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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEFINA V. BALLESTEROS,) NO. CV 09-06372 SS
)
Plaintiff,)
)
v.) MEMORANDUM DECISION AND ORDER
)
MICHAEL J. ASTRUE,)
Commissioner of the Social)
Security Administration)
)
Defendant.)
_____)

I.

INTRODUCTION

Plaintiff Josefina V. Ballesteros ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying her application for Disability Insurance Benefits ("DIB"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Agency is REVERSED and REMANDED for further proceedings.

1 rejecting it and to re-evaluate Plaintiff's RFC and support his
2 determination with substantial evidence in the record. (AR 349). On
3 March 25, 2008, Judge Virginia A. Phillips adopted this recommendation
4 and the case was remanded. (AR 375).

5
6 On October 30, 2008, a second administrative hearing was held with
7 new evidence. (AR 414-440). On May 15, 2009, the ALJ issued a decision
8 finding Plaintiff not disabled. (AR 303-309). Plaintiff filed the
9 instant action on September 1, 2009.

10
11 **III.**

12 **FACTUAL BACKGROUND**

13
14 **A. Plaintiff's Medical History**

15
16 Plaintiff has the following impairments: history of breast cancer
17 currently in remission, lumbar disc disease, neck pain secondary to a
18 cervical disc bulge and left shoulder pain secondary to a rotator cuff
19 tear. (AR 305-306). Plaintiff also has a history of chronic anxiety
20 disorder and depression. (AR 316).

21
22 Dr. Robert Finkelstein, Plaintiff's primary doctor for thirty-one
23 years, (AR 286), wrote the Agency a letter on February 10, 2006, stating
24 that he believed Plaintiff's severe anxiety disorder and depression
25 rendered her "fully incapacitated and unable to perform any type of
26 employment, part time or full time." (AR 256). Dr. Finkelstein stated
27 that he had treated Plaintiff for these symptoms. (Id.). Plaintiff
28

1 received prescriptions for Ativan, Lorazepam, Paxil and Wellbutrin,
2 which she took to treat her anxiety and depression. (AR 257-66).

3
4 **B. New Evidence**

5
6 The District Court directed the ALJ to further develop the record
7 by retaining the services of a consultative examiner to offer her
8 opinions after an examination of Plaintiff. (AR 373). Plaintiff
9 underwent a state agency consultative psychological examination.
10 Additionally, after the remand, Facey Medical Group submitted updated
11 evidence through July 2008. Two medical experts and Plaintiff testified
12 at the hearing. Lastly, Plaintiff submitted a letter from Judy Sturman,
13 her licensed clinical social worker. Ms. Sturman is a board certified
14 diplomate in clinical social work and a master of social work. (AR
15 311).

16
17 **1. Consultative Examination**

18
19 On December 29, 2008, Dr. Evelyn Garcia performed a psychological
20 evaluation at the request of the Department of Social Services. (AR
21 403). Plaintiff reported to Dr. Garcia that she needed help with
22 shopping, making meals and doing household chores due to her pain,
23 anxiety and depression, though she could dress, bathe and walk on her
24 own. (AR 406). Her husband drove for long trips and managed
25 Plaintiff's money. (Id.). Dr. Garcia noted that Plaintiff's mood was
26 anxious and that Plaintiff became teary-eyed during certain tasks.
27 (Id.). Dr. Garcia opined that Plaintiff's concentration and attention
28 span were mildly impaired but she was able to do various tasks. Based

1 on test results and clinical data, Dr. Garcia opined that Plaintiff's
2 overall cognitive ability fell within the borderline range and that
3 diagnoses included major depressive disorder and anxiety disorder. (AR
4 408). Dr. Garcia noted difficulty with daily tasks due to chronic pain,
5 anxiety and depression. (Id.). Dr. Garcia opined that Plaintiff would
6 be able to understand, remember and carry out short and simplistic
7 instructions and that Plaintiff has a mild inability to understand,
8 remember and carry out detailed instructions but could make simplistic
9 work-related decisions. (Id.). Dr. Garcia recommended that Plaintiff
10 continue psychological treatment in order to help her overcome her
11 depression and anxiety. (AR 409).

