

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DESIREE HODGENS,)	Case No.: 5:13-cv-00161-PSG
)	
Plaintiff,)	ORDER GRANTING MOTION FOR
v.)	SUMMARY JUDGMENT AND
)	REMANDING FOR FURTHER
COMMISSIONER OF SOCIAL SECURITY,)	ADMINISTRATIVE PROCEEDINGS
)	
Defendant.)	(Re: Docket No. 18)

This case is nearly identical to *Bustamante v. Massanari*.¹

There, the Ninth Circuit first held the administrative law judge committed legal error by evaluating the claimant’s impairments using the five-step sequential process without separating out the impact of his alcoholism. Second, the ALJ’s alternative finding that the claimant’s mental impairments were not severe, regardless of the impact of alcoholism, was not supported by substantial evidence where an examining psychologist found the claimant had “a marked degree of impairment in activities of daily living, as well as cognitive functioning and interpersonal relations.”²

¹ See *Bustamante v. Massanari*, 262 F.3d 949, 956 (9th Cir. 2001).

² See *id.*

1 Here, the ALJ likewise ruled out disability without separating out Plaintiff Desiree
2 Hodgens' past substance abuse. Further, there was insubstantial evidence to support the ALJ's
3 finding where her treating physician testified without rebuttal that Hodgens had "marked
4 difficulty interacting adequately with others" and "marked difficulties concentrating or persisting
5 independently at work-related activities at a consistent pace for a normal workday or
6 workweek."³

7 Just as the errors in this case and binding precedent from the Ninth Circuit are nearly
8 identical, so too must be the outcome. That the Commissioner does not even address
9 *Bustamante* in its papers, let alone distinguish it, all but confirms this outcome. Because the ALJ
10 applied improper legal standards by considering the impact of substance abuse prematurely, and
11 her determination was not supported by substantial evidence, the court GRANTS Hodgens'
12 motion for summary judgment and remands the case.

13 **I.**

14 Through its administrative law judges, the Commissioner of Social Security evaluates
15 claims using a sequential five-step evaluation process. In the first step, the ALJ must determine
16 whether the claimant currently is engaged in substantial gainful activity, and if so, the claimant is
17 not disabled and the claim is denied.⁴ If the claimant currently is not engaged in substantial
18 gainful activity, the second step requires the ALJ to determine whether the claimant has a
19 "severe" impairment or combination of impairments that significantly limits the claimant's
20 ability to do basic work activities; if not, the ALJ finds the claimant "not disabled" and the claim
21 is denied.⁵ If the claimant has a "severe" impairment or combination of impairments, the third
22 step requires the ALJ to determine whether the impairment or combination of impairments meets
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25 ³ See Docket No. 14-8 at 22.

26 ⁴ See *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981).

27 ⁵ See *id.*

1 or equals an impairment in the listing of impairments.⁶ If so, disability is conclusively presumed
2 and benefits awarded.⁷

3 If the claimant's impairment or combination of impairments does not meet or equal an
4 impairment in the listing, the fourth step requires the ALJ to determine whether the claimant has
5 sufficient "residual functional capacity"⁸ to perform his or her past work; if so, the claimant is not
6 disabled and the ALJ denies the claim.⁹ It is the claimant's burden to prove that he or she is
7 unable to perform past relevant work.¹⁰ If the claimant meets this burden, a prima facie case of
8 disability is established. The Commissioner then bears the burden of establishing that the
9 claimant can perform other substantial gainful work,¹¹ comprising the fifth and final step in the
10 sequential analysis.

11 Impairments that can be controlled effectively with treatment are not disabling.¹² A
12 claimant will not be found disabled if she does not follow her prescribed treatment without good
13 reason.¹³ Further, an "individual shall not be considered to be disabled for purposes of [benefits

14 ⁶ See 20 C.F.R. § 404 app. 1.

15 ⁷ See *id.*

16 ⁸ A claimant's RFC is what the claimant can still do despite existing physical, mental,
17 nonexertional and other limitations. See *Cooper v. Sullivan*, 880 F.2d 1152, 1155 n.5 (9th Cir.
18 1989).

19 ⁹ See *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992); *Gallant v. Heckler*, 753 F.2d 1450,
20 1452 (9th Cir. 1994).

21 ¹⁰ See *Druoin*, 966 F.2d at 1257.

22 ¹¹ There are two ways for the Commissioner to meet the burden of showing that there is work in
23 significant numbers in the national economy that the claimant can perform: (1) by the testimony
24 of a vocational expert or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. §
25 404, Subpart P, Appendix 2. See *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999).

26 ¹² See 20 C.F.R. §§ 404.1530, 416.930; *Warre v. Comm'r of the SSA*, 439 F.3d 1001, 1006 (9th
27 Cir. 2006) (finding impairments that can be controlled effectively with treatment are not
28 disabling); *Odle v. Heckler*, 707 F.2d 439, 440 (9th Cir. 1983) (affirming a denial of benefits and
noting that the claimant's impairments were responsive to medication).

