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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GLENN A. DAVIS,)	Case No. CV 12-1474-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of the)	
Social Security)	
Administration,)	
)	
Defendant.)	
)	

Plaintiff Glenn A. Davis ("Plaintiff") seeks judicial review of the Commissioner's final decision denying his application for supplemental security income benefits ("SSI") pursuant to Title XVI of the Social Security Act. For the reasons stated below, the Commissioner's decision is remanded for further proceedings.

I. Factual and Procedural Background

Plaintiff was born on March 29, 1961. (Administrative Record ("AR") at 32, 75). He has a limited education and is able to communicate in English. (AR at 32).

1 On March 15, 2010, Plaintiff filed an application for SSI, alleging
2 that he has been disabled since January 2, 2002, due to degenerative
3 disc disease, rheumatoid arthritis, hip and low back problems, a
4 learning impairment, and illiteracy. (AR at 139). The Social Security
5 Administration denied Plaintiff's application initially and on
6 reconsideration.¹ (AR at 95-98, 100-04).

7 An administrative hearing was held before Administrative Law Judge
8 Sherwin F. Biesman ("the ALJ") on May 23, 2011. (AR at 71-90).
9 Plaintiff, who was represented by counsel, testified at the hearing. In
10 a written decision dated May 26, 2011, the ALJ found: Plaintiff had not
11 engaged in substantial gainful activity since March 15, 2010, the date
12 of the application (step one); Plaintiff has the severe impairment of
13 degenerative disc disease of the lumbar spine (step two); Plaintiff's
14 impairment did not meet or equal any impairment in the Listing (step
15 three); Plaintiff retained the residual functional capacity ("RFC") to
16 perform the full range of medium work, see 20 C.F.R. § 416.967(a);
17 Plaintiff was unable to perform past relevant work (step four); and
18 Medical-Vocational Guideline Rule 203.26 directed a finding of "not
19 disabled" (step five), given Plaintiff's residual functional capacity,
20 age, education and work experience. (AR at 23-33). Accordingly, the ALJ
21 determined that Plaintiff had not been under a disability since the date
22 he filed the SSI application. (AR at 33). On December 20, 2011, the
23 Appeals Council denied review.

24 Plaintiff commenced this action for judicial review on March 2,
25 2012. The parties filed a joint statement of disputed issues on
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27 ¹ Plaintiff also applied for Disability Insurance Benefits. (AR at
28 117-20). That application was denied, as Plaintiff had not worked long
enough to qualify for disability benefits. (AR at 65-67, 117-20).

1 September 18, 2012. Plaintiff contends that the ALJ: (1) failed to
2 correctly consider the opinions of Plaintiff's examining physicians; and
3 (2) failed to correctly consider Plaintiff's testimony. (Joint
4 Stipulation at 4-7, 10-18, 23-24). Plaintiff seeks remand for further
5 proceedings. (Joint Stipulation at 19). The Commissioner requests that
6 the ALJ's decision be affirmed. (Joint Stipulation at 19). The Joint
7 Stipulation has been taken under submission without oral argument.

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9 **II. Standard of Review**

10 Under 42 U.S.C. § 405(g), a district court may review the
11 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
12 findings and decision should be upheld if they are free from legal error
13 and are supported by substantial evidence based on the record as a
14 whole. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401
15 (1971); *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
16 evidence means such evidence as a reasonable person might accept as
17 adequate to support a conclusion. *Richardson*, 402 U.S. at 401;
18 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more
19 than a scintilla, but less than a preponderance. *Lingenfelter*, 504 F.3d
20 at 1035 (citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir.
21 2006)). To determine whether substantial evidence supports a finding,
22 the reviewing court "must review the administrative record as a whole,
23 weighing both the evidence that supports and the evidence that detracts
24 from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715,
25 720 (9th Cir. 1996). "If the evidence can reasonably support either
26 affirming or reversing," the reviewing court "may not substitute its
27 judgment" for that of the Commissioner. *Id.* at 720-721.

