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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RUSSELL R. MILLER,)	No. CV 08-8226-RC
)	
Plaintiff,)	
)	OPINION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Russell R. Miller filed a complaint on December 17, 2008, seeking review of the Commissioner's decision denying his application for disability benefits. On May 20, 2009, the Commissioner answered the complaint, and the parties filed a joint stipulation on June 19, 2009.

BACKGROUND

On October 31, 2005, plaintiff, who was then 52 years old, applied for disability benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. § 423, claiming an inability to work since May 21, 2004, due to lead poisoning, dementia, and neuropsychological

1 problems. Certified Administrative Record ("A.R.") 94-98, 122. The
2 plaintiff's application was initially denied on May 11, 2006, and was
3 denied again on April 5, 2007, following reconsideration. A.R. 64-74.
4 The plaintiff then requested an administrative hearing, which was held
5 before Administrative Law Judge Lawrence D. Wheeler ("the ALJ") on
6 November 13, 2007. A.R. 26-48, 75. On January 29, 2008, the ALJ
7 issued a decision finding plaintiff is not disabled. A.R. 7-21. The
8 plaintiff appealed the decision to the Appeals Council, which denied
9 review on October 10, 2008. A.R. 3-6.

10 11 DISCUSSION

12 I

13 The Court, pursuant to 42 U.S.C. § 405(g), has the authority to
14 review the decision denying plaintiff disability benefits to determine
15 whether his findings are supported by substantial evidence and whether
16 the Commissioner used the proper legal standards in reaching his
17 decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009);
18 Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009). The claimant
19 is "disabled" for the purpose of receiving benefits under the Act if
20 he is unable to engage in any substantial gainful activity due to an
21 impairment which has lasted, or is expected to last, for a continuous
22 period of at least twelve months. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R.
23 § 404.1505(a). "The claimant bears the burden of establishing a prima
24 facie case of disability." Roberts v. Shalala, 66 F.3d 179, 182 (9th
25 Cir. 1995), cert. denied, 517 U.S. 1122 (1996); Smolen v. Chater, 80
26 F.3d 1273, 1289 (9th Cir. 1996).

27
28 The Commissioner has promulgated regulations establishing a five-

1 step sequential evaluation process for the ALJ to follow in a
2 disability case. 20 C.F.R. § 404.1520. In the **First Step**, the ALJ
3 must determine whether the claimant is currently engaged in
4 substantial gainful activity. 20 C.F.R. § 404.1520(b). If not, in
5 the **Second Step**, the ALJ must determine whether the claimant has a
6 severe impairment or combination of impairments significantly limiting
7 him from performing basic work activities. 20 C.F.R. § 404.1520(c).
8 If so, in the **Third Step**, the ALJ must determine whether the claimant
9 has an impairment or combination of impairments that meets or equals
10 the requirements of the Listing of Impairments ("Listing"), 20 C.F.R.
11 § 404, Subpart P, App. 1. 20 C.F.R. § 404.1520(d). If not, in the
12 **Fourth Step**, the ALJ must determine whether the claimant has
13 sufficient residual functional capacity despite the impairment or
14 various limitations to perform his past work. 20 C.F.R. §
15 404.1520(f). If not, in **Step Five**, the burden shifts to the
16 Commissioner to show the claimant can perform other work that exists
17 in significant numbers in the national economy. 20 C.F.R. §
18 404.1520(g). Moreover, where there is evidence of a mental impairment
19 that may prevent a claimant from working, the Commissioner has
20 supplemented the five-step sequential evaluation process with
21 additional regulations addressing mental impairments.¹ Maier v.

22
23 ¹ First, the ALJ must determine the presence or absence of
24 certain medical findings relevant to the ability to work. 20
25 C.F.R. § 404.1520a(b)(1). Second, when the claimant establishes
26 these medical findings, the ALJ must rate the degree of
27 functional loss resulting from the impairment by considering four
28 areas of function: (a) activities of daily living; (b) social
functioning; (c) concentration, persistence, or pace; and (d)
episodes of decompensation. 20 C.F.R. § 404.1520a(c)(2-4).
Third, after rating the degree of loss, the ALJ must determine
whether the claimant has a severe mental impairment. 20 C.F.R.

