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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

BARBARA HANDY,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner,
Social Security Administration,

Defendant.

) CV 14-02149-SH

) MEMORANDUM DECISION
) AND ORDER

This matter is before the Court for review of the Decision by the Commissioner of Social Security denying plaintiff's application for Disability Insurance Benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the undersigned. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter Judgment upon the pleadings and transcript of the record before the Commissioner. The parties have filed their pleadings and their respective briefs in support of those pleadings. The plaintiff has also filed a Reply Brief, and the defendant has filed the

1 certified Administrative Record. After reviewing the matter, the Court concludes
2 that the Decision of the Commissioner should be reversed and remanded, on the
3 issue of fibromyalgia severity, rendering moot the remaining claims of error.
4

5 **I. BACKGROUND**

6 The Plaintiff Barbara Handy filed an application for Disability Insurance
7 Benefits under Title II of the Social Security Act, alleging disability beginning
8 June 28, 2010. (See Administrative Record ["AR"] 22; 136). The Commissioner
9 initially denied the application on February 22, 2011, and again upon
10 reconsideration on September 1, 2011. Thereafter, plaintiff filed a written
11 request for hearing on September 21, 2011. On February 22, 2012, plaintiff
12 appeared and testified at a hearing. (Id.) The Administrative Law Judge ("ALJ")
13 issued an Unfavorable Decision, finding that plaintiff was not disabled and was
14 capable of performing less than the full range of light work. (See AR 32-34).

15 On May 22, 2012, plaintiff sought review of the Unfavorable Decision to
16 the Appeals Council. (See AR 18). Plaintiff's counsel forwarded additional
17 medical evidence to the Appeals Council on February 11, 2014. (See AR 1148-
18 1158; 1159-1200). The Appeals Council denied plaintiff's request for review. It
19 identified some of the new evidence submitted, but not all, and declined to
20 consider additional medical records dated beyond March 23, 2012, the date of
21 the ALJ's Decision.

22 Plaintiff challenges the ALJ's Decision denying disability benefits. She
23 alleges six grounds on which the ALJ erred: (1) improperly declining to order
24 remand for analysis of plaintiff's fibromyalgia in accord with Social Security
25 Ruling 12-2p, (2) failing to give sufficient weight to plaintiff's treating
26 physicians and improperly relying on the examining consultant, (3) improperly
27 rejecting new evidence material to plaintiff's disability, (4) improperly rejecting
28 plaintiff's subjective testimony as not credible, (5) improperly rejecting third

1 party testimony, and (6) failing to properly apply the appropriate Medical-
2 Vocational Guideline, 201.14.

3 The parties phrase the various issues raised by plaintiff in terms of
4 whether the ALJ properly considered the evidence and whether he gave
5 appropriate weight to the treating physician, the credibility of the plaintiff, and
6 third party testimony. This Court focuses on the issue of whether the ALJ's non-
7 severity finding as to fibromyalgia was free of material error. Based on the
8 totality of the record, including what was before the Appeals Council, the Court
9 concludes that the ALJ clearly erred in finding that plaintiff's fibromyalgia was
10 less than severe. This Court also finds that the Appeals Council erred in
11 dismissing relevant evidence submitted after the ALJ's Decision.

12 13 **II. DISCUSSION**

14 A severe impairment is one that significantly limits the physical or mental
15 ability to perform basic work activities. 20 C.F.R. §404.1520 (2004). Plaintiff is
16 not required to establish total disability at this level of the evaluation. Rather,
17 the severe impairment requirement is a threshold element that plaintiff must
18 prove in order to establish disability within the meaning of the Act. Bowen v.
19 Yuckert, 482, U.S. 137, 146 (1987). An impairment will be considered non-
20 severe when medical evidence establishes only a "slight abnormality or
21 combination of slight abnormalities which would have not more than a minimal
22 effect on the individual's ability to work, even if age, education or work
23 experience were specifically considered." Social Security Ruling 85-28; Bowen
24 v. Yuckert, 482 U.S. at 154.

25 With respect to the new evidence submitted to and rejected by the
26 Appeals Council, defendant argues that this Court does not have jurisdiction to
27 review a decision of the Appeals Council denying a request for review of the
28 ALJ's Decision because the Appeals Council is a non-final agency action.

1 Brewes v. Astrue, 682 F.3d 1157, 1161 (9th Cir. 2012). Defendant's argument
2 fails, however, because he has misinterpreted the holding of Brewes. Brewes
3 held that "when a claimant submits evidence for the first time to the Appeals
4 Council, which considers that evidence in denying review of the ALJ's decision,
5 the new evidence is part of the administrative record, which the district court
6 must consider in determining whether the Commissioner's decision is supported
7 by substantial evidence." Id. at 1159-60. Therefore, this Court has the
8 jurisdiction and obligation to review the ALJ's Decision in light of the new
9 evidence submitted to and considered by the Appeals Council. (See AR 6).