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1 **III. Discussion**

2 **A. Plaintiff's Mental Impairment**

3 Plaintiff contends that the ALJ failed to properly consider the
4 medical evidence concerning his borderline intellectual functioning.
5 (Joint Stipulation at 4). The Court agrees with Plaintiff.

6 On August 5, 2008, Steven I. Brawer, Ph.D conducted a psychological
7 evaluation of Plaintiff. (AR at 211-17). Plaintiff reported that he had
8 been classified with a learning disability and was unable to read or
9 write. (AR at 212). Plaintiff also stated that he had been depressed for
10 several years. (AR at 212). Intelligence testing revealed that Plaintiff
11 had a full scale IQ score of 73, which was in the borderline range of
12 intellectual functioning. (AR at 214-15). Plaintiff's general memory
13 functioning and working memory were also in the borderline range. (AR at
14 215). Plaintiff was in the mildly delayed range of visual and perceptual
15 motor functioning and in the low average range for short-term visual
16 memory for designs. (AR at 215-16). Plaintiff displayed a "mild-to-
17 moderate impairment" on complex tasks involving mental flexibility in
18 shifting sets. (AR at 264).

19 Dr. Brawer determined that Plaintiff was functioning in the
20 borderline range of intellectual ability. (AR at 216). Dr. Brawer
21 diagnosed Plaintiff with depressive disorder, NOS, and learning
22 disorder, NOS. (AR at 216). Dr. Brawer opined that Plaintiff "would be
23 able to learn a simple, repetitive task and may be able to perform some
24 detailed, varied or complex nonverbal tasks." (AR at 216). Dr. Brawer
25 further found that Plaintiff demonstrated mildly diminished attention,
26 concentration, persistence and pace in completing tasks, and that
27 Plaintiff may have mild limitations in the ability to effectively manage
28 customary work stresses, and difficulties maintaining stamina and

1 motivation. (AR at 217).

2 The ALJ concluded that Plaintiff did not suffer from a severe
3 mental impairment. (AR at 29, 32). While the ALJ found Plaintiff's
4 depression and learning disorder to be medically determinable
5 conditions, the ALJ found that Plaintiff was able to perform the full
6 range of medium work. (AR at 26). The ALJ asserted that Dr. Brawer's
7 findings were consistent with the record as a whole, including the
8 opinions of an examining psychiatrist and non-examining medical
9 consultant. (AR at 31, 265-68, 269-78). The ALJ stated that he afforded
10 "significant weight" to Dr. Brawer's opinion. (AR at 31).

11 It is well settled that an ALJ must present specific and legitimate
12 reasons supported by substantial evidence in the record before rejecting
13 an examining physician's opinion. *Lester v. Chater*, 81 F.3d 821, 830-31
14 (9th Cir. 1996). The ALJ may reject physicians' opinions "by setting out
15 a detailed and thorough summary of the facts and conflicting clinical
16 evidence, stating his interpretation thereof, and making findings."
17 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). Rather than merely
18 stating his conclusions, the ALJ "must set forth his own interpretations
19 and explain why they, rather than the doctors', are correct." *Id.*
20 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

21 Here, the ALJ erred by failing to provide reasons for discounting
22 Dr. Brawer's opinion. Although the ALJ stated that he gave Dr. Brawer's
23 opinion "significant weight," the ALJ did not address Dr. Brawer's
24 finding that Plaintiff may be able to perform "some detailed, varied or
25 complex nonverbal tasks." (AR at 216) (emphasis added). It was improper
26 for the ALJ to rely on aspects of Dr. Brawer's opinion supporting his
27 evaluation of Plaintiff's mental condition, while ignoring those aspects
28 of Dr. Brawer's findings contradicting that conclusion. *Gallant v.*

1 *Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984) (stating that it is error
2 for an ALJ to ignore or misstate the competent evidence in the record in
3 order to justify her conclusion); *Day v. Weinberger*, 522 F.2d 1154, 1156
4 (9th Cir. 1975) (stating that an ALJ is not permitted to reach a
5 conclusion "simply by isolating a specific quantum of supporting
6 evidence"). Therefore, the ALJ's consideration of Dr. Brawer's opinion
7 was not supported by substantial evidence. *Lester*, 81 F.3d at 830-31.