1 Comm'r of the Soc. Sec. Admin., 154 F.3d 913, 914-15 (9th Cir. 1998)
2 (per curiam).

3
4 Applying the five-step sequential evaluation process, the ALJ
5 found plaintiff has not engaged in substantial gainful activity since
6 the alleged onset date of May 21, 2004. (Step One). The ALJ then
7 found plaintiff "has the following severe impairments: peripheral
8 neuropathy (possibly lead toxicity related) and mild depression/
9 dementia (also possibly related to lead toxicity)" (Step Two);
10 however, he does not have an impairment or combination of impairments
11 that meets or equals a Listing. (Step Three). The ALJ next
12 determined plaintiff is unable to perform his past relevant work as an
13 automobile muffler and radiator installer. (Step Four). Finally, the
14 ALJ determined plaintiff can perform a significant number of jobs in
15 the national economy; therefore, he is not disabled. (Step Five).

16
17 **II**

18 A claimant's residual functional capacity ("RFC") is what he can
19 still do despite his physical, mental, nonexertional, and other
20 limitations. Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001);
21 see also Valentine v. Comm'r, Soc. Sec. Admin., 574 F.3d 685, 689 (9th
22 Cir. 2009) (RFC is "a summary of what the claimant is capable of doing

23
24 § 404.1520a(d). Fourth, when a mental impairment is found to be
25 severe, the ALJ must determine if it meets or equals a Listing.
26 20 C.F.R. § 404.1520a(d)(2). Finally, if a Listing is not met,
27 the ALJ must then perform a residual functional capacity
28 assessment, and the ALJ's decision "must incorporate the
pertinent findings and conclusions" regarding plaintiff's mental
impairment, including "a specific finding as to the degree of
limitation in each of the functional areas described in
[§ 404.1520a(c)(3)]." 20 C.F.R. § 404.1520a(d)(3), (e)(2).

1 (for example, how much weight he can lift)."). Here, the ALJ found
2 plaintiff has the RFC to:

3
4 perform medium work activity² not involving more than
5 simple, repetitive tasks, more than frequent use of his
6 bilateral upper and lower extremities, frequent use of his
7 hands for fingering, handling and feeling, concentrated
8 exposure to extreme temperatures or vibration, or more than
9 moderate exposure to workplace hazards such as machinery or
10 working at unprotected heights.

11
12 A.R. 16 (footnote omitted; footnote added). However, plaintiff
13 contends the ALJ's RFC assessment is not supported by substantial
14 evidence because the ALJ improperly rejected the opinions of examining
15 psychologist Jennifer Watson, Ph.D. The plaintiff is correct.

16
17 Dr. Watson examined plaintiff on June 13 and July 13, 2005,
18 conducted extensive psychological testing, including the Wechsler
19 Memory Scale-R, and diagnosed plaintiff as having "moderate" dementia.
20 A.R. 185-87, 201-09. Dr. Watson found plaintiff has "multiple areas
21 of moderate to severe cognitive compromise, including memory. There
22 is clear decline from a previous level of higher cognitive function.
23 Record review raises the possibility of concentration from lead
24 exposure." A.R. 208. Dr. Watson summarized plaintiff's cognitive

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² Under Social Security regulations, "[m]edium work
28 involves lifting no more than 50 pounds at a time with frequent
lifting or carrying of objects weighing up to 25 pounds." 20
C.F.R. § 404.1567(c).

1 difficulties as:

2
3 1. Memory impairment, including impairment in verbal and
4 nonverbal memory. Impairment includes working memory,
5 immediate or short term memory, delayed memory, and
6 recognition memory. Both verbal and non-verbal memory are
7 severely impaired. Memory testing documents the presence of
8 rapid forgetting or what is also described as an amnesic
9 memory pattern. This type of pattern occurs in organic
10 illness.

11 2. Impaired verbal fluency, including both phonemic and
12 semantic verbal fluency. Both are severely impaired.

