertain to a higher residual functional capacity. *See* AR 19.

1 III. ANALYSIS

2 Plaintiff contends that the ALJ made contradictory findings with respect to the severity of  
3 her MRSA infection and failed to properly develop the record with respect to plaintiff's  
4 functional limitations from this impairment. As a result of the errors, plaintiff asserts the ALJ  
5 erred in finding plaintiff could perform her past relevant work.

6 "The step-two inquiry is a de minimis screening device to dispose of groundless claims."  
7 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). The purpose is to identify claimants  
8 whose medical impairment is so slight that it is unlikely they would be disabled even if age,  
9 education, and experience were taken into account. *Bowen v. Yuckert*, 482 U.S. 137, 153 (1987).

10 At step two of the sequential evaluation, the ALJ determines which of claimant's alleged  
11 impairments are "severe" within the meaning of 20 C.F.R. § 416.920(c). A severe impairment  
12 significantly limits a person's physical or mental ability to do basic work activities. *Id.* "An  
13 impairment is not severe if it is merely 'a slight abnormality (or combination of slight  
14 abnormalities) that has no more than a minimal effect on the ability to do basic work activities.'"  
15 *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (quoting Social Security Ruling ("SSR")  
16 96-3p (1996)). If a severe impairment exists, all medically determinable impairments must be  
17 considered in the remaining steps of the sequential analysis. 20 C.F.R. § 416.923. The ALJ  
18 "must consider the combined effect of all of the claimant's impairments on her ability to  
19 function, without regard to whether each alone [i]s sufficiently severe." *Smolen*, 80 F.3d at  
20 1290; 20 C.F.R. § 416.923.

21 At step two of the sequential analysis, the ALJ found plaintiff has a severe impairment of  
22 history of MRSA infection. AR 17. Within the body of the decision, however, the ALJ made  
23 the contradictory finding that plaintiff's MRSA infection did not meet the durational  
24 requirement. AR 22. This finding is not supported by substantial evidence. On the contrary, the  
25 medical evidence is replete with references to the sequelae of recurrent MRSA infection over an  
26 extended period, well beyond the twelve month durational requirement. AR 402 (October, 2007,

1 request for follow up for treatment for MRSA infection), 229 (October, 2007, sores in axilla  
2 from MRSA healed), 269-271 (October, 2007 multiple acute MRSA infection in axilla), 403  
3 (September, 2007 (reinfection), 272-279 (August, 2007, treatment for colitis type syndrome  
4 associated with antibiotics), 409 (prior infection from MRSA had resolved; three week history of  
5 diarrhea with weight loss, infection with *C. difficile enteritis*), 286-293 (May, 2007 treatment for  
6 MRSA infection), 347-355 (May-June, 2006 treatment for MRSA labial abscess).

7         Although inartfully formulated by plaintiff, the question presented here is whether the  
8 ALJ properly considered the functional limitations of all medically determinable impairments at  
9 the remaining steps of the sequential evaluation. *See Smolen*, 80 F.3d at 1290 (if one severe  
10 impairment exists, all medically determinable impairments must be considered in the remaining  
11 steps of the sequential analysis) (citing 20 C.F.R. § 404.1523); *see Burch v. Barnhart*, 400 F.3d  
12 676, 682-82 (9th Cir. 2005). The ALJ found that the MRSA impairment causes no limitations in  
13 plaintiff's ability to perform work activity other than limitations indicated in the residual  
14 functional capacity assessed by the ALJ. AR 22. Since the residual functional capacity sets  
15 forth no limits attributable to MRSA (AR 19), such as avoiding close contact with individuals  
16 susceptible to infection, it appears the ALJ inconsistently found the MRSA infection was severe  
17 and not severe at the same time.

18         This inconsistency is fatal to the ALJ's conclusion at step four of the sequential  
19 evaluation that plaintiff could perform her past relevant work as a companion in an elder care  
20 facility. "Although the burden of proof lies with the claimant at step four, the ALJ still has a  
21 duty to make the requisite factual findings to support his conclusion. Social Security Ruling  
22 "S.S.R.") 82-62.<sup>3</sup> *See* 20 C.F.R. §§ 404.1571 and 416.971, 404.1574 and 416.974, 404.1565 and  
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24         <sup>3</sup> Social Security Rulings "represent precedent final opinions and orders and statements  
25 of policy and interpretations that we have adopted." 20 C.F.R. § 402.35(b)(1). Social Security  
26 Rulings are "binding on all components of the Social Security Administration." *Heckler v.*  
*Edwards*, 465 U.S. 870, 873 n.3 (1984); *cf. Silveira v. Apfel*, 204 F.3d 1257, 1260 (9th Cir.2000)  
("This court defer[s] to Social Security Rulings . . . unless they are plainly erroneous or