10 The Appeals Council erred by dismissing the following evidence
11 submitted by plaintiff after the ALJ's Decision: reports of medical records and
12 examinations by Dr. Stanley L. Goodman, Dr. Alexander Angerman, and Dr.
13 Phot Luisiri, and a letter from Janice Gaines, plaintiff's family therapist. This
14 evidence was submitted after the March 23, 2012 Decision, but before the
15 Appeals Council's denial of plaintiff's claim on February 25, 2014. Dr.
16 Goodman's records were referenced by the Appeals Council but were never
17 made part of the record. Dr. Angerman's November 12, 2012 examination of
18 plaintiff reveals her long medical history. According to Dr. Angerman's report,
19 plaintiff could not complete nerve conduction studies during an October 19,
20 2010 examination, "due to patient [sic] pain intolerance." (See AR 1191). Dr.
21 Luisiri, a rheumatologist, diagnosed plaintiff with fibromyalgia in 2014, and
22 listed limitations that would prevent plaintiff from performing more than
23 sedentary work. (See AR 1149-1157). In describing the severity of the pain, Dr.
24 Luisiri stated that plaintiff experiences "generalized pain." (See AR 1157).
25 Lastly, the letter from Janice Gaines states that plaintiff has physical restrictions,
26 and that the only reason why plaintiff was able to help care for her grandson is
27 because she had help from other family members. (See AR 227).

28 All of this indicates that plaintiff's fibromyalgia is severe. If new material

1 evidence is submitted to the Appeals Council, it must consider the additional
2 evidence only where it relates to the period on or before the date of the ALJ's
3 decision. 20 C.F.R. § 404.970(b). In addressing and dismissing the new
4 evidence, the Appeals Council explained, "the new information is about a later
5 time. Therefore, it does not affect the decision . . ." (See AR 2). Nevertheless,
6 the Appeals Council erred. It should have considered the above reports, despite
7 their taking place after the ALJ's decision, because they comment on plaintiff's
8 fibromyalgia (and other impairments) during the relevant time period.

9 Even without the additional evidence submitted to Appeals Council, the
10 record upon which the ALJ relied was saturated with evidence corroborating
11 plaintiff's claim that she suffers from severe fibromyalgia. Four doctors,
12 including the examining physician, Dr. Taylor, whom the ALJ gave greater
13 weight than plaintiff's treating physician, opined that there was, at the very least,
14 a possibility that plaintiff suffers from fibromyalgia. (See AR 465). Another
15 physician, Dr. Duc Thai Ngo, diagnosed plaintiff with fibromyalgia and noted
16 that she is "painful especially at the fibromyalgia points", and that she
17 experiences facial numbness most likely as a result of fibromyalgia. (See AR
18 296). This was briefly dismissed in the ALJ's decision simply because Dr. Ngo
19 is not a rheumatologist. Nevertheless, the ALJ also failed to consider the
20 medical examinations conducted in 2011 by Dr. Linda Miller Atkinson, a
21 rheumatologist.

22 The ALJs Decision regarding fibromyalgia was far too cursory. In finding
23 plaintiff's fibromyalgia non-severe, the ALJ's explanation was limited to the
24 following:

25 On the other hand, the claimant complains of several
26 impairments that the medical record does not support as being
27 "severe." Specifically, the claimant testified that she has had
28 fibromyalgia for about six years and saw a rheumatologist
about four years ago who diagnosed the condition but did not
prescribe medication. The evidence is quite equivocal with

1 respect to this impairment. There is no evidence of a
2 rheumatological work-up in the record.

3 (See AR 24). Had the ALJ delved further into the record, he would have
4 noted Dr. Atkinson's report that plaintiff exhibited "total body pain, [and]
5 tender points consistent with a diagnosis of fibromyalgia. (See AR 681).
6 Atkinson's report also indicates that plaintiff "has had many years of total
7 body pain", takes Vicodin, and experiences fatigue as "the worst symptoms
8 [sic]."

9 In sum, the ALJ's finding that plaintiff's fibromyalgia is non-severe
10 is unsupported by the record. This is true independent of the later-submitted
11 evidence to Appeals Council. The new evidence only reinforces this
12 conclusion. This Court must consider whether, in light of the record as a
13 whole, the ALJ's decision was supported by substantial evidence and was
14 free of legal error. Taylor v. Comm'r of Social Security, 659 F.3d 1228 (9th
15 Cir. 2011). The foregoing evidence compels the conclusion that plaintiff's
16 fibromyalgia is severe. The record as a whole indicates that her impairment
17 is more than a slight abnormality and has more than a minimal effect on her
18 ability to work.

19 If there is a need to further develop the record in order to determine
20 the disability analysis, the ALJ should do so. But there is no question that
21 plaintiff clearly satisfies the severity test. Fibromyalgia is a very difficult
22 disease to diagnose; yet at least two doctors opined that plaintiff has multiple
23 tender points consistent with a diagnosis of fibromyalgia. The totality of the
24 picture is clear that fibromyalgia, which the ALJ deemed a medically
25 determinable impairment from the outset of plaintiff's hearing, clearly had
26 more than a minimal impact on her ability to work.

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ORDER

For the foregoing reasons, it is hereby adjudged that the Decision of the ALJ is reversed and remanded pursuant to Sentence 4 of 42 U.S.C. § 405(g).

Dated: September 30, 2014



STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

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