12

13 2. Updated Records From Treating Physician

14

15 Updated records from Dr. Finkelstein's medical group, Facey Medical
16 Group, revealed that Plaintiff still experienced recurring problems with
17 depression and anxiety disorder. In April 2008, Plaintiff's depression
18 was under very good control and she asked to discontinue her medication.
19 (AR 327). The doctor lowered her dosage. (AR 327). At her June 27,
20 2008 appointment, her doctor reported that her depression with anxiety
21 disorder was still under excellent control but Plaintiff remained on
22 Ativan and Wellbutrin. (AR 317). However, Plaintiff was then advised
23 at her July 17, 2008 appointment to increase her Wellbutrin dosage again
24 for her anxiety. (AR 313-315). She was reportedly seeing a therapist
25 in July 2008. (AR 313-315). The most recent report from Facey Medical
26 Group reports that Plaintiff still suffered from depression and anxiety
27 and was on medication (Wellbutrin and Ativan) as of July 2008. (Id.).
28

1 **3. Testimony of Medical Experts**

2
3 Glenn Griffin, M.D., an impartial medical expert, testified at
4 trial. He stated that he did not review the Facey Medical Group
5 records. (AR 419). He believed Plaintiff had a severe condition and
6 required further psychological assessment to determine how severe.
7 (Id.).

8
9 Reuben Beezy, the second medical expert, did not comment on
10 Plaintiff's psychiatric manifestations. (AR 422). He testified that
11 Plaintiff had glaucoma, neck pain with radiation into the arms, shoulder
12 pain secondary to a rotator cuff tear, which was confirmed by an MRI,
13 back pain and benign postural vertigo. (AR 422-423). Dr. Beezy opined
14 without explanation that none of Plaintiff's conditions met a listing
15 but that he thought Plaintiff was sedentary considering her neck and
16 back problems. (AR 422).

17
18 **4. Plaintiff's Testimony**

19
20 Plaintiff testified that she was taking Lorazepam, Wellbutrin,
21 Actonel and Aspirin. (AR 423). She testified that she was not capable
22 of sedentary work due to anxiety and depression. (AR 424). She
23 testified that if she did chores, they took her a long time because she
24 did them slowly. (AR 429). Plaintiff testified that she split up her
25 cooking so she did a little each day because she got too tired and
26 anxious. (AR 430). Plaintiff testified that she had anxiety attacks
27 every day, whether at home or in public. (AR 430-431). She testified
28 she went to the grocery store once in awhile when she knew there would

1 be few people around. (AR 432). Plaintiff testified that she had been
2 receiving treatment from a psychotherapist for four years for depression
3 and anxiety. (AR 432).

4
5 **5. Statement From Plaintiff's Clinical Social Worker**

6
7 Judy Sturman, MSW, LCSW, submitted a letter dated October 27, 2008,
8 stating that Plaintiff had been in treatment with her since 2005 and
9 opining that Plaintiff's depression, anxiety and panic disorder rendered
10 her unable to work. (AR 311). Ms. Sturman wrote that Plaintiff was
11 depressed most of the day, often had either hypersomnia or insomnia and
12 usually felt fatigued. (Id.). She noted Plaintiff's weight gain and
13 that Plaintiff's panic had been severe enough that she was unable to
14 leave her house for several weeks at a time. (Id.). Ms. Sturman opined
15 that Plaintiff would continue to have these episodes, which involve
16 dizziness, chest pain, rapid heartbeat, shortness of breath and
17 sweating. Because of these attacks, Plaintiff was unable to sleep,
18 focus or concentrate. (Id.).

19
20 **6. Vocational Expert**

21
22 A vocational expert departed from the hearing early and was unable
23 to testify due to a scheduling conflict. (AR 426).

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1 IV.

2 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

3
4 To qualify for disability benefits, a claimant must demonstrate
5 a medically determinable physical or mental impairment that prevents him
6 from engaging in substantial gainful activity¹ and that is expected to
7 result in death or to last for a continuous period of at least twelve
8 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
9 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
10 incapable of performing the work he previously performed and incapable
11 of performing any other substantial gainful employment that exists in
12 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
13 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

14
15 To decide if a claimant is entitled to benefits, an ALJ conducts
16 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are as
17 follows:

18
19 (1) Is the claimant presently engaged in substantial gainful
20 activity? If so, the claimant is found not disabled.
21 If not, proceed to step two.

22
23 (2) Is the claimant's impairment severe? If not, the
24 claimant is found not disabled. If so, proceed to step
25 three.