13 3. Impaired fund of word knowledge. This is moderately to
14 severely impaired.

15 4. Decreased confrontation naming ability. This is in low
16 average range.

17 5. Variable Executive skills, with impaired phonemic
18 fluency. . . , slowing in cognitive processing and severely
19 impaired multi-tasking ability.

20 6. Impaired calculation ability.

21 7. Visual-constructive skills on timed tasks (reflecting
22 also slowing in cognitive processing speed) are in the low
23 average range which is likely below expectation for
24 [plaintiff] based on prior occupational skills.

25 8. By clinical observation, he needs to exert extreme
26 effort on testing.

27
28 A.R. 207-08. Dr. Watson also found that plaintiff's cognitive and

1 personality strengths included his: ability to reason about visual-
2 spatial patterns, including the ability to organize and draw a complex
3 figure; orientation; motivation and perseverance despite cognitive
4 difficulties; and emotional coping, including lack of depression.
5 A.R. 208. Subsequently, based on her 2005 examination and testing of
6 plaintiff, Dr. Watson opined that plaintiff is unable to work because
7 of his "severe impairment . . . in memory (not able to learn or recall
8 new information), verbal fluency, and vocabulary knowledge (fund of
9 word knowledge), and calculation ability[,]" A.R. 181, as well as his
10 impaired "ability to sustain attention[.]" A.R. 183.

11
12 "[T]he ALJ may only reject . . . [an] examining physician's
13 uncontradicted medical opinion based on 'clear and convincing
14 reasons[,]' " Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155,
15 1164 (9th Cir. 2008) (citation omitted); Widmark v. Barnhart, 454 F.3d
16 1063, 1066 (9th Cir. 2006), and "[e]ven if contradicted by another
17 doctor, the opinion of an examining doctor can be rejected only for
18 specific and legitimate reasons that are supported by substantial
19 evidence in the record." Regennitter v. Comm'r of the Soc. Sec.
20 Admin., 166 F.3d 1294, 1298-99 (9th Cir. 1999); Ryan v. Comm'r of Soc.
21 Sec., 528 F.3d 1194, 1198 (9th Cir. 2008).

22
23 Here, the ALJ rejected Dr. Watson's opinions, stating:

24
25 Dr. Watson apparently administered various psychological
26 tests in which the claimant achieved "compromised" and/or
27 "borderline" results in various areas of memory functioning.
28 Without giving specific examples or observations, Dr. Watson

1 noted that the claimant has severe memory problems impacting
2 his ability to learn or recall new information, his verbal
3 fluency and ability to perform calculations. However, she
4 noted the claimant displayed no signs of depression,
5 anxiety, or psychosis and, although she noted that the
6 claimant's cognitive problems impact his ability to perform
7 daily functions, no specific examples, complaints or
8 observations were noted. As such, Dr. Watson diagnosed the
9 claimant with moderate dementia and assessed him as unable
10 to work. . . . [¶] A statement by any physician that the
11 claimant is disabled or unable to work is a conclusion on
12 the ultimate issue to be decided, however, and is not
13 binding in reaching a determination as to whether the
14 claimant is disabled within the meaning of the Social
15 Security Act.

16
17 A.R. 14. Although the ALJ is "not bound by the uncontroverted
18 opinions of the claimant's physicians on the ultimate issue of
19 disability, . . . he cannot reject them without presenting clear and
20 convincing reasons for doing so." Reddick v. Chater, 157 F.3d 715,
21 725 (9th Cir. 1998) (citations omitted). Here, the ALJ's circular
22 reasoning does not constitute a specific and legitimate reason for
23 rejecting Dr. Watson's opinions. Moreover, the ALJ is wrong. Dr.
24 Watson **gave** (not "apparently") plaintiff a battery of psychological
25 tests and listed plaintiff's scores on those tests, A.R. 185-7, and
26 then set forth the medical implications and conclusions drawn from
27 those tests, as is appropriate. A.R. 180-4, 201-9. In discussing the
28 implications of plaintiff's test results, Dr. Watson stated, for