¹³ See 20 C.F.R. §§ 404.1530, 416.930.

1 under Title II or XVI of the Act] if alcoholism or drug addiction would (but for this
2 subparagraph) be a contributing factor material to the Commissioner’s determination that the
3 individual is disabled.”¹⁴ An ALJ need not evaluate alcoholism’s contribution to a claimant’s
4 symptoms when substantial evidence supported the ALJ’s determination that the claimant’s
5 symptoms were not severe in the first place.¹⁵ But “[i]t is an error for the ALJ to determine that a
6 claimant’s mental impairments are ‘the product and consequence of his alcohol abuse’ prior to
7 making a determination that the claimant is disabled under the five-step inquiry.”¹⁶

8 Over six years ago, Hodgens filed a Title II application for a period of disability and
9 disability insurance benefits, as well as a Title XVI application for supplemental security
10 income.¹⁷ In both applications, Hodgens claimed disability beginning August 1, 2007.¹⁸ The
11 claims were denied initially, upon reconsideration, following a hearing¹⁹ and upon administrative
12 appeal for review.²⁰

13 Hodgens now requests that this court reverse and set aside the decision of the
14 Commissioner or alternatively remand the case back to the Commissioner for a hearing *de novo*
15 or for proper evaluation of the evidence.²¹ The Commissioner requests that the court affirm the
16 ALJ’s decision or remand so that the Commissioner may correct any perceived errors.

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19 ¹⁴ 42 U.S.C. §§ 423(d)(C), 1382c(a)(3)(J); *see also Sousa v. Callahan*, 143 F.3d 1240, 1242 (9th
20 Cir. 1998).

21 ¹⁵ *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).

22 ¹⁶ *See Bustamante*, 262 F.3d at 954-55.

23 ¹⁷ *See* Docket No. 14-3 at 14.

24 ¹⁸ *See id.*

25 ¹⁹ *See id.*

26 ²⁰ *See id.* at 8.

27 ²¹ *See* Docket No. 1 at 3.

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II.

The court has jurisdiction under 28 U.S.C. § 1331. The parties further consented to the jurisdiction of the undersigned magistrate judge under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 72(a). The court finds this motion suitable for disposition on the papers in light of this court’s Procedural Order on Social Security Cases,²² its local rules²³ and the parties’ representations at a status conference following transfer of this case to this district.²⁴

Pursuant to 42 U.S.C. § 405(g), this court has the authority to review the Commissioner’s decision denying Hodgens her benefits. The Commissioner’s decision will be disturbed only if it is not supported by substantial evidence or if it is based upon the application of improper legal standards.²⁵ In this context, the term “substantial evidence” means “more than a scintilla but less than a preponderance—it is such relevant evidence a reasonable mind might accept as adequate to support the conclusion.”²⁶ When determining whether substantial evidence exists to support the administrative record as a whole, the court must consider adverse as well as supporting evidence.²⁷ Where evidence exists to support more than one rational interpretation, the court must defer to the decision of the ALJ.²⁸ However, a non-examining physician cannot present substantial evidence unless corroborated.²⁹ Further, “[i]f additional proceedings can remedy defects in the original administrative proceedings, a social security case should be remanded.”³⁰

²² See Docket No. 25.

²³ See Civil L.R. 7–1(b) (“In the Judge’s discretion, or upon request by counsel and with the Judge’s approval, a motion may be determined without oral argument or by telephone conference call.”).

²⁴ See Docket No. 29.

²⁵ See *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin*, 966 F.2d at 1257.

²⁶ See *Moncada*, 60 F.3d at 523; *Druoin*, 966 F.2d at 1257.

²⁷ See *Druoin*, 966 F.2d at 1257; *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989).

²⁸ See *Moncada*, 60 F.3d at 523; *Druoin*, 966 F.2d at 1258.

²⁹ See 20 C.F.R. § 404.1527(d)(4); *Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1996); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (An opinion by a “non-examining

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III.

Pursuant to 20 C.F.R. §§ 404.1520(a) and 416.920(a), the ALJ conducted the sequential five-step evaluation process for determining whether an individual is disabled. At step one, she found Hodgens had not engaged in substantial gainful activity since August 1, 2007.³¹ At step two, the ALJ found that Hodgens had the following severe impairments: major depressive disorder, post-traumatic stress disorder, personality disorder and a history of substance abuse in remission since March of 2009.³²

At step three, the ALJ found Hodgens did not have an impairment or combination of impairments that meets or medically equals one of the listed impairments.³³ Based on the testimony of Dr. Charles Agler, a non-examining physician,³⁴ she found that when not drinking, Hodgens had mild restriction in activities of daily living, moderate difficulties in social functioning and concentration and no episodes of decompensation.³⁵ This did not reach the requirement of marked limitation in at least two of those categories.³⁶

medical expert . . . may constitute substantial evidence when it is consistent with other independent evidence in the record.”); *Thomas v. Barnhart*, 278 F.3d 948, 957 (9th Cir. 2002) (“The opinions of non-treating or non-examining physicians may also serve as substantial evidence when the opinions are consistent with independent clinical findings or other evidence in the record . . . Generally, the more consistent an opinion is with the record as a whole, the more weight [the ALJ] will give to that opinion.”).

³⁰ *See Lewin*, 654 F.2d at 635.

³¹ *See* Docket No. 14-3 at 16.

³² *See id.*

³³ *See id.* at 17. Impairments are listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926), as well as in criteria listings of 12.04, 12.06, 12.08 and 12.09.

³⁴ *See* Docket No. 14 at 19.

³⁵ *See id.* at 17-18.

³⁶ *See id.*

1 At step four, the ALJ found Hodgens had the RFC to perform a full range of work at all
2 exertional levels, but could perform only simple, repetitive tasks with limited contact with the
3 general public.³⁷ She found Hodgens' claims of symptoms were not credible to the extent they
4 were inconsistent with her RFC.³⁸ She further gave the opinions of psychological consultative
5 examiner Dr. Robert Billbrey little weight due to inconsistencies with his findings.³⁹ The ALJ
6 ultimately found Hodgens had not been under a disability since August 1, 2007 and was capable
7 of performing her past work as a janitor.⁴⁰

8 **IV.**

9 Having reviewed the ALJ's reasoning, considering adverse as well as reinforcing
10 evidence,⁴¹ the court finds substantial evidence and proper application of law do not support the
11 ALJ's decision.⁴² Because additional proceedings may remedy defects in the original
12 administrative proceedings, and the cumulative error outline below is not harmless,⁴³ the case is
13 remanded for further fact finding consistent with the following.⁴⁴

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³⁷ See Docket No. 14-3 at 18.

18 ³⁸ See *id.* at 19.

19 ³⁹ See *id.* at 20.

20 ⁴⁰ See *id.* at 21.

21 ⁴¹ See *Druoin*, 966 F.2d at 1257; *Hammock*, 879 F.2d at 501.

22 ⁴² See *Moncada*, 60 F.3d at 523; *Druoin*, 966 F.2d at 1257.

23 ⁴³ See, e.g., *Garrison v. Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (citing *Nguyen v. Charter*,
24 100 F.3d 1462, 1464 (9th Cir. 1996) (“[A]n ALJ errs when he rejects a medical opinion or
25 assigns it little weight while doing nothing more than ignoring it, asserting without explanation
26 that another medical opinion is more persuasive, or criticizing it with boilerplate language that
fails to offer a substantive basis for his conclusion.”); cf. *McClary v. Astrue*, Case No. 11-cv-
1226-GGH, 2012 WL 2921352, at *10-11 (E.D. Cal. July 17, 2012).

27 ⁴⁴ See *Lewin*, 654 F.2d at 635.

1 *First*, the ALJ found that from August 1, 2007 until March 2009, Hodgens had a
2 significant alcohol abuse problem.⁴⁵ The ALJ appears to have only considered Hodgens’ status
3 from March 2009 on, in the apparent absence of alcohol abuse, in making Hodgens disability
4 determination: “These treatment notes are consistent with a finding that the claimant’s symptoms
5 are well controlled with medication when she is in remission for substance abuse, and would be
6 able to sustain simple, repetitive work with limited contract with the general public.”⁴⁶ “After
7 careful consideration of all the evidence, the undersigned concludes the claimant has not been
8 under a disability within the meaning of the Social Security Act from August 1, 2007, through
9 the date of this decision.”⁴⁷ As a result, it appears that the ALJ did not consider substantial
10 evidence that Hodgens may have been under a disability from August 2007 until March 2009,
11 however impacted by substance abuse. The ALJ thus did not use the proper procedures laid out
12 in *Bustamante*.

13 ⁴⁵ See Docket No. 14-3 at 14 (“Disability is defined as the inability to engage in any substantial
14 gainful activity by reason of any medically determinable physical or mental impairment or
15 combination of impairments that can be expected to result in death or that has lasted or can be
16 expected to last for a continuous period of not less than 12 months”); *id.* at 16 (“The claimant has
17 . . . [a] history of substance abuse, in remission since March of 2009”); *id.* at 19-20 (“Dr. Charles
18 Agler, the Medical Expert, testified that a review of the medical evidence supported a conclusion
19 that, in the absence of substance abuse, the claimant retains a capacity for simple, repetitive tasks
20 with limited contact with the general public . . . Dr. Agler testified that substance abuse was a
21 significant issue until March of 2009 . . . Treatment notes in the record show a pattern of
22 increased symptoms coinciding with polysubstance abuse and non-compliance with prescribed
23 medications . . . The claimant stated that she was not compliant with her medications, and was
24 consuming approximately 1 pint of whisky a day for 33 years, with the last use 3 to 4 days before
25 the March 2008 intake . . . in August of 2008, the claimant had not been using alcohol and drugs,
26 and was compliant with her medications and taking Antabuse . . . It appears that as of March
27 2009, the claimant had stopped abusing alcohol . . . these notes from the appointments that the
28 claimant did keep, indicate that the claimant was not using alcohol or illegal drugs, and was not
experiencing any symptoms of panic, mania, or psychosis with her current medication
regiment”).

⁴⁶ See Docket No. 14-3 at 20; see also Docket No. 19 at 6, 11 (“At the ALJ hearing, Dr. Agler
provided some context regarding Plaintiff’s GAF scores, noting they were identical throughout
Dr. Colbert’s records, and that even though Plaintiff had a GAF of 50, given the record ‘it looked
at that time’ she could still perform simple repetitive tasks”).

⁴⁷ See Docket No. 14-3 at 14.

1 Under *Bustamante*, the ALJ “should have proceeded with the five-step inquiry without
2 attempting to determine the impact of [Hodgens’] alcoholism on [her] other mental impairments.
3 If, and only if, the ALJ found Hodgens was disabled under the five-step inquiry, should the ALJ
4 have evaluated whether [Hodgens] would still be disabled if [she] stopped using alcohol.”⁴⁸ The
5 ALJ should have “proceed[ed] with step three (and four and five, if necessary) of the disability
6 determination without attempting to separate out the impact of [Hodgens’] alcohol abuse.”⁴⁹ The
7 ALJ should not have factored alcoholism’s contribution at step three in order to determine that
8 Hodgens did not have a disability. “Only if the ALJ determines that [Hodgens] is disabled under
9 the five-step inquiry, should the ALJ consider whether ‘alcoholism is a contributing factor
10 material to’ that determination, pursuant to 20 C.F.R. §§ 404.1535 and 416.935.”⁵⁰

11 **Second**, to reject a controverted treating physician’s opinion, the ALJ must give specific
12 and legitimate reasons.⁵¹ Here, the ALJ did not address treating psychiatrist Dr. Heather
13 Colbert’s assessment of Hodgens. Colbert found a global assessment of functioning (“GAF”) of
14 “50,” even without substance abuse, indicating serious impairment in occupational functioning,
15 and backed by clinical findings and an ongoing medication regime.⁵² While a GAF may be
16 broader than an assessment of a claimant’s capacity to work, Colbert used it to opine on
17 Hodgens’ serious impairment in occupational and social functioning.⁵³ It needs to be addressed.

18 **Third**, a non-examining physician cannot present substantial evidence unless
19 corroborated by an abundance of evidence.⁵⁴ The ALJ endorsed Agler’s findings, which were

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21 ⁴⁸ *Bustamante*, 262 F.3d at 955-56.

22 ⁴⁹ *Id.*

23 ⁵⁰ *Id.* at 956.

24 ⁵¹ *See Lester*, 81 F.3d at 831.

25 ⁵² *See id.*

26 ⁵³ *See Docket No. 20 at 2.*

27 ⁵⁴ *See Lester*, 81 F.3d at 831.

1 only “in the absence of Plaintiff’s substance abuse,”⁵⁵ and which were controverted by Colbert’s
2 and Bilbrey’s findings as well as Hodgens’ claims. Even still, Agler found the information on
3 borderline intellectual functioning was insufficient to determine whether it would prevent
4 employment, an ambiguity giving credence to the examining physicians Colbert and Bilbrey.
5 This was not sufficient corroboration.

6 **Fourth**, in discrediting a claimant, “unless the ALJ makes a finding of malingering based
7 on affirmative evidence thereof, he or she may only find an applicant not credible by making
8 specific findings as to credibility and stating clear and convincing reasons for each.”⁵⁶ This is not
9 an easy requirement to meet,⁵⁷ and one the ALJ did not meet here.

10 **Finally**, the vocational expert provided testimony that a person likely to leave work early
11 or miss three days of work per month would not be employable.⁵⁸ The ALJ did not address this
12 aspect of Hodgens’ employability.

13 **SO ORDERED.**

14 Dated: December 31, 2014

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16 PAUL S. GREWAL
17 United States Magistrate Judge

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⁵⁵ See Docket No. 19 at 3.

24 ⁵⁶ *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

25 ⁵⁷ See *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002) (“The clear and
26 convincing standard is the most demanding required in Social Security cases.”).

27 ⁵⁸ See *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004).