26
27
28

¹ Substantial gainful activity means work that involves doing
significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 (3) Does the claimant's impairment meet or equal one of a
2 list of specific impairments described in 20 C.F.R. Part
3 404, Subpart P, Appendix 1? If so, the claimant is
4 found disabled. If not, proceed to step four.

5
6 (4) Is the claimant capable of performing her past work? If
7 so, the claimant is found not disabled. If not, proceed
8 to step five.

9
10 (5) Is the claimant able to do any other work? If not, the
11 claimant is found disabled. If so, the claimant is
12 found not disabled.

13
14 Tackett, 180 F.3d at 1098-99; see also 20 C.F.R. §§ 404.1520(b)-(g)(1),
15 416.920(b)-(g)(1); Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th
16 Cir. 2001) (citations omitted).

17
18 The claimant has the burden of proof at steps one through four, and
19 the Commissioner has the burden of proof at step five. Bustamante, 262
20 F.3d at 953-54. If, at step four, the claimant meets his burden of
21 establishing an inability to perform past work, the Commissioner must
22 show that the claimant can perform some other work that exists in
23 "significant numbers" in the national economy, taking into account the
24 claimant's residual functional capacity ("RFC"),² age, education, and
25 work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at

26
27 ² Residual functional capacity is "the most [one] can still do
28 despite [one's] limitations" and represents an assessment "based on all
the relevant evidence in [one's] case record." 20 C.F.R. §§
404.1545(a), 416.945(a).

1 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may
2 do so by the testimony of a VE or by reference to the Medical-Vocational
3 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2
4 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157,
5 1162 (9th Cir. 2001). When a claimant has both exertional (strength-
6 related) and nonexertional limitations, the Grids are inapplicable and
7 the ALJ must take the testimony of a VE. Moore v. Apfel, 216 F.3d 864,
8 869 (9th Cir. 2000).

9
10 **V.**

11 **THE ALJ'S DECISION**

12
13 The ALJ employed four of the five steps involved in the five-step
14 sequential evaluation process discussed above. At step one, the ALJ
15 determined that Plaintiff had not engaged in substantial gainful
16 activity since the alleged onset of disability. (AR 305). At step two,
17 the ALJ found that Plaintiff's history of breast cancer, currently in
18 remission, lumbar disc disease, neck pain secondary to a cervical disc
19 bulge and left shoulder pain secondary to a rotator cuff tear were
20 severe impairments. (AR 306). However, the ALJ found that Plaintiff's
21 anxiety and depressive disorders were nonsevere. (Id.). At step three,
22 the ALJ ascertained that Plaintiff's physical impairments did not meet
23 or equal a listing. (Id.).

24
25 At step four, the ALJ found that Plaintiff's medically determinable
26 impairments could reasonably be expected to produce the alleged
27 symptoms, but that Plaintiff's statements concerning the intensity,
28 persistence and limiting effects of these symptoms were not entirely

1 credible. (AR 307). The ALJ assessed that Plaintiff had the RFC to
2 perform "the exertional demands of medium work, or work which requires
3 maximum lifting of fifty pounds and frequent lifting of up to twenty-
4 five pounds." (AR 306). Additionally, the ALJ found that in light of
5 Plaintiff's neck and shoulder pain, she should avoid repetitive neck or
6 shoulder motions and would find using the arms overhead difficult. (AR
7 307). The ALJ determined that Plaintiff was capable of performing her
8 past relevant work. (Id.). Accordingly, the ALJ found that Plaintiff
9 was not disabled and did not proceed to step five. (Id.).

10
11 **VI.**

12 **STANDARD OF REVIEW**

13
14 Under 42 U.S.C. § 405(g), a district court may review the
15 Commissioner's decision to deny benefits. The court may set aside the
16 Commissioner's decision when the ALJ's findings are based on legal error
17 or are not supported by substantial evidence in the record as a whole.
18 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
19 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

20
21 "Substantial evidence is more than a scintilla, but less than a
22 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
23 which a reasonable person might accept as adequate to support a
24 conclusion." Id. To determine whether substantial evidence supports
25 a finding, the court must "'consider the record as a whole, weighing
26 both evidence that supports and evidence that detracts from the
27 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny
28 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can

1 reasonably support either affirming or reversing that conclusion, the
2 court may not substitute its judgment for that of the Commissioner.
3 Reddick, 157 F.3d at 720-21.

