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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

STUART BOYAR,)	No. CV 11-02414-VBK
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER
v.)	
)	(Social Security Case)
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") erred in

1 failing to give appropriate weight to the treating
2 physician; and

3 2. Whether the ALJ erred in evaluating Plaintiff's severe
4 impairments.

5 (JS at 2.)

6
7 This Memorandum Opinion will constitute the Court's findings of
8 fact and conclusions of law. After reviewing the matter, the Court
9 concludes that for the reasons set forth, the decision of the
10 Commissioner must be reversed and the matter remanded.

11
12 I

13 **THE ALJ'S DETERMINATION THAT PLAINTIFF DOES NOT SUFFER**
14 **A SEVERE IMPAIRMENT IS NOT BASED ON SUBSTANTIAL EVIDENCE**

15 Plaintiff filed an application for Disability Insurance Benefits
16 under Title II of the Social Security Act, alleging an onset of
17 disability as of January 3, 1997 (AR 98), due to both physical and
18 mental symptoms, including a self-described increasing severity of
19 depression, and a lack of concentration, extreme irritability, extreme
20 anxiety, and fatigue. (AR 133.)

21 Following a hearing before an ALJ (AR 42-54), an unfavorable
22 decision was issued on January 27, 2009. (AR 27-35.) Utilizing the
23 standard five-step sequential evaluation process (AR 31-32),
24 Plaintiff's case ended at Step Two, when the ALJ found that Plaintiff
25 did not have a severe impairment or combination of impairments. (AR
26 32; see 20 C.F.R. § 404.1521.)

27 In support of his disability claim Plaintiff tendered the
28 Treatment Report of his long-time psychiatrist, Dr. Schachter. (AR

1 270-271.) In that document Dr. Schachter indicated that he has
2 treated Plaintiff in psychotherapy for over a decade. Dr. Schachter
3 began treating Plaintiff for severe anxiety and long-standing
4 depression for several years, until Plaintiff suffered a serious
5 shoulder injury in 1992, which exacerbated his symptoms of anxiety and
6 depression. (AR 270.) In the Treatment Report, Dr. Schachter
7 indicated that following the cessation of Plaintiff's employment in
8 1997, he suffered deepening anxiety and marked depression which
9 worsened significantly. In addition, Dr. Schachter indicated that
10 Plaintiff, "began a pronounced withdrawal from remaining friends and
11 family ... struggling with unrelenting insomnia; these are common
12 features of clinical depression." (AR 270.) Dr. Schachter's
13 description of Plaintiff's condition continued past the last date of
14 his insured status, December 31, 2001. (AR 30.)

15 The ALJ completely discounted Dr. Schachter's diagnostic report,
16 based on several reasons indicated in the decision (see AR at 35-36),
17 including, principally, the fact that there are no progress notes.
18 While the ALJ acknowledged that a flood in Dr. Schachter's office may
19 have destroyed treatment and other relevant notes in 1999, he still
20 determined that Dr. Schachter's opinion would not accorded credibility
21 because of contradictory evidence from Dr. Fishman (AR 34); however,
22 Dr. Fishman treated Plaintiff for physical, not mental impairments.
23 Although Dr. Schachter made a connection between Plaintiff's physical
24 injuries and his ensuing depression and other symptoms, even if there
25 is evidence in the record which might dispute or contradict the
26 existence or extent of Plaintiff's physical injuries, this would not
27 serve to fully depreciate Dr. Schachter's opinion as to Plaintiff's
28 mental condition.

1 The Step Two determination of whether a claimant suffers from a
2 severe impairment, as set forth in the regulation (see 20 C.F.R. §
3 404.1520(c)), is recognized as a "de minimis screening device [used]
4 to dispose of groundless claims," Smolen v. Chater, 80 F.3d 1273, 1290
5 (9th Cir. 1996). It would certainly appear that, if accepted as
6 credible to any extent, Dr. Schachter identified conditions that would
7 have more than a minimal effect on Plaintiff's ability to function in
8 the workplace for more than a continuous period of twelve months. The
9 fact that there are no treatment records is not irrelevant, but under
10 the circumstances, has been adequately explained, as acknowledged by
11 the ALJ. Moreover, in this context, the absence of treating records,
12 even if unexplained, would be an insufficient basis in itself upon
13 which to reject the existence of a severe impairment. Dr. Schachter
14 clearly has treated Plaintiff for an extensive period of time, and his
15 diagnostic opinions should not have been tossed out like the baby with
16 the bath water because of an absence of treatment records. Enough red
17 flags have been raised about Plaintiff's mental condition to have
18 seemingly inspired the ALJ to develop the record further. See Brown
19 v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983). The Court,
20 consequently, does not find that the ALJ's rejection of the existence
21 of a severe mental impairment at Step Two is supported by substantial
22 evidence. The matter must be remanded so that a Step Two
23 determination can be made based upon consideration of substantial
24 evidence.

25 Plaintiff's second issue, which is whether the ALJ erred in
26 evaluating Plaintiff's severe impairments, is inextricably intertwined
27 with the first issue as to whether Dr. Schachter's opinion was
28 properly considered. The result is the same, which is remand for