1 416.965.” *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). “This is done by looking at  
2 the ‘residual functional capacity and the physical and mental demands’ of the claimant's past  
3 relevant work. 20 C.F.R. §§ 404.1520(e) and 416.920(e).” *Pinto*, 249 F.3d at 844-45. The  
4 claimant must be able to perform: (1) the actual functional demands and job duties of a particular  
5 past relevant job; or (2) the functional demands and job duties of the occupation as generally  
6 required by employers throughout the national economy. *Id.* at 845 (citing S.S.R. 82-61). “This  
7 requires specific findings as to the claimant’s residual functional capacity, the physical and  
8 mental demands of the past relevant work, and the relation of the residual functional capacity to  
9 the past work.” *Id.* (citing S.S.R. 82-62). “Social Security Regulations name two sources of  
10 information that may be used to define a claimant’s past relevant work as actually performed: a  
11 properly completed vocational report, S.S.R. 82-61, and the claimant's own testimony, S.S.R.  
12 82-41.” *Id.*

13         The vocational expert testified that plaintiff’s past work as a housekeeper, food server  
14 and companion at an elder care facility could be performed if plaintiff retained the residual  
15 functional capacity to perform light work. AR 458. At step four, the ALJ found plaintiff could  
16 perform her past relevant work in the occupations identified by the vocational expert. AR 23. A  
17 job is considered past relevant work only if it involved “substantial gainful activity.” 20 C.F.R.  
18 § 416.972; *Lewis v. Apfel*, 236 F.3d 503, 515 (9th Cir. 2001). The job must have been “done  
19 within the last 15 years [and] lasted long enough for [plaintiff] to learn to do it.” 20 C.F.R.  
20 § 416.965. Past work which was done for a *de minimis* period is not past relevant work within  
21 the meaning of the regulations. 20 C.F.R. § 416.965; SSR 84-25 (jobs ending with three months  
22 considered unsuccessful work attempt); *cf. Gatliff v. Commissioner of Social Security*, 172 F.3d  
23 690 (9th Cir. 1999) (string of sequential two month jobs does not constitute substantial gainful  
24 activity.)

25 \_\_\_\_\_  
26 inconsistent with the Act or regulations”).

1 Plaintiff's work history shows only one job, *i.e.* that of care giver in an elderly facility,  
2 which can be considered to be past relevant work, from both a durational viewpoint as well as  
3 the amount of money earned. AR 107; 20 C.F.R. § 416.974 (earnings below certain thresholds  
4 not considered to be substantial gainful activity). This point appears to be conceded by  
5 defendant. *See* Def.'s Br. at 9:23-28, fn. 4. The ALJ included no limitations in the residual  
6 functional capacity attributable to the MRSA impairment. No inquiry was made of the  
7 vocational expert as to what duties would be performed by a companion at an elder care facility.  
8 The vocational expert simply testified that such a job would require a light residual functional  
9 capacity and identified such job in the Dictionary of Occupation Titles<sup>4</sup> as 309.677-010.<sup>5</sup> AR  
10 458. The position of care giver, as described by plaintiff, included dispensing medication,  
11 helping the elderly in personal hygiene, and transferring the residents of the elder care facility.  
12 AR 108. Under the DOT's description of the job as well as plaintiff's testimony, it appears close  
13 personal contact with the patient is required. There was no questioning of the vocational expert  
14 as to whether a person who has a recurrent MRSA infection would be allowed to perform duties  
15 requiring close physical contact with elderly persons. On the present record, substantial  
16 evidence does not support the ALJ's finding that plaintiff could perform her past relevant work.

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20 <sup>4</sup> The United States Dept. of Labor, Employment & Training Admin., Dictionary of  
21 Occupational Titles (4th ed. 1991), ("DOT") is routinely relied on by the SSA "in determining  
22 the skill level of a claimant's past work, and in evaluating whether the claimant is able to  
perform other work in the national economy." *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir.  
1990). The DOT classifies jobs by their exertional and skill requirements. The DOT is a  
primary source of reliable job information for the Commissioner. 20 C.F.R. § 404.1566(d)(1).

23 <sup>5</sup> That occupational category is described in the DOT as follows:  
24 309.677-010 COMPANION (domestic ser.)  
25 Cares for elderly, handicapped, or convalescent persons: Attends to employer's personal  
26 needs [PERSONAL ATTENDANT (domestic ser.)]. Transacts social or business affairs  
[SOCIAL SECRETARY (clerical)]. Reads aloud, plays cards, or other games to entertain  
employer. Accompanies employer on trips and outings. May prepare and serve meals to  
employer.



1 VI. CONCLUSION

2 For the foregoing reasons, this matter should be remanded under sentence four of 42  
3 U.S.C. § 405(g) for further findings addressing the deficiencies noted above.

4 Accordingly, IT IS HEREBY RECOMMENDED that:

- 5 1. Plaintiff's motion for summary judgment or remand be granted;
- 6 2. The Commissioner's cross-motion for summary judgment be denied;
- 7 3. This matter be remanded for further proceedings consistent with this order; and
- 8 4. The Clerk be directed to enter judgment for plaintiff.

9 These findings and recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
11 after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
14 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
15 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

16 DATED: February 14, 2011.

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18 EDMUND F. BRENNAN  
19 UNITED STATES MAGISTRATE JUDGE  
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