4
5 **VII.**
6 **DISCUSSION**

7
8 Plaintiff contends that the Commissioner's decision should be
9 overturned for four reasons. First, Plaintiff claims that the ALJ
10 improperly assessed Plaintiff's credibility. (Memorandum in Support of
11 Plaintiff's Complaint ("Complaint Memo") at 4-7). Second, she asserts
12 that the ALJ erred in determining that depression and anxiety were not
13 severe impairments. (Id. at 8-10). Third, Plaintiff claims that the
14 ALJ did not properly evaluate the assessments and opinions of treating
15 and examining physicians. (Id. at 10-12). Finally, she asserts that
16 the ALJ erred in not considering the combined effects of all of
17 Plaintiff's impairments in assessing her RFC. (Id. at 12-15). The
18 Court agrees with some of Plaintiff's contentions and finds that the
19 ALJ's decision should be reversed and remanded.

20
21 **A. The ALJ Failed To Properly Assess Plaintiff's Mental Health**
22 **Impairment At Step Two Of The Evaluation Process**

23
24 By its own terms, the evaluation at step two is a de minimis test
25 intended to weed out the most minor of impairments. See Bowen v.
26 Yuckert, 482 U.S. 137, 153-54, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987);
27 Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001) (describing the
28 step-two inquiry as a de minimis screening device to dispose of

1 groundless claims) (quoting Smolen, 80 F.3d at 1290). An impairment or
2 combination of impairments can be found "not severe" only if the
3 evidence establishes "a slight abnormality that has no more than a
4 minimal effect on [the claimant's] ability to work." Smolen, 80 F.3d
5 at 1290 (internal quotations and citations omitted).

6
7 The ALJ here applied more than a de minimis test when he determined
8 that Plaintiff's mental impairment was not severe. Although Plaintiff
9 presented records of her treatment for "severe anxiety disorder
10 associated with depression," (AR 256), the ALJ disregarded this and much
11 of the other evidence establishing Plaintiff's mental impairments.

12
13 **1. The ALJ Selectively Reviewed The Evidence**

14
15 The ALJ selectively reviewed the evidence regarding Plaintiff's
16 mental impairments. The ALJ cannot "reach a conclusion first, and then
17 attempt to justify it by ignoring competent evidence in the record that
18 suggests an opposite result." Gallant v. Heckler, 753 F.2d 1450, 1455-
19 56 (9th Cir. 1984). See also Reddick v. Chater, 157 F.3d 715, 722-23
20 (9th Cir. 1998) (impermissible for ALJ to develop evidentiary basis by
21 "not fully accounting for the context of materials or all parts of the
22 testimony and reports").

23
24 The ALJ acknowledged the record of Plaintiff's psychological
25 treatment, but did not address material evidence. For instance, the ALJ
26 focused on the fact that Plaintiff's symptoms were well controlled as
27 long as Plaintiff was compliant and then noted that there was
28 "[e]vidence of poor compliance." (AR 308). The ALJ focused on a August

1 3, 2005 office note that stated that Plaintiff was not taking the Paxil
2 prescribed by Dr. Finklestein. (Id., citing AR 265). The ALJ further
3 noted that "on July 1, 2008, Dr. Finkelstein noted that [Plaintiff] was
4 not taking Wellbutrin as prescribed." (Id., citing "new medicals").
5 This Court disagrees with the finding that Plaintiff was not compliant
6 with a prescribed course of treatment. As discussed above, Plaintiff
7 used several forms of prescribed medication and other physician-
8 recommended treatment to combat her neck and shoulder pain. That she
9 apparently was not taking her medications on two occasions over a five-
10 year period does not provide substantial evidence of a lack of severity
11 of her impairment.

12
13 The ALJ noted that "[t]he only detailed and objective . . .
14 examinations comes from the two consultative psychological consultative
15 examinations," Dr. Colonna's March 28, 2006 report and Dr. Garcia's
16 December 29, 2008 report. (AR 308, citing AR 269-276, 403-443). The
17 ALJ summarized Dr. Colonna's and Dr. Garcia's opinions and concluded
18 that Plaintiff had a "[m]oderately severe but not disabling level of
19 depression and anxiety." (Id.). However, the ALJ again selectively
20 considered the evidence in his review of Dr. Colonna's and Dr. Garcia's
21 reports. Dr. Colonna diagnosed Plaintiff with dysthymia³ and assigned
22 her a Global Assessment of Functioning ("GAF") score of 65.⁴ (AR 14).

