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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Lisa Henderson,)	Case No. CV 07-8325-MLG
Plaintiff,)	
v.)	MEMORANDUM OPINION AND ORDER
)	
Michael J. Astrue,)	
Commissioner of Social)	
Security)	
)	
Defendant.)	

I. Procedural and Factual History

Plaintiff Lisa Henderson ("Plaintiff") seeks judicial review of the Commissioner's final decision denying her application for Social Security Disability Insurance benefits. Plaintiff filed for Social Security Disability Insurance benefits on November 8, 2004. (Administrative Record ("AR") at 19). She alleges disability beginning December 4, 2003, due to lumbar spine degenerative disc disease, lupus and depression. (AR at 21).

Plaintiff was born on July 10, 1966 and was 39 years old at the time of the administrative hearing. She completed a high school

1 education and two years of college. Plaintiff worked as an
2 administrative assistant from 1991 to August 2000 at Verizon. (AR at
3 357-358). She received worker's compensation benefits from January
4 1996 through December 1996 for a back injury that occurred at work.
5 (AR at 361).

6 On May 12, 2005, Plaintiff's application was denied at the
7 initial stage of the administrative process. (AR at 19). A de novo
8 hearing was held on April 26, 2006, before Administrative Law Judge
9 ("ALJ") Charles D. Reite, at which Plaintiff, unrepresented by
10 counsel, testified. (AR at 19). Plaintiff's husband, Ronald Henderson,
11 also testified. (AR at 19). Sandra Trost testified as a vocational
12 expert. (TR at 383).

13 On February 26, 2007, the ALJ issued an unfavorable decision.
14 The ALJ determined that Plaintiff suffers from the severe impairments
15 of lumbar spine degenerative disc disease and lupus. (AR at 21). The
16 ALJ found that Plaintiff has a number of physical limitations as the
17 result of these medical conditions, including restrictions on how much
18 she can lift and carry, how long she can sit and stand, as well as
19 restrictions on working outside, due to sensitivity to sunlight caused
20 by Plaintiff's lupus. (AR at 23).

21 However, with respect to Plaintiff's claim of depression, the ALJ
22 found that she did not have a "severe" impairment within the meaning
23 of the Social Security regulations. (AR at 21); see 20 C.F.R.
24 §404.1520(c). The ALJ found that Plaintiff could return to her past
25 relevant work as an administrative assistant as it is generally
26 performed in the national economy. (AR at 25). The ALJ concluded
27 that Plaintiff was not disabled, as defined in the Social Security
28 Act, at any time from December 4, 2003 through the date of the

1 decision. (AR at 25). On October 26, 2007, the Appeals Council denied
2 Plaintiff's request for review. (AR at 5-7).

3 Plaintiff timely commenced this action for judicial review.
4 Plaintiff contends that the ALJ: (1) erroneously concluded that
5 Plaintiff's mental impairment was not severe; and (2) did not properly
6 consider the testimony of Plaintiff and her husband, in light of the
7 record as a whole. The Commissioner disagrees and requests that the
8 Commissioner's final decision be affirmed.

9 After reviewing the parties' respective contentions and the
10 record as a whole, the Court finds Plaintiff's contention regarding
11 the ALJ's non-severity finding to be meritorious and remands this
12 matter for further proceedings consistent with this opinion.¹

13

14 **II. Standard of Review**

15 Under 42 U.S.C. § 405(g), a district court may review the
16 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
17 decision must be upheld unless "the ALJ's findings are based on legal
18 error or are not supported by substantial evidence in the record as
19 a whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990);
20 *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
21 evidence means such evidence as a reasonable person might accept as
22 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.
23 389, 401 (1971); *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir.

24

25 ¹The court will only address the non-severity finding. However, as
26 noted above, Plaintiff also challenges the ALJ's determinations
27 regarding the credibility of Plaintiff's and her husband's testimony.
28 Because the ALJ erred by finding Plaintiff's mental impairment non-
severe, the Court does not reach this remaining issue and will not
decide whether this issue would independently warrant relief.