1 instance:

2

3 [The plaintiff] has difficulty learning and recalling new
4 information. He benefits little if at all from repetition,
5 cueing, and recognition in increasing his memory. [¶] He
6 was only able to repeat 3 digits backward (Digit Span),
7 often viewed as an index of working memory, this score is
8 far below expectation. [¶] He was unable to learn or
9 recall two stories (Logical Memory I and II, 0 out of 75
10 story elements and 0 out of 50 story elements, respectively)
11 with both scores falling in the first percentile or
12 compromised range. [¶] Compromise is documented in his
13 ability to learn and recall novel words [sic] pairs (Verbal
14 Paired Associates I and II). [¶] Compromise is also
15 documented in his ability to learn and recall a long list of
16 15 words. He was given 5 trials to learn this list. He
17 learned 3, 2, 4, 3, and 4 out of 15 of the words across the
18 five learning trials. He could only recall 2 of the words
19 upon brief delay and one upon long delay and could only
20 recognize three of the words when verbally presented a list
21 to sort them out of. Thus compromise is documented in
22 verbal memory testing. [¶] To further assess memory
23 function, he was asked to draw and then later recall a
24 complex design. Delayed recall again fell in the
25 compromised range as he could only recall 8 out of 36
26 elements both on brief and long delay (first percentile,
27 compromised). Thus nonverbal memory is impaired. [¶] [The
28 plaintiff] was given the Paced Auditory Serial Addition

1 Test. . . . This test combines cognitive processing speed
2 with calculation ability, and assesses the impact of multi-
3 tasking on memory function. Impairment was again documented
4 with his scores falling on both the three second and two
5 second trials in the compromised range (1st percentile).
6

7 A.R. 206.
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9 The ALJ also rejected Dr. Watson's opinions for the following
10 reasons:
11

12 [T]he claimant has never sought out or required ongoing
13 mental health treatment or psychiatric medications.

14 Although Dr. Watson noted that the claimant has severe
15 memory problems impacting his ability to learn or recall new
16 information, his verbal fluency and ability to perform
17 calculations, no specific examples or observations were
18 cited and Dr. Watson admits that she is not a treating
19 source but only saw the claimant on a single occasion. . . .

20 Although the claimant showed some genuine signs of impaired
21 memory and concentration during Dr. Donohue's examination,
22 as noted above, the claimant denied having any trouble
23 performing daily living activities or experiencing
24 depression, anxiety, or similar psychiatric problems. [¶]

25 At the hearing, the claimant's thoughts did not seem to
26 wander and all questions were answered alertly and
27 appropriately. . . .
28

//

1 A.R. 19. As discussed above, the record does not support the ALJ's
2 conclusion that Dr. Watson cited no examples or observations.
3 Moreover, the ALJ's disparagement of Dr. Watson's opinions because she
4 is not a treating physician is contrary to the law, and "ignores the
5 well-established [Social Security] distinction between an examining
6 and a treating doctor. Like the doctor[] who examined [plaintiff] at
7 the Commissioner's request, Dr. [Watson] was neither asked, nor paid,
8 to provide treatment for [plaintiff], but rather to give an objective
9 opinion about [plaintiff's] medical condition."³ Regennitter, 166
10 F.3d at 1299. Similarly, the ALJ's rejection of Dr. Watson's opinions
11 because plaintiff "has never sought out or required ongoing mental
12 health treatment or psychiatric medications[,] " A.R. 19, has
13 specifically been criticized by the Ninth Circuit "because mental
14 illness is notoriously underreported and because 'it is a questionable
15 practice to chastise one with a mental impairment for the exercise of
16 poor judgment in seeking rehabilitation.'" Regennitter, 166 F.3d at
17 1299-1300 (citations omitted).

18
19 Finally, in noting "[a]t the hearing, the claimant's thoughts did
20 not seem to wander and all questions were answered alertly and
21 appropriately[,] "⁴ the ALJ acted as his own medical expert,

22
23 ³ The dismissal of Dr. Watson's opinions on this ground is
24 particularly ironic here where the ALJ relied on the opinions of
25 examining psychologist Margaret A. Donohue, Ph.D., and
26 nonexamining psychiatrist M.G. Salib, M.D., to determine
plaintiff is not disabled. A.R. 14-15, 19, 231-35, 244-61.