24 ³ "Dysthymia is a chronic type of depression in which a person's
25 moods are regularly low. However, it is not as extreme as other types
26 of depression." U.S. National Library of Medicine and National
27 Institutes of Health, MedlinePlus Medical Encyclopedia,
<http://www.nlm.nih.gov/medlineplus/ency/article/000918.htm>.

28 ⁴ GAF ratings range from 0 to 100. A rating of 61-70 denotes some
mild symptoms (e.g., depressed mood and mild insomnia) or some

1 The ALJ further noted Dr. Colonna's finding that Plaintiff had only
2 "mild" limitations in the ability to understand, remember and carry out
3 detailed instructions. (Id.). Dr. Colonna did assign Plaintiff a
4 primary diagnosis of dysthymia, but conceded that Plaintiff "may meet
5 the diagnostic criteria for anxiety disorder." (AR 274). Dr. Colonna
6 also found an indication of "moderate anxiety, depression, fatigue,
7 exhaustion, [and] insomnia." (Id.). These findings fully support a
8 conclusion that Plaintiff did, in fact, have a severe mental impairment,
9 at least for purposes of the step two evaluation.

10
11 **2. The Evidence Supports A Finding Of A Severe Mental Impairment**
12 **At Step Two**
13

14 Dr. Finkelstein's records show that Plaintiff repeatedly complained
15 of anxiety and depression. Dr. Finkelstein treated her with Lorazepam.
16 When the Lorazepam proved ineffective to treat her depression, Dr.
17 Finkelstein changed Plaintiff's medication to Wellbutrin. Dr.
18 Finkelstein found Plaintiff "fully incapacitated" as a result of her
19 anxiety disorder and depression. Even if the ALJ found that Dr.
20 Finkelstein's opinion was not entitled to much weight in evaluating
21 whether Plaintiff was disabled at step four or five, this evidence was
22 certainly sufficient to satisfy the de minimis step two evaluation,
23 particularly when combined with clinical psychologist Rosa Colonna's
24 diagnosis of dysthymia and a GAF of 65. As such, the ALJ's conclusion

25 _____
26 difficulty in social, occupational or school functioning (e.g.,
27 occasional truancy or theft within the household), but generally
28 functioning pretty well and maintaining some meaningful interpersonal
relationships. American Psychiatric Association, Diagnostic and
Statistical Manual of Mental Disorders 34 (4th ed., text rev. 2000).

1 at step two, that Plaintiff's mental impairment was not severe, was
2 error. See 20 C.F.R. § 416.920a(b)(1).

3
4 On August 3, 2004, the Agency conducted a face-to-face interview
5 with Plaintiff, in which the interviewer noted that Plaintiff's "eyes
6 were constantly tearing and red" and that "she appeared to be tired and
7 depressed." (AR 60). On June 30, 2005, an unidentified doctor,
8 apparently Dr. Finkelstein, noted that Plaintiff "has been depressed and
9 quite anxious and actually is crying in the office." (AR 266). On
10 August 3, 2005, Dr. Sheldon Davidson, Plaintiff's oncologist, noted that
11 "she still has depression and crying spells." (AR 265). On August 8,
12 2005, Dr. Finkelstein noted that Plaintiff was feeling "quite anxious."
13 (AR 264). On September 6, 2005, he diagnosed her with "chronic anxiety
14 and depression." (AR 263). On November 17, 2005, Dr. Finkelstein noted
15 "[s]ome improvement in depression and anxiety." (AR 261). On December
16 5, 2005, Dr. Albert Dekker, an oncologist, noted that Plaintiff was
17 "very emotional." (AR 258). On January 10, 2006, Dr. Finkelstein noted
18 that the Wellbutrin helped Plaintiff to feel "much less anxious." (AR
19 257).

20
21 Moreover, the ALJ failed to consider the recent psychological
22 consultation performed for the Department of Social Services. On
23 December 29, 2008, Dr. Evelyn Garcia performed a psychological
24 evaluation at the request of the Department of Social Services.
25 Plaintiff reported to Dr. Garcia that she needed help with shopping,
26 making meals and doing household chores due to her pain, anxiety and
27 depression, though she could dress, bathe and walk on her own. (AR
28 406). Her husband drove for long trips and managed Plaintiff's money.

