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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

FRANCES WILLIS,	)	Case No. CV 07-7541-MLG
Plaintiff,	)	
v.	)	MEMORANDUM OPINION AND ORDER
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security	)	
Defendant.	)	

**I. Procedural and Factual History**

Plaintiff Frances Willis ("Plaintiff") seeks judicial review of the Commissioner's final decision denying her application for Social Security Disability Insurance ("DIB") and Supplemental Security Income ("SSI") benefits. Plaintiff filed for SSI on October 26, 2001 (Administrative Record ("AR") at 682) and for DIB on December 7, 2001. (AR at 189). She alleges disability beginning June 20, 1998 due to hypertension, osteoarthritis, and depression. (AR at 21).

Plaintiff was born on September 2, 1954 and was 52 years old at the time of the administrative hearing. She completed a high school

1 education and two years of college. From 1985 to 1997, Plaintiff  
2 worked as a counselor in a shelter for homeless parolees. (AR at 95).  
3 In addition, for a few months during 2000, Plaintiff worked as a  
4 counselor at a boys' home. (AR at 50).

5 On January 3, 2002, Plaintiff's application was denied at the  
6 initial stage of the administrative process. (AR at 18). A de novo  
7 hearing was held on September 17, 2002, before Administrative Law  
8 Judge ("ALJ") Walter Fisher. (AR at 49-58). On March 18, 2003, the ALJ  
9 issued an unfavorable decision ("Decision #1"), determining that  
10 Plaintiff retained the residual functional capacity ("RFC") to perform  
11 her past relevant work. (AR at 128-136). Plaintiff appealed this  
12 determination to the Appeals Council. On January 30, 2004, the Appeals  
13 Council remanded the matter for further proceedings. (AR at 158-161).

14 On October 13, 2004, the ALJ again denied the application  
15 ("Decision #2"), finding that Plaintiff retained the RFC to perform  
16 her past relevant work. (AR at 162-171). Plaintiff appealed this  
17 determination to the Appeals Council. On March 22, 2005, the Appeals  
18 Council again remanded the matter for further proceedings. (AR at 175-  
19 178).

20 On September 8, 2006, ALJ London Steverson denied the  
21 applications ("Decision #3"), finding that Plaintiff retained the RFC  
22 to perform her past relevant work. (AR at 137-145). Plaintiff appealed  
23 the determination to the Appeals Council. On January 10, 2007, the  
24 Appeals Council remanded for further proceedings. (AR at 183-185).

25 On June 27, 2007, the ALJ denied the applications ("Decision  
26 #4"), finding that Plaintiff retained the RFC to perform her past  
27 relevant work. (AR at 15-24). The ALJ found that Plaintiff's  
28 hypertension and osteoarthritis were severe impairments. (AR at 20).

1 However, with respect to Plaintiff's claim of depression, the ALJ  
2 found that she did not have a "severe" impairment within the meaning  
3 of the Social Security regulations. (AR at 20-21); see 20 C.F.R.  
4 §404.1520(c). The ALJ determined that Plaintiff could return to her  
5 past relevant work as a homeless shelter counselor as it is generally  
6 performed in the national economy. (AR at 23). The ALJ concluded that  
7 Plaintiff was not disabled, as defined in the Social Security Act, at  
8 any time from June 20, 1998 through the date of the decision. (AR at  
9 24). Plaintiff appealed this determination to the Appeals Council.  
10 On September 21, 2007, the Appeals Council denied Plaintiff's request  
11 for review and Decision #4 became the final decision of the  
12 Commissioner. (AR at 8-10).

13 Plaintiff timely commenced this action for judicial review.  
14 Plaintiff contends that the ALJ erroneously concluded that Plaintiff's  
15 mental impairment was not severe. The Commissioner disagrees and  
16 requests that the Commissioner's final decision be affirmed.

17 After reviewing the parties' respective contentions and the  
18 record as a whole, the Court finds Plaintiff's contention regarding  
19 the ALJ's non-severity finding to be meritorious and remands this  
20 matter for further proceedings consistent with this opinion.