27 ⁴ To the extent the Commissioner posits other reasons for
28 the ALJ's rejection of Dr. Watson's opinion, since the ALJ did
not rely on such reasoning in finding plaintiff not disabled, the
Court cannot consider the Commissioner's post hoc rationale. See

1 substituting his opinion for Dr. Watson's professional interpretation
2 of the clinical testing, which is improper. Day v. Weinberger, 522
3 F.2d 1154, 1156 (9th Cir. 1975); see also Nguyen v. Chater, 172 F.3d
4 31, 35 (1st Cir. 1999) (As a lay person, an ALJ is "not at liberty to
5 ignore medical evidence or substitute his own views for uncontroverted
6 medical opinion"; he is "simply not qualified to interpret raw medical
7 data in functional terms."); Balsamo v. Chater, 142 F.3d 75, 81 (2d
8 Cir. 1998) ("[T]he ALJ cannot arbitrarily substitute his own judgment
9 for competent medical opinion. . . ." (citations omitted)); Rohan v.
10 Chater, 98 F.3d 966, 970 (7th Cir. 1996) (ALJ "must not succumb to the
11 temptation to play doctor and make [his] own independent medical
12 findings."); Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1985)
13 (ALJ may not substitute his interpretation of laboratory reports for
14 that of physician).

15
16 "Because the ALJ failed to provide adequate reasons for rejecting
17 Dr.[Watson's] opinion[s], [this Court] credit[s] [them] as a matter of
18 law." Widmark, 454 F.3d at 1069; Benecke v. Barnhart, 379 F.3d 587,
19 594 (9th Cir. 2004). Crediting the limitations Dr. Watson found, it
20 is clear that substantial evidence does not support the RFC
21 assessment, Widmark, 454 F.3d at 1070, "[n]or does substantial
22 evidence support the ALJ's step-five determination, since it was based

23
24 Bray v. Astrue, 554 F.3d 1219, 1225-26 (9th Cir. 2009)
25 ("Long-standing principles of administrative law require us to
26 review the ALJ's decision based on the reasoning and factual
27 findings offered by the ALJ - not post hoc rationalizations that
28 attempt to intuit what the adjudicator may have been thinking.");
Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007) ("We review only
the reasons provided by the ALJ in the disability determination
and may not affirm the ALJ on a ground upon which he did not
rely.").

1 on this erroneous RFC assessment." Lingenfelter v. Astrue, 504 F.3d
2 1028, 1040 (9th Cir. 2007).

3
4 **III**

5 When the Commissioner's decision is not supported by substantial
6 evidence, the Court has authority to affirm, modify, or reverse the
7 Commissioner's decision "with or without remanding the cause for
8 rehearing." 42 U.S.C. § 405(g); McCartey v. Massanari, 298 F.3d 1072,
9 1076 (9th Cir. 2002). "Remand for further administrative proceedings
10 is appropriate if enhancement of the record would be useful."
11 Benecke, 379 F.3d at 593; Harman v. Apfel, 211 F.3d 1172, 1178 (9th
12 Cir.), cert. denied, 531 U.S. 1038 (2000). Here, this matter must be
13 remanded for the redetermination of Step Five, in light of the
14 limitations Dr. Watson found. Widmark, 454 F.3d at 1070; Harman, 211
15 F.3d at 1180.

16
17 **ORDER**

18 IT IS ORDERED that: (1) plaintiff's request for relief is
19 granted; and (2) the Commissioner's decision is reversed, and the
20 action is remanded to the Social Security Administration for further
21 proceedings consistent with this Opinion and Order, pursuant to
22 sentence four of 42 U.S.C. § 405(g), and Judgment shall be entered
23 accordingly.

24
25 DATE: January 28, 2010

/S/ ROSALYN M. CHAPMAN
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE