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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Case No.: 2:18-cv-02226-WGC

MANUEL GARCIA,

Plaintiff

v.

ANDREW SAUL,
COMMISSIONER OF SOCIAL SECURITY,

Defendant

Order

Re: ECF No. 31

Before the court is the Commissioner's Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e). (ECF No. 31.) Plaintiff filed a response. (ECF No. 32.) The Commissioner filed a reply. (ECF No. 35.)

After a thorough review, the Commissioner's motion is granted, and the judgment is amended to reflect that the matter will be remanded for further proceedings instead of for the calculation and award of benefits.

I. BACKGROUND

This action was originally assigned to District Judge James C. Mahan and Magistrate Judge George Foley, Jr. After the filing of the dispositive motions, due to Magistrate Judge Foley's retirement, the action was reassigned to Magistrate Judge Elayna J. Youchah on August 8, 2019. On October 16, 2019, the case was reassigned to the undersigned as magistrate judge. Following the consent of the parties, on January 23, 2020, the case was assigned to the undersigned for all purposes.

1 On April 26, 2015, Plaintiff protectively completed an application for disability insurance
2 benefits (DIB) under Title II of the Social Security Act, alleging disability beginning
3 September 1, 2012. (Administrative Record (AR) 173-174.) The application was denied initially
4 and on reconsideration. (AR 82-86, 92-96.) Plaintiff had a hearing before an administrative law
5 judge (ALJ) on June 8, 2017. (AR 30-46.) On November 1, 2017, the ALJ issued a decision
6 finding Plaintiff not disabled. (AR 13-25.) Plaintiff requested review and the Appeals Council
7 denied the request making the ALJ's decision the final decision of the Commissioner. (AR 1-3.)

8 Plaintiff commenced this action for judicial review under 42 U.S.C. § 405(g). Plaintiff
9 filed a motion to remand, arguing that the ALJ failed to articulate specific and legitimate reasons
10 supported by substantial evidence for rejecting the two-hour stand/walk limitation assessed by
11 examining physician, Adrian Adrian, M.D. (ECF No. 19.) The Commissioner filed a cross-
12 motion to affirm and opposition to Plaintiff's motion, arguing that the ALJ appropriately
13 discounted the two-hour stand/walk limitation. (ECF Nos. 20, 21.)

14 On March 16, 2020, the court issued an order on the motions. The court concluded that
15 the ALJ's reason for discounting the opinion of the examining physician was not supported by
16 substantial evidence because the longitudinal record did in fact support the two-hour stand/walk
17 limitation. (ECF No. 29.)

18 The court then addressed whether the matter should be remanded for further proceedings
19 or for the calculation and award of benefits. Plaintiff argued that Dr. Adrian's opinion should be
20 credited and that he should be awarded benefits because if he is limited to standing for two-hours
21 in an eight-hour workday, he is limited to sedentary work. By the time of the hearing, he was 51
22 years old, and so Plaintiff asserted that he was deemed disabled under the Grids, 20 C.F.R. §
23 404, subpart P, Appendix, Rule 201.14. The Commissioner did not include any argument as to

1 'necessary to correct manifest errors of law or fact upon which the judgment is based;' 2) the
2 moving party presents 'newly discovered or previously unavailable evidence;' 3) the motion is
3 necessary to 'prevent manifest injustice;' or 4) there is an 'intervening change in controlling law.'

4 *Id.*

5 Rule 59(e) offers an "extraordinary remedy, to be used sparingly in the interests of
6 finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir.
7 2003) (citing 12 James Wm. Moore et. al., Moore's Federal Practice § 59.03[4] (3d ed. 2000)).

8 "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time
9 when they could reasonably have been raised earlier in the litigation." *Carroll*, 229 F.3d at 890.

10 First, the Commissioner argues that even if Plaintiff is limited to stand/walking for two-
11 hours in a workday, this does not limit him to only sedentary work. Instead, the Commissioner
12 contends that because Plaintiff could still lift/carry 10 pounds frequently and 20 pounds
13 occasionally, his RFC would fall between two exertional levels: sedentary and light.

14 Plaintiff argues that the Commissioner could have raised this argument in the response to
15 Plaintiff's motion.

16 Second, the Commissioner argues that while Plaintiff would be incapable of performing
17 his past relevant work as a blackjack dealer with the stand/walk limitation, it is not clear whether
18 he has skills that were transferrable to other work at step five.

19 Plaintiff admits that there is an unanswered question of the transfer of skills at step five;
20 however, Plaintiff argues he cannot perform his past light work, and the burden shifted to the
21 Commissioner to find alternative work he could perform. The ALJ found Plaintiff could perform
22 his past relevant work, and made an alternative step five finding that failed to assess transferable
23 skills.

1 Third, the Commissioner asserts that even if Plaintiff were limited to sedentary work, he
2 was not disabled under the Grids from his alleged onset date of September 2012 until June 2015,
3 when he changed age categories.