1 2006). It is more than a scintilla, but less than a preponderance.
2 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). To
3 determine whether substantial evidence supports a finding, the
4 reviewing court "must review the administrative record as a whole,
5 weighing both the evidence that supports and the evidence that
6 detracts from the Commissioner's conclusion." *Reddick v. Chater*, 157
7 F.3d 715, 720 (9th Cir. 1996). "If the evidence can support either
8 affirming or reversing the ALJ's conclusion," the reviewing court "may
9 not substitute its judgment for that of the ALJ." *Robbins*, 466 F.3d
10 at 882.

11

12 **III. Discussion and Analysis**

13 The Court agrees with Plaintiff that remand is warranted based
14 on the ALJ's erroneous finding that her mental impairment was non-
15 severe because that decision is not supported by substantial evidence.
16 The existence of a severe impairment is demonstrated when the evidence
17 establishes that an impairment has more than a minimal effect on an
18 individual's ability to perform basic work activities. *Smolen v.*
19 *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); 20 C.F.R. §§ 404.1521(a),
20 416.921(a). The regulations define "basic work activities" as "the
21 abilities and aptitudes necessary to do most jobs," which include
22 physical functions such as walking, standing, sitting, pushing,
23 carrying; capacities for seeing, hearing and speaking; understanding
24 and remembering simple instructions; responding appropriately in a
25 work setting; and dealing with changes in a work setting. 20 C.F.R.
26 § 404.1521(b). The inquiry at this stage is "a de minimis screening
27 device to dispose of groundless claims." *Smolen*, 80 F.3d at 1290
28 (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)). An impairment

1 is not severe only if it is a slight abnormality with "no more than
2 a minimal effect on an individual's ability to work." See SSR 85-28;
3 *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988).

4 Here, Plaintiff has offered sufficient evidence to demonstrate
5 that her mental impairment has more than a minimal effect on her
6 ability to perform work-related functions. In addition to Plaintiff's
7 statements regarding her depression in the Disability Report², both
8 the consulting physician and the reviewing state agency physician who
9 evaluated Plaintiff's mental state found that she experienced some
10 degree of depression. Although the physicians' assessments varied in
11 terms of severity, both indicated a level of impairment that meets the
12 "de minimis" requirement at this stage of the inquiry. *Smolen*, 80
13 F.3d at 1290. The ALJ simply did not persuasively explain why he
14 rejected these findings.

15 For example, on May 2, 2005, State Agency consultive psychiatrist
16 Dr. Christopher Ho performed a complete psychiatric evaluation of
17 Plaintiff. Dr. Ho diagnosed the Plaintiff with depression. Dr. Ho
18 observed that Plaintiff appeared mildly sad and indifferent, and was
19 "tearful at times." Dr. Ho also gave the Plaintiff a Global
20 Assessment of Functioning ("GAF") score of 50, which is generally
21 indicative of serious mental impairments. Dr. Ho found that her
22 prognosis was fair to guarded. (AR at 212-216).

23 The ALJ did not accept Dr. Ho's opinion "since it is not based
24 on a treating relationship, and the narrative does not support the GAF
25 score and conclusion. In addition, Dr. Ho finds [Plaintiff's]

26
27 ²"I get really depressed often because of [sic] I can't do a lot
28 of things. My illnesses and injury has [sic] changed my life
physically and financially. I feel worthless and feel like a burden to
my family." (AR at 83).

1 psychological condition to be based primarily on her physical
2 impairments not psychologically based. Although Dr. Ho noted that the
3 claimant was tearful at times, she also did not display many types of
4 depressive symptoms such as hallucinations, and she was oriented times
5 four and had appropriate affect." (AR at 21).

6 In reaching this conclusion, the ALJ improperly discounted Ho's
7 opinion. Ho's clinical evaluation and conclusions constitute
8 "objective clinical findings," even though based in part on
9 Plaintiff's subjective complaints. Furthermore, Plaintiff need not
10 display hallucinations, nor must the cause of her depression be
11 "psychologically based," as opposed to being caused by her physical
12 ailments, as the ALJ implies it must, in order to meet the *de minimis*
13 step two severity threshold.