1 (Id.). Dr. Garcia noted that Plaintiff's mood was anxious and that
2 Plaintiff became teary-eyed during certain tasks. (Id.). Dr. Garcia
3 opined that Plaintiff's concentration and attention span were mildly
4 impaired but she was able to do the tasks at hand. Based on test
5 results and clinical data, Dr. Garcia opined that Plaintiff's overall
6 cognitive ability fell within the borderline range and that diagnoses
7 included major depressive disorder and anxiety disorder. (AR 408). Dr.
8 Garcia noted difficulty with daily tasks due to chronic pain, anxiety
9 and depression. (Id.). Dr. Garcia opined that Plaintiff would be able
10 to understand, remember and carry out short and simplistic instructions
11 and that Plaintiff has a mild inability to understand, remember and
12 carry out detailed instructions but could make simplistic work-related
13 decisions. (Id.). Dr. Garcia recommended that Plaintiff continue
14 psychological treatment in order to help her overcome her depression and
15 anxiety. (AR 409). Substantial evidence supports Plaintiff's
16 allegations of disability due to anxiety and depression.

17
18 **3. The ALJ Failed To Employ The Agency's Regulations For The**
19 **Evaluation Of Mental Impairments**

20
21 Before remand, the ALJ failed to follow the Agency's own
22 regulations for the evaluation of mental impairments. (AR 357-358).
23 The ALJ again failed to follow these regulations. Where there is
24 evidence of a mental impairment that allegedly prevents the plaintiff
25 from working, the Agency has supplemented the five-step sequential
26
27
28

1 evaluation process with additional regulations.⁵ Maier v. Comm'r of the
2 Soc. Sec. Admin., 154 F.3d 913, 914-15 (9th Cir. 1998) (citing 20 C.F.R.
3 § 416.920a)(per curiam). First, the ALJ must determine the presence or
4 absence of certain medical findings relevant to the plaintiff's ability
5 to work. 20 C.F.R. § 416.920a(b)(1). Second, when the plaintiff
6 establishes these medical findings, the ALJ must rate the degree of
7 functional loss resulting from the impairment by considering four areas
8 of function: (a) activities of daily living; (b) social functioning; (c)
9 concentration, persistence, or pace; and (d) episodes of decompensation.
10 20 C.F.R. § 416.920a(c)(2)-(4). Third, after rating the degree of loss,
11 the ALJ must determine whether the claimant has a severe mental
12 impairment. 20 C.F.R. § 416.920a(d). Fourth, when a mental impairment
13 is found to be severe, the ALJ must determine if it meets or equals a
14 listing in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §
15 416.920a(d)(2). Finally, if a listing is not met, the ALJ must then
16 assess the plaintiff's RFC, and the ALJ's decision "must incorporate the
17 pertinent findings and conclusions" regarding the plaintiff's mental
18 impairment, including "a specific finding as to the degree of limitation
19 in each of the functional areas described in [§ 416.920a(c)(3)]." 20
20 C.F.R. § 416.920a(d)(3), (e)(2).

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26 ⁵ These additional steps are intended to assist the ALJ in
27 determining the severity of mental impairments at steps two and three.
28 The mental RFC assessment used at steps four and five of the evaluation
process, on the other hand, require a more detailed assessment. Social
Security Ruling 96-8P, 1996 WL 374184 at * 4.

1 The regulations describe an impairment as follows:

2
3 A physical or mental impairment must result from anatomical,
4 physiological, or psychological abnormalities which can be
5 shown by medically acceptable clinical and laboratory
6 diagnostic techniques. A physical or mental impairment must
7 be established by medical evidence consisting of signs,
8 symptoms, and laboratory findings, not only by [a
9 plaintiff's] statements of symptoms.

10
11 20 C.F.R. § 416.908; see also Ukolov v. Barnhart, 420 F.3d 1002, 1005
12 (9th Cir. 2005) (noting that the existence of a medically determinable
13 physical or mental impairment may only be established with objective
14 medical findings) (citing Social Security Ruling 96-4p, 1996 WL 374187
15 at *1-2).

16
17 Here, the ALJ erred by finding that Plaintiff's mental impairment
18 was not severe at step two. Furthermore, the ALJ should have evaluated
19 Plaintiff's mental impairment by applying the agency's regulations, as
20 described above. As such, remand is required to remedy these defects.