21

## 22 **II. Standard of Review**

23 Under 42 U.S.C. § 405(g), a district court may review the  
24 Commissioner's decision to deny benefits. The Commissioner's or ALJ's  
25 decision must be upheld unless "the ALJ's findings are based on legal  
26 error or are not supported by substantial evidence in the record as  
27 a whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990);  
28 *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial

1 evidence means such evidence as a reasonable person might accept as  
2 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.  
3 389, 401 (1971); *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir.  
4 2006). It is more than a scintilla, but less than a preponderance.  
5 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). To  
6 determine whether substantial evidence supports a finding, the  
7 reviewing court "must review the administrative record as a whole,  
8 weighing both the evidence that supports and the evidence that  
9 detracts from the Commissioner's conclusion." *Reddick v. Chater*, 157  
10 F.3d 715, 720 (9th Cir. 1996). "If the evidence can support either  
11 affirming or reversing the ALJ's conclusion," the reviewing court "may  
12 not substitute its judgment for that of the ALJ." *Robbins*, 466 F.3d  
13 at 882.

14

15 **III. Discussion and Analysis**

16 The Court agrees with Plaintiff that remand is warranted based  
17 on the ALJ's erroneous finding that her mental impairment was non-  
18 severe, because that decision is not supported by substantial  
19 evidence. The existence of a severe impairment is demonstrated when  
20 the evidence establishes that an impairment has more than a minimal  
21 effect on an individual's ability to perform basic work activities.  
22 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); 20 C.F.R. §§  
23 404.1521(a), 416.921(a). The regulations define "basic work  
24 activities" as "the abilities and aptitudes necessary to do most  
25 jobs," which include physical functions such as walking, standing,  
26 sitting, pushing, carrying; capacities for seeing, hearing and  
27 speaking; understanding and remembering simple instructions;  
28 responding appropriately in a work setting; and dealing with changes

1 in a work setting. 20 C.F.R. § 404.1521(b). The inquiry at this stage  
2 is "a de minimis screening device to dispose of groundless claims."  
3 *Smolen*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54  
4 (1987)). An impairment is not severe only if it is a slight  
5 abnormality with "no more than a minimal effect on an individual's  
6 ability to work." See SSR 85-28; *Webb v Barnhart*, 433 F.3d 683, 686  
7 (9th Cir. 2005); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988).

8 Here, Plaintiff has offered sufficient evidence to demonstrate  
9 that her mental impairment has more than a minimal effect on her  
10 ability to perform work-related functions. Plaintiff testified  
11 regarding her depression, anxiety and difficulty concentrating in four  
12 separate hearings before the Social Security Administration's Office  
13 of Hearings and Appeals (AR at 52-55, 67-68, 97-101, 121-122).  
14 Further, Plaintiff's treating psychiatrist, Dr. Norma Aguilar,  
15 diagnosed Plaintiff with depression and anxiety. Dr. Aguilar's report  
16 indicates a level of impairment that meets the "de minimis"  
17 requirement at this stage of the inquiry. *Smolen*, 80 F.3d at 1290.  
18 The ALJ did not persuasively explain why he rejected these findings.

19 On July 15, 2003, Plaintiff began treatment at Compton Mental  
20 Health Center for depression, anxiety and insomnia (AR at 605). She was  
21 seen by Dr. Aguilar on a regular basis for over four years. (AR at  
22 593-615). Plaintiff also received individual psychological therapy at  
23 Compton Mental Health Center approximately once a month. (AR at 606).  
24 In a Mental Impairment Questionnaire completed on May 2, 2005, Dr.  
25 Aguilar diagnosed Plaintiff with "major depressive disorder" and  
26 assessed Plaintiff with a Global Assessment of Functioning ("GAF")  
27 scale of 60. (AR at 606). Dr. Aguilar observed that Plaintiff was  
28 "disheveled" and "tearful" and that her "mood is depressed." (AR at

1 607). Dr. Aguilar also noted that Plaintiff felt "worthless" because  
2 she could not "take care of herself anymore." (AR at 607). Dr. Aguilar  
3 found that Plaintiff's prognosis was guarded to poor. (AR at 608).  
4 Dr. Aguilar determined that Plaintiff had slight limitation in the  
5 activities of daily living, but extreme difficulties in maintaining  
6 social functioning, constant limitation in concentration, persistence,  
7 or pace, and continual limitation in work settings. (AR at 609). Dr.  
8 Aguilar prescribed the prescription medications Lexapro, Desyrel and  
9 Remeron, as well as monthly individual counseling. (AR at 607).

10 The ALJ did not give significant weight to Dr. Aguilar's opinion,  
11 finding it to be "internally inconsistent" which "lessens its  
12 credibility." (AR at 21). The ALJ stated: "Dr. Aguilar opines that the  
13 claimant only has slight limitations on her ability to perform  
14 activities of daily living, which suggest that her ability to maintain  
15 concentration, persistence and pace is not severely limited, in  
16 contrast to Dr. Aguilar's opinion that she has extreme difficulty  
17 maintaining concentration, persistence or pace." (AR at 21).

18 In rejecting Dr. Aguilar's opinion, the ALJ adopted the opinion  
19 of the examining physician, Dr. Suzanne Dupee. (AR at 21). Dr. Dupee,  
20 who examined Plaintiff on one occasion, on December 5, 2005, concluded  
21 that Plaintiff had some "mild symptoms of depression," but that  
22 Plaintiff had "no cognitive deficits that would impair her ability to  
23 work at this time." (AR at 628). The ALJ found that Plaintiff's  
24 treating physician's opinion was contradicted by the consultative  
25 examination by Dr. Dupee, "who gave [Plaintiff] a GAF score of 65,  
26 with no more than slight mental functional limitations."

27 Plaintiff contends, and the Court agrees, that the examining  
28 physician's opinion was not a valid basis for rejecting the treating

1 physician's opinion. A treating physician's opinion must be given  
2 controlling weight if it is well-supported and not inconsistent with  
3 the other substantial evidence in the record. *Orn v. Astrue*, 495 F.3d  
4 625, 631-32 (9th Cir. 2007); 20 C.F.R. § 404.1527(d)(2). The ALJ may  
5 not reject the opinion of a treating physician, even if it is  
6 contradicted by the opinion of another doctor, without first providing  
7 specific and legitimate reasons supported by substantial evidence in  
8 the record. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996);  
9 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Murray v.*  
10 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983) ("If the ALJ wishes to  
11 disregard the opinion of the treating physician, he or she must make  
12 findings setting forth specific, legitimate reasons for doing so that  
13 are based on substantial evidence in the record"). An examining  
14 physician's opinion constitutes substantial evidence if the physician  
15 relied on "independent clinical findings that differ from the findings  
16 of the treating physician." *Orn*, 495 F.3d at 631-32.

17 Even if there is evidence in the record contradicting a treating  
18 physician's opinion, the opinion is still entitled to deference and  
19 must be weighed using the following factors: "[l]ength of the  
20 treatment relationship and the frequency of examination" by the  
21 treating physician; and the "nature and extent of the treatment  
22 relationship" between the patient and the treating physician. 20  
23 C.F.R. §§ 404.1527(d)(2)(i)-(ii), 416.927(d)(2)(i)-(ii); *Orn*, 495 F.3d  
24 at 631-33. Other factors to be considered include the supportability  
25 of the treating physician's opinion, consistency with the record as  
26 a whole, the specialization of the physician, and the extent to which  
27 the physician is familiar with disability programs and evidentiary  
28 requirements. 20 C.F.R. §§ 404.1527(d)(3)-(6), 416.927(d)(3)-(6).

1 Thus, "[i]n many cases, a treating source's medical opinion will be  
2 entitled to the greatest weight and should be adopted, even if it does  
3 not meet the test for controlling weight." S.S.R. 96-2p; *Orn*, 495 F.3d  
4 at 632-633.

5 Here, even if the opinion of Dr. Dupee constitutes substantial  
6 evidence, Dr. Aguilar's opinion was still entitled to deference. SSR  
7 96-2p; *Orn*, 495 F.3d at 633. Indeed, the factors identified in the  
8 regulations weigh in favor of Dr. Aguilar's opinion. 20 C.F.R. §§  
9 404.1527, 416.927. For example, the nature and extent of Plaintiff's  
10 relationship with Dr. Aguilar provides a unique longitudinal  
11 perspective on Plaintiff's mental condition, adding weight to Dr.  
12 Aguilar's opinion. See 20 C.F.R. §§ 404.1527(d)(2)(i)-(ii),  
13 416.927(d)(2)(i)-(ii); *Orn*, 495 F.3d at 633. As discussed above, the  
14 lengthy administrative record contains countless medical forms and  
15 progress reports completed by Dr. Aguilar over a period of more than  
16 four years. Dr. Aguilar offered diagnoses of Plaintiff's mental  
17 condition, made clinical findings, assessed Plaintiff's ability to  
18 work, and prescribed a variety of medications.

19 While Dr. Aguilar's progress notes do not reveal detailed  
20 discussions regarding Plaintiff's mental condition, "[t]he primary  
21 function of medical records is to promote communication and  
22 recordkeeping for health care personnel - not to provide evidence for  
23 disability determinations." *Orn*, 495 F.3d at 634. Dr. Aguilar did,  
24 however, provide a more reasoned explanation for her opinion in the  
25 Mental Impairment Questionnaire by referring to Plaintiff's symptoms,  
26 signs, and prognosis. (AR at 784-87, 911-14); see 20 C.F.R. §§  
27 404.1527(d)(3) ("Supportability. The more a medical source presents  
28 relevant evidence to support an opinion, particularly medical signs



1 and laboratory findings, the more weight we will give that opinion."),  
2 416.927(d)(3) (same); see also *Orn*, 495 F.3d at 634 ("A medical  
3 condition [need not] be mentioned in every report to conclude that a  
4 physician's opinion is supported by the record."). Thus, when viewed  
5 in its entirety, the record provides ample support for Dr. Aguilar's  
6 opinion.