14 Second, the May 10, 2005 State Agency Mental Residual Functional
15 Capacity Assessment and the May 10, 2005 State Agency Psychiatric
16 Review Technique form found Plaintiff to have "moderate mental
17 functional limitations on her ability to maintain concentration,
18 persistence or pace." Again, the ALJ improperly rejected valid
19 medical evidence of Plaintiff's mental impairment, because the
20 opinions "are based only on a nonexamining relationship and are not
21 supported by the record." (AR at 22). However, the reviewing
22 physicians are, by definition, non-treating physicians, whose primary
23 function is to examine the medical record. Therefore, this is not a
24 valid reason for rejecting the opinion of the reviewing physician.

25 The ALJ placed significant weight on the fact that Plaintiff had
26 "not had any mental health treatment aside from Dr. Ho's examination
27 since the December 4, 2003 alleged onset date," and the fact that
28 Plaintiff was not currently "taking any mental health medications."

1 (AR at 22). The ALJ, however, omitted a notation in Dr. Ho's report,
2 where Plaintiff stated that "she was recommended to see a therapist
3 but her insurance would not cover this." (AR at 213). Further, the
4 Ninth Circuit has recognized that depression is "one of the most
5 under-reported illnesses in the country because those afflicted often
6 do not recognize that their condition reflects a potentially serious
7 mental illness." *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir.
8 1996). Thus, the fact that Plaintiff "may be one of millions of
9 people who did not seek treatment for a mental disorder until late in
10 the day is not a substantial basis on which to conclude that [the
11 consulting and examining physicians'] assessment of claimant's
12 condition is inaccurate." *Id.*

13 The only other factual evidence the ALJ identified in finding
14 Plaintiff's mental impairment to be non-severe was Plaintiff's
15 testimony that she could "pay bills, count change, handle a savings
16 account and use a checkbook/money orders." (AR at 22). The ALJ found
17 this fact consistent with Dr. Ho's opinion, but "inconsistent with
18 moderate mental functional limitations and is evidence that she can
19 perform complex tasks." (AR at 22).

20 Given the minimal threshold required to show that an impairment
21 is severe, the ALJ's determination that Plaintiff's mental impairments
22 are not severe was not supported by substantial evidence. First, the
23 ALJ did not sufficiently articulate any reason to reject the objective
24 findings of both the consulting and examining physicians. Plaintiff's
25 impairments and complaints of depression are consistently and
26 objectively documented in her medical records. Second, the factual
27 evidence upon which the ALJ based his decision does not, without more,
28 support a finding of non-severity. The ALJ appears not to have

1 considered the record as a whole, but instead emphasized only
2 selective evidence which was unfavorable to Plaintiff. Accordingly,
3 the ALJ's failure to find Plaintiff's mental impairment severe
4 warrants remand for further proceedings and evaluation of Plaintiff.

5
6 **V. Conclusion**

7 The decision whether to remand for further proceedings is within
8 this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th
9 Cir. 2000). Where no useful purpose would be served by further
10 administrative proceedings, or where the record has been fully
11 developed, it is appropriate to exercise this discretion to direct an
12 immediate award of benefits. *Id.* at 1179 ("the decision of whether
13 to remand for further proceedings turns upon the likely utility of
14 such proceedings"); *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir.
15 2004). However, where there are outstanding issues that must be
16 resolved before a determination of disability can be made, and it is
17 not clear from the record that the ALJ would be required to find the
18 claimant disabled if all the evidence were properly evaluated, remand
19 is appropriate. *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th Cir.
20 2003); *see also Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir.
21 2003)(remanding case for reconsideration of credibility
22 determination).

23 Here, the evidence shows an impairment that can be considered
24 "severe" within the meaning of the Social Security Regulations, but
25 which might not prevent Plaintiff from performing either her past work
26 or some work in the national economy. However, that is not a
27 determination that this Court can make. Accordingly, the case is
28 remanded for further evaluation in accordance with the five-step

1 sequential process.

2 **ORDER**

3 For the reasons stated above, the Court finds that the ALJ's
4 decision is not supported by substantial evidence.

5 Accordingly, it is **ORDERED** that this case be remanded to the
6 Commissioner for further proceedings consistent with this opinion.

7 **IT IS FURTHER ORDERED** that the Clerk of the Court serve copies
8 of this Order and the Judgment herein on all parties or their counsel.

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10 Dated: September 12, 2008



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MARC L. GOLDMAN
United States Magistrate Judge

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