21
22 **B. The ALJ Did Not Consider The Combined Effect Of Plaintiff's**
23 **Physical and Mental Impairments In Determining Her Residual**
24 **Function Capacity**

25
26 The ALJ first determined that Plaintiff had only slight mental
27 impairments that would not interfere with her ability to do "simple and
28 some detailed work or worklike tasks." (AR 306). He then addressed

1 Plaintiff's RFC. The ALJ determined that Plaintiff, a nearly-sixty-year
2 old woman with severe neck and shoulder pain, can perform medium work,
3 which requires maximum lifting of fifty pounds and frequent lifting of
4 up to twenty-five pounds. (AR 306-307). In light of Plaintiff's neck
5 and shoulder pain, the ALJ also found that Plaintiff should avoid
6 repetitive neck or shoulder motions and would find using the arms
7 overhead difficult. (AR 307).

8
9 Although the ALJ claimed that "[i]n making this finding, [he]
10 considered all symptoms," the ALJ did not sufficiently weigh Plaintiff's
11 mental impairments in his discussion. This was error. See Edlund, 253
12 F.3d at 1158 ("Important here, at the step two inquiry, is the
13 requirement that the ALJ must consider the combined effect of all of the
14 claimant's impairments on h[is] ability to function, without regard to
15 whether each alone was sufficiently severe.") (quoting Smolen, 80 F.3d
16 at 1290); 20 C.F.R. §§ 404.1523, 416.923. Even if the ALJ had been
17 correct that Plaintiff's mental impairments were non-severe, he was
18 still required to consider the limitations arising from those non-severe
19 impairments in determining her RFC. 20 C.F.R. § 404.1545(a)(2) ("[W]e
20 will consider all of your medically determinable impairments . . .
21 including your medically determinable impairments that are not
22 "severe."). While the ALJ did take into account Plaintiff's mild
23 problems understanding, remembering and carrying out complex
24 instructions, he completely disregarded substantial evidence in the
25 record that Plaintiff suffers from frequent and disabling anxiety
26 attacks.

1 In addition, the ALJ must consider each of Plaintiff's individual
2 physical impairments. Here, the ALJ did not address the joint pain that
3 Plaintiff experienced while on the course of aromatase inhibitors in the
4 months following her chemotherapy. The ALJ also did not address
5 Plaintiff's report that she does "very little lifting" and that "because
6 of the pain and weakness," anything she carries "must be light in
7 weight." (AR 63). This evidence contradicts the ALJ's determination
8 that Plaintiff can perform medium work. Although the Agency's
9 consultative RFC assessment indicated that Plaintiff could handle medium
10 work, (AR 244-54), this opinion appears to be conclusory. Regardless,
11 the ALJ did not refer to it in his decision. Accordingly, this issue
12 also requires remand so that the ALJ can make a proper determination of
13 Plaintiff's RFC in light of the entire record.

14
15 **VIII.**

16 **CONCLUSION**

17
18 Upon remand, the ALJ must evaluate Plaintiff's mental impairment
19 at step two, following the agency's own regulations for mental
20 impairments. In addition, the ALJ must re-evaluate Plaintiff's RFC and
21 support his determination with substantial evidence in the record. In
22 making this determination, the ALJ must consider the combined effects
23 of all of Plaintiff's impairments -- physical and mental -- and all of
24 the record evidence in making his RFC determination. The ALJ should
25 call a vocational expert to testify, as Plaintiff suffers from both
26 exertional and non-exertional impairments. The ALJ must complete the
27 five-step analysis so that this Court has adequate information in
28 reviewing any decision for harmless error.

1 Consistent with the foregoing, and pursuant to sentence four of 42
2 U.S.C. § 405(g),⁶ IT IS ORDERED that judgment be entered REVERSING the
3 decision of the Commissioner and REMANDING this matter for further
4 proceedings consistent with this decision. IT IS FURTHER ORDERED that
5 the Clerk of the Court serve copies of this Order and the Judgment on
6 counsel for both parties.

7
8 DATED: August 30, 2010
9

10 _____/S/_____
11 SUZANNE H. SEGAL
12 UNITED STATES MAGISTRATE JUDGE
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25 _____
26 ⁶ This sentence provides: "The [district] court shall have power
27 to enter, upon the pleadings and transcript of the record, a judgment
28 affirming, modifying, or reversing the decision of the Commissioner of
Social Security, with or without remanding the cause for a rehearing."