7       Moreover, the ALJ's finding at step two of the sequential  
8 analysis was not supported by substantial factual evidence. In  
9 addition to his reliance on the consulting doctor's opinion in  
10 concluding that Plaintiff does not suffer from a severe mental  
11 impairment, the ALJ cited various facts which, even when viewed  
12 collectively, do not constitute substantial evidence. (AR at 21).  
13 First, the ALJ noted that there were "[g]aps in [Plaintiff's] mental  
14 health treatment." The ALJ did not, however, specifically identify any  
15 gaps in Plaintiff's mental health history or articulate how such gaps  
16 demonstrate that Plaintiff's impairment is not severe. Second, the ALJ  
17 stated that the "medication logs indicate that much of the cause of  
18 the claimant's mental symptoms was due to her appeal of these claims,  
19 rather than due to an ongoing underlying mental impairment." (AR at  
20 21). The single page in Plaintiff's medical records to which the ALJ  
21 refers in support of this argument merely states that, on the day of  
22 her appointment with Dr. Aguilar, Plaintiff was feeling "anxious  
23 because she [was] going to court for SSI." (AR at 675). Third, the ALJ  
24 noted that the "claimant's mental health treatment consists primarily  
25 of medication refills and not counseling." To the contrary, Plaintiff  
26 testified at three separate hearings that she is seeing a therapist  
27 for individual counseling on a monthly basis, in addition to her  
28 regular visits to Dr. Aguilar (RT at 66, 100-101, 121-122). Finally,

1 the only other factual evidence the ALJ identified to support his  
2 finding of non-severity was that Plaintiff's "medication logs indicate  
3 that [Plaintiff's] response was fair and she denied suicidal  
4 ideations, which indicates that medication controls her symptoms," and  
5 that Plaintiff has "never been psychiatrically hospitalized." (AR at  
6 21).

7         Given the minimal threshold required to show that an impairment  
8 is severe, the ALJ's determination that Plaintiff's mental impairments  
9 are not severe was not supported by substantial evidence. First, the  
10 ALJ did not sufficiently articulate any reason to reject the objective  
11 findings of Plaintiff's treating physician. Plaintiff's impairments  
12 and complaints of anxiety and depression are consistently and  
13 objectively documented in her medical records. Second, the factual  
14 evidence upon which the ALJ based his decision does not, without more,  
15 support a finding of non-severity. The ALJ appears not to have  
16 considered the record as a whole, but instead emphasized only  
17 selective evidence which was unfavorable to Plaintiff. Accordingly,  
18 the ALJ's failure to find Plaintiff's mental impairment severe  
19 warrants remand for further proceedings and evaluation of Plaintiff.

20

21 **V. Conclusion**

22         The decision whether to remand for further proceedings is within  
23 this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th  
24 Cir. 2000). Where no useful purpose would be served by further  
25 administrative proceedings, or where the record has been fully  
26 developed, it is appropriate to exercise this discretion to direct an  
27 immediate award of benefits. *Id.* at 1179 ("the decision of whether  
28 to remand for further proceedings turns upon the likely utility of

1 such proceedings"); *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir.  
2 2004). However, where there are outstanding issues that must be  
3 resolved before a determination of disability can be made, and it is  
4 not clear from the record that the ALJ would be required to find the  
5 claimant disabled if all the evidence were properly evaluated, remand  
6 is appropriate. *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th Cir.  
7 2003); see also *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir.  
8 2003)(remanding case for reconsideration of credibility  
9 determination).

10 Here, the evidence shows an impairment that can be considered  
11 "severe" within the meaning of the Social Security Regulations, but  
12 which might not prevent Plaintiff from performing either her past work  
13 or some work in the national economy. However, that is not a  
14 determination that this Court can make. Accordingly, the case is  
15 remanded for further evaluation in accordance with the five-step  
16 sequential process.

17 **ORDER**

18 For the reasons stated above, it is **ORDERED** that this case be  
19 remanded to the Commissioner for further proceedings consistent with  
20 this opinion.

21  
22 Dated: October 2, 2008



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Marc L. Goldman  
United States Magistrate Judge