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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

VERNER L. SHEPARD,)	No. CV 12-10468-VBK
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER
v.)	
)	(Social Security Case)
CAROLYN W. COLVIN, Acting)	
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 issue:

1. Whether the Commissioner failed to provide specific and

1 or may not be true, but it is not the Court's role to perform an
2 evidentiary credibility analysis in the absence of the Commissioner
3 having indicated what consideration, if any, was given to this new
4 medical evidence. As to this, nothing is said by the Appeals Council,
5 other than, having reviewed the new evidence (AR 5), it indicating,
6 "We found no reason under our rules to review the Administrative
7 Judge's decision. Therefore we have denied your request for review."
8 (AR 1.)

9 The Court cannot apply harmless error analysis in this case, for
10 to do so, the Court would have to make an assessment of the value of
11 Dr. Yemofio's Questionnaire, or at the least, engage in a speculative,
12 predictive exercise as to how the ALJ or the Appeals Council would
13 have evaluated this evidence. By definition, the harmless error
14 doctrine requires a reviewing Court to consider that even if the
15 evidence was fully credited, it would not change the result. See
16 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050,
17 1055-56 (9th Cir. 2006), and Molina v. Astrue, 674 F.3d 1104, 1122-23,
18 9th Cir. 2012, Graber, Circuit Judge, concurring in part and
19 dissenting in part). As Judge Graber plainly and correctly stated
20 with regard to the evaluation of evidence under a harmless error
21 analysis, "Rather, we still must decide whether the testimony affected
22 the disability determination. [Citation omitted.] If the ignored
23 testimony had no bearing on that determination, the error is
24 harmless." (Id.) As this Court has indicated, it cannot make an
25 assessment whether, if found credible, this evidence would change the
26 disability analysis. Indeed, in the Molina case itself, the evidence
27 in question was found to be immaterial to the ultimate decision, and
28 thus properly considered harmless error, because, as the majority

1 opinion indicates, "Although the ALJ erred in failing to give germane
2 reasons for rejecting the lay witness testimony, such error was
3 harmless given that the lay testimony described the same limitations
4 as Molina's own testimony, and the ALJ's reasons for rejecting
5 Molina's testimony apply with equal force to the lay testimony." That
6 analytical framework cannot apply to an analysis of the effect of Dr.
7 Yemofio's opinion, because, as noted, it is in fact contradictory to
8 the evidence relied upon by both the ALJ and the Appeals Council in
9 finding Plaintiff to be not disabled. Therefore, this matter must be
10 remanded so that consideration can be given to this evidence. If
11 appropriate, the ALJ will develop the record to determine whether the
12 Questionnaire is supported by underlying objective evidence.

13 For the foregoing reasons, this matter will be remanded for
14 further hearing consistent with this Memorandum Opinion.

15 **IT IS SO ORDERED.**

16
17 DATED: September 11, 2013

17 /s/
18 VICTOR B. KENTON
19 UNITED STATES MAGISTRATE JUDGE
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