8 The Commissioner asserts that any error was harmless, as a residual
9 functional capacity assessment for medium work was supported by the
10 medical evidence of record. (Joint Stipulation at 9-10). "[A] district
11 court's erroneous exclusion of evidence does not warrant reversal unless
12 the error 'more probably than not tainted the verdict.'" *Molina v.*
13 *Astrue*, 674 F.3d 1104, 1119 (9th Cir. 2012) (quoting *Engquist v. Or.*
14 *Dept. of Agriculture*, 478 F.3d 985, 1009 (9th Cir. 2007)). "[A]n ALJ's
15 error is harmless where it is 'inconsequential to the ultimate
16 nondisability determination.'" *Molina*, 674 F.3d at 1115 (quoting
17 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir.
18 2008)). Factors important in determining whether the omission of
19 evidence was harmless, include whether the evidence at issue was
20 cumulative of other competent evidence, and the "overall strength of the
21 case against the appealing party." *Id.* at 1119-20 (internal quotation
22 marks and citations omitted). Here, the Commissioner contends that Dr.
23 Brawer's opinion was consistent with the opinions of another examining
24 physician, Minh-Khoi Doung, M.D., and a state agency reviewing
25 physician. (Joint Stipulation at 9-10; AR at 265-68, 269-78). Both Dr.
26 Duong and the state agency physician found that Plaintiff had no mental
27 functional limitations. (AR at 265-68, 269-78). Dr. Brawer's opinion,
28 however, significantly differed from these doctor's opinions. Dr. Brawer

1 diagnosed Plaintiff with mental impairments (learning disorder, NOS and
2 borderline intellectual functioning) and assessed functional limitations
3 (ability to learn "a simple, repetitive task and may be able to perform
4 some detailed, varied or complex nonverbal tasks") that were never
5 discussed by the other physicians. (AR at 216). Further, Dr. Duong did
6 not administer any intellectual testing or review Plaintiff's
7 psychological record, and the non-examining physician's opinion by
8 itself did not justify rejection of an examining physician's opinion.
9 *Lester*, 81 F.3d at 831; (AR at 265-68). Thus, Dr. Brawer's assessment
10 of Plaintiff's mental functioning was not cumulative of other competent
11 evidence. *Molina*, 674 F.3d at 1115. Viewing the record as a whole, the
12 Court cannot find that the ALJ's error was harmless or inconsequential
13 to the ultimate disability determination. *Molina*, 674 F.3d at 1115

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15 **IV. Conclusion**

16 This matter is reversed and remanded so that the ALJ may further
17 evaluate the medical evidence and make appropriate findings with respect
18 to Plaintiff's mental condition. See *Bunnell v. Barnhart*, 336 F.3d 1112,
19 1115-16 (9th Cir. 2003) (where there are outstanding issues that must be
20 resolved before a determination of disability can be made, and it is not
21 clear from the record that the ALJ would be required to find the
22 claimant disabled if all the evidence were properly evaluated, remand is
23 appropriate).²

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27 ² In light of this remand, the Court does not reach Plaintiff's
28 remaining arguments. See *Bunnell*, 336 F.3d at 1115-16. The Court
recommends, however, that the ALJ consider all of Plaintiff's arguments
when determining the merits of his case on remand.

ORDER

Accordingly, **IT IS ORDERED** that this action is **REMANDED** for further proceedings consistent with this Memorandum Opinion.

DATED: October 1, 2012



MARC L. GOLDMAN
United States Magistrate Judge

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