4 Plaintiff asserts that the court found him disabled under Rule 201.14, and therefore, found
5 him disabled as of June 28, 2015, when he turned 50.

6 Preliminarily, this briefing could have been avoided had the Commissioner raised these
7 arguments in the cross-motion and opposition in the first place. Nevertheless, the court is in a
8 position where there are arguments the Commissioner could have raised earlier, but at least one
9 of the arguments also reveals that the court's determination was based on an error of law, which
10 is a basis for amending the judgment under Rule 59(e).

11 Specifically, the court accepted Plaintiff's proposition, which the Commissioner
12 unfortunately did not address in earlier filings, that he was limited to sedentary work if he was
13 restricted to two hours of standing/walking in a workday. Based on this proposition, the court
14 found Plaintiff was disabled under Grid Rule 201.14, which pertains to an individual limited to
15 sedentary work who is closely approaching advanced age (50 or over), has a high school
16 education that does not provide for direct entry into skilled work, and past relevant work that was
17 semi-skilled or skilled, but has no transferrable skills. It was not correct, however, that Plaintiff
18 was necessarily limited to sedentary work based on Dr. Adrian's restriction.

19 The Agency classifies jobs as sedentary, light, medium, heavy and very heavy. 20 C.F.R.
20 § 404.1567.

21 Sedentary work involves lifting no more than 10 pounds at a time,
22 and occasionally lifting or carrying articles like docket files,
23 ledgers, and small tools. Although a sedentary job is defined as one
which involves sitting, a certain amount of walking and standing is
often necessary in carrying out job duties. Jobs are sedentary if

1 walking and standing are required occasionally and other sedentary
2 criteria are met.

3 20 C.F.R. § 404.1567(a).

4 Light work involves lifting no more than 20 pounds at a time with
5 frequent lifting or carrying objects weighing up to 10 pounds. Even
6 though the weight lifted may be very little, a job is in this category
7 when it requires a good deal walking or standing, *or when it*
8 *involves sitting most of the time with some pushing and pulling of*
9 *arm or leg controls*. To be considered capable of performing a full
10 or wide range of light work, you must have the ability to do
11 substantially all of these activities. If someone can do light work,
12 we determine that he or she can also do sedentary work, unless
13 there are additional limiting factors such as loss of fine dexterity or
14 inability to sit for long periods of time.

15 20 C.F.R. 404.1567(b)(emphasis added).

16 Since Plaintiff could do a job sitting most of the time, and could still satisfy the lifting
17 requirements of light work and there were no restrictions on pushing or pulling with the upper or
18 lower extremities, he is between the sedentary and exertional levels. In other words, it is possible
19 he is not limited to only sedentary work, but could perform a reduced range of light work, and
20 there may be light jobs that Plaintiff could perform.

21 Therefore, the court agrees with the Commissioner than instead of being remanded for
22 the calculation and award of benefits, this matter should be remanded to the ALJ for further
23 proceedings. The ALJ should account for Dr. Adrian's two-hour stand/walk limitation, and
consult a vocational expert to determine whether other jobs exist in significant numbers in the
national economy that Plaintiff could perform, or whether Plaintiff should be considered disabled
under Rule 201.14. The inquiry of disability under Rule 201.14 will require the ALJ to consider
transferability of skills. In addition, if Plaintiff were to be found disabled under Rule 201.14, it
would only apply as of June 28, 2015, when he turned 50.

1 While the Commissioner could have raised these arguments earlier, the court erroneously
2 relied on Plaintiff's representation that he was limited to sedentary work if Dr. Adrian's
3 restrictions were credited. In social security cases, in determining whether a matter should be
4 remanded for further proceedings or for calculation and award of benefits, the court is required to
5 consider whether there are other issues that must be resolved before a disability determination
6 can be made, and whether there is any doubt as to disability. *Leon v. Berryhill*, 880 F.3d 1041,
7 1045 (9th Cir. 2017). The Commissioner's motion has demonstrated that there are other issues
8 that need to be resolved before a disability determination can be made; therefore, it is appropriate
9 to grant the Commissioner's Rule 59(e) motion.

10 **III. CONCLUSION**

11 The Commissioner's motion under Rule 59(3) is **GRANTED**. The judgment is amended
12 such that the matter is no longer remanded for the calculation and award of benefits, but is
13 remanded for further proceedings so that the ALJ can evaluate Plaintiff's disability claim taking
14 into account the two-hour stand/walk limitation of Dr. Adrian. The ALJ should consider whether
15 there is other work that exists in the national economy that Plaintiff could perform at step five or
16 whether Plaintiff is disabled under Rule 201.14 (which should in turn consider transferability of
17 skills and the date Plaintiff turned 50).

18 **IT IS SO ORDERED.**

19 Dated: August 18, 2020

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William G. Cobb
22 United States Magistrate Judge
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