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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

ANTHONY S. THORSBORNE,)	Case No. CV 14-08352-AS
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	
v.)	ORDER OF REMAND
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On October 28, 2014, Plaintiff filed a Complaint seeking review of the denial of his application for Supplemental Security Income. (Docket Entry No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 6, 8). On March 5, 2015, Defendant filed an Answer along with the Administrative Record ("AR") and Supplemental Administrative Record

1 ("SAR"). (Docket Entry Nos. 10-12). The parties filed a Joint Position
2 Statement ("Joint Stip.") on May 18, 2015, setting forth their
3 respective positions regarding Plaintiff's claims. (Docket Entry No.
4 13).

5 The Court has taken this matter under submission without oral
6 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social
7 Security Case," filed July 29, 2014 (Docket Entry No. 4).

8
9 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

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11 On May 21, 2009, Plaintiff, formerly employed as a painter and
12 glazier (see AR 19, 190-94, 196-98), filed an application for
13 Supplemental Security Income, alleging a disability since September 24,
14 2007. (See AR 114-20).

15 Based on Plaintiff's failure to appear at the scheduled hearing,
16 the Administrative Law Judge dismissed the application on July 8, 2011.
17 (See AR 39-43, 75-80).

18 Based on Plaintiff's submission of a statement showing "good cause"
19 for his failure to appear at the hearing, on December 18, 2012, the
20 Appeals Council vacated the order of dismissal and remanded the case.
21 (See AR 44-46, 81).

22
23 On October 29, 2013, the Administrative Law Judge ("ALJ"), Sara A.
24 Gillis, heard testimony from Plaintiff, who was not represented by
25 counsel, and vocational expert Thomas Reed. (See AR 16-36). On January
26 31, 2014, the ALJ issued a decision denying Plaintiff's application.
27 (See SAR 725-35). After finding that Plaintiff had severe impairments
28 -- seizure disorder, alcohol dependence, lumbar and cervical

1 degenerative disorder (SAR 727-28),¹ and after finding that Plaintiff
2 does not have an impairment or a combination of impairments that meets
3 or equals the severity of one of the Listings (SAR 728), the ALJ found
4 that Plaintiff had the residual functional capacity² ("RFC") to perform
5 light work,³ with the following limitations: no climbing ropes and
6 scaffolds; occasionally stooping and crouching; frequently balancing,
7 crawling and climbing stairs; occasionally performing overhead reaching
8 with left upper extremity; and avoiding extreme cold, wetness and
9 working around hazards (i.e., heights and dangerous machinery). (SAR
10 728-33). After finding that Plaintiff could not perform his past
11 relevant work (SAR 733), the ALJ found that jobs existed in significant
12 numbers in the national economy that Plaintiff could perform, and
13 therefore found that Plaintiff was not disabled within the meaning of
14 the Social Security Act. (SAR 733-34).

15 Plaintiff requested that the Appeals Council review the ALJ's
16 decision. (See AR 7-12). The request was denied on September 11, 2014.
17 (See AR 1-5). The ALJ's decision then became the final decision of the
18 Commissioner, allowing this Court to review the decision. See 42 U.S.C.
19 §§ 405(g), 1383(c).

20 **PLAINTIFF'S CONTENTIONS**

21 Plaintiff alleges that the ALJ erred in failing to properly: (1)
22 consider Listing 12.05C; (2) assess the opinion of the

24 ¹ The ALJ found that Plaintiff's cognitive disorder was a non-
25 severe impairment. (SAR 727-28).

26 ² A Residual Functional Capacity is what a claimant can still
27 do despite existing exertional and nonexertional limitations. See 20
28 C.F.R. § 404.1545(a)(1).

³ "Light work involves lifting no more than 20 pounds at a time
with frequent lifting or carrying of objects weighing up to 10 pounds."
20 C.F.R. §§ 404.1567(b) and 416.967(b).

1 neuropsychological consultative examiner; (3) consider all of
2 Plaintiff's severe impairments; and (4) assess Plaintiff's testimony
3 regarding his pain and limitations. (See Joint Stip. at 3-5, 7-13, 18-
4 22, 27-33, 39-41).

5 DISCUSSION

6
7 After consideration of the record as a whole, the Court finds that
8 Plaintiff's first claim of error warrants a remand for further
9 consideration. Since the Court is remanding the matter based on
10 Plaintiff's first claim of error, the Court will not address Plaintiff's
11 second through fourth claims of error.

12 **A. The ALJ Erred in Failing to Properly Consider Listing 12.05C**

13
14 Plaintiff asserts that the ALJ failed to properly consider whether
15 Plaintiff's impairments or combination of impairments met or equaled
16 Listing 12.05C. (See Joint Stip. at 3-5, 7-11). Defendant asserts that
17 "Listing 12.05 is not relevant to Plaintiff's claim that he became
18 disabled when he was an adult and the evidence he relies on is not
19 valid." (See Joint Stip. at 5-7).

20 If a claimant suffers a severe impairment, the ALJ is required to
21 decide whether the impairment meets or equals one of the listed
22 impairments. See 20 C.F.R. § 416.920(d); Young v. Sullivan, 911 F.2d
23 180, 181 (9th Cir. 1990); Marcia v. Sullivan, 900 F.2d 172, 174 (9th
24 Cir. 1990). Disability is presumed if a claimant's impairment or
25 combination of impairments meets or is medically equivalent to one of
26 the listed impairments. 20 C.F.R. § 416.920(d); Bowen v. Yuckert, 482
27 U.S. 137, 141-42 (1987); Barker v. Secretary of Health & Human Servs.,
28 882 F.2d 1474, 1477 (9th Cir. 1989). An impairment meets a listed
impairment if a claimant has "a medically determinable impairment(s)
that satisfies all of the criteria of the listing." 20 C.F.R. §

1 416.925(d); see also Sullivan v. Zebley, 493 U.S. 521, 531 (1990). The
2 criteria of a listed impairment cannot be met solely based on a
3 diagnosis. 20 C.F.R. § 416.925(d); see also Key v. Heckler, 754 F.2d
4 1545, 1549-50 (9th Cir. 1985). An impairment is "medically equivalent
5 to a listed impairment . . . if it is at least equal in severity and
6 duration to the criteria of any listed impairment." 20 C.F.R. §
7 416.926(a). If an impairment is not described in the listed
8 impairments, or if the combination of impairments does not meet one of
9 the listed impairments, the determination of medical equivalence is
10 based on a comparison of findings (concerning a claimant) "with those
11 for closely analogous listed impairments." 20 C.F.R. § 416.926(b). The
12 decision is based on "all evidence in [a claimant's] record about [his
13 or her] impairment(s) and its effect on [a claimant] that is relevant to
14 this finding" and on designated medical or psychological consultants.
15 20 C.F.R. § 416.926(c).

16 Listing 12.05 concerns intellectual disability: "Intellectual
17 disability refers to significantly subaverage general intellectual
18 functioning with deficits in adaptive functioning initially manifested
19 during the developmental period, *i.e.*, the evidence demonstrates or
20 supports onset of the impairment before age 22." 20 C.F.R. § 404,
21 Subpart P, Appendix 1, Listing of Impairments 12.05. Listing 12.05C
22 requires "[a] valid verbal, performance, or full scale IQ of 60 through
23 70 and a physical or other mental impairment imposing an additional and
24 significant work-related limitation of function." Id.

25 In the section dealing with the Listings, the ALJ found that "the
26 claimant does not have an impairment or combination of impairments that
27 meets or medically equals the severity of one of the listed impairments
28 in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d),
416.920(d), 416.925 and 416.926)." (SAR 728). As support for that
finding, the ALJ wrote, "The claimant's musculoskeletal impairments have
not resulted in motor loss, reflex changes, neurological deficits or the

1 degree of functional loss required by the musculoskeletal listings."
2 (Id.). Thus, it is clear that the ALJ did not consider Listing 12.05C.

3
4 As support for his claim that the ALJ failed to consider Listing
5 12.05C, Plaintiff relies on: (1) the finding by the consultative
6 examiner, Thomas F. Wylie, Ph.D. R.N., a clinical neuropsychologist,
7 following an examination of Plaintiff on April 8 and 9, 2008, that WAIS-
8 III showed that Plaintiff had a full scale IQ score of 70 (see AR 312)⁴;
9 and (2) the finding by the ALJ that Plaintiff had severe physical
10 impairments (seizure disorder, and lumbar and cervical degenerative
11 disorder) (see SAR 727).

12 Defendant does not challenge the Plaintiff's claim with respect to
13 the second component of Listing 12.05C (i.e., that Plaintiff had a
14 severe physical impairment that imposed a significant work-related
15 limitation of function). It appears that the ALJ's finding that
16 Plaintiff had severe physical impairments satisfied the second component
17 of Listing 12.05C. See 20 C.F.R. § 404, Subpart P, Appendix 1, Listing
18 of Impairments 12.00A ("For [Listing 12.05C], we will assess the degree
19 of functional limitation the additional impairment(s) imposes to
20 determine if it significantly limits your physical or mental ability to
21 do basic work activities, i.e., is a 'severe' impairment(s), as defined
22 in §§ 404.1520(c) and 416.920(c)."); Gomez v. Astrue, 695 F.Supp.2d
23 1049, 1061-62 (C.D. Cal. Feb. 10, 2010). Instead, Defendant challenges
24 Plaintiff's claim with respect to the first component of Listing 12.05C
25 (i.e., that Plaintiff had a valid full scale IQ of 60 through 70).

26 Defendant's assertion that the ALJ did not fail to consider whether
27 Plaintiff's impairment or combination of impairments met or equaled
28 Listing 12.05C because Plaintiff is an adult and did not allege the

⁴ Dr. Wylie also found that Plaintiff had a verbal IQ score of 73 and a performance IQ score of 72. (AR 312).

1 onset of the intellectual disability impairment before age 22 (see Joint
2 Stip. at 6, citing AR 114 [Plaintiff stated in his application his
3 disability began when he was 47 years old and he "was not disabled prior
4 to age 22"] and 155 [Plaintiff stated in a Disability Report - Adult
5 that he obtained his GED and did not attend special education classes],
6 and AR 308 [the report of Dr. Wylie reflecting that Plaintiff was 48
7 years old at the time of IQ testing]) fails. Although some Circuit
8 courts have credited low IQ scores after age twenty-two as presumptively
9 satisfying the diagnostic criteria of "significantly subaverage general
10 intellectual functioning with deficits in adaptive functioning initially
11 manifested during the developmental period," see Hodges v. Barnhart, 276
12 F.3d 1265, 1268 (11th Cir. 2001) ("Acknowledging the lack of IQ evidence
13 before age twenty-two, Hodges asserts that absent evidence of sudden
14 trauma that can cause retardation, the IQ tests create a rebuttable
15 presumption of a fairly constant IQ throughout her life. We agree.");
16 Muncy v. Apfel, 247 F.3d 728, 734 (8th Cir. 2001) ("Mental retardation is
17 not normally a condition that improves as an affected person ages....
18 Rather, a person's IQ is presumed to remain stable over time in the
19 absence of any evidence of a change in a claimant's intellectual
20 functioning"); Luckey v. U.S. Dep't of Health and Human Servs., 890 F.2d
21 666, 668-69 (4th Cir. 1989); but see Markle v. Barnhart, 324 F.3d 182,
22 188-89 (3d Cir. 2003); Foster v. Halter, 279 F.3d 348, 354-55 (6th Cir.
23 2001), the Ninth Circuit has not yet decided whether to adopt this
24 presumption. See Frear v. Astrue, 2013 WL 454902, *5 n.6 (C.D. Cal.
25 Feb. 6, 2013); Applestein-Chakiris, 2009 WL 2406358, *8 (S.D. Cal. Aug.
26 5, 2009).

27 The Court finds persuasive the reasoning of the Circuit courts and
28 the district courts which have adopted the IQ presumption. See Hodges
v. Barnhart, supra; Muncy v. Apfel, supra; Luckey v. U.S. Dep't of
Health and Human Servs., supra; Guzman v. Bowen, 801 F.2d 273, 275 (7th
Cir. 1986); Flores v. Astrue, 2013 WL 146190, *4 (C.D. Cal. Jan. 11,
2013); Woods v. Astrue, 2012 WL 761720, *3-*4 (E.D. Cal. March 7, 2012);

1 Forsythe v. Astrue, 2012 WL 2177551, *7 (E.D. Cal. Jan. 24, 2012);
2 Campbell v. Astrue, 2011 WL 444783, *16-*17 (E.D. Cal. Feb. 8, 2011);
3 Schuler v. Astrue, 2010 WL 1443892, *6 (C.D. Cal. April 7, 2010);
4 Walberg v. Astrue, 2009 WL 1763295, *8-*9 (W.D. Wash. June 18, 2009);
5 Jackson v. Astrue, 2008 WL 5210668, *6 (C.D. Cal. Dec. 11, 2008). It is
6 up to the ALJ, not the Court, to address whether the IQ presumption was
7 rebutted by the evidence of Plaintiff's statements that he obtained a
8 GED and did not attend special education classes. See Connett v.
9 Barnhart, 340 F.3d 871, 874 (9th Cir. 2003)("But the problem is that we
10 cannot rely on independent findings of the district court. We are
11 constrained to review the reasons the ALJ asserts.")(citing SEC v.
12 Cehery Corp., 332 U.S. 194, 196 (1947) and Pinto v. Massanari, 249 F.3d
13 840, 847-48 (9th Cir. 2001)).

14 Defendant asserts that the ALJ did not err in failing to consider
15 Listing 12.05C because the full scale IQ score assessed by Dr. Wylie
16 does not appear to be valid. (See Joint Stip. at 6-7, n.2, citing AR
17 314-14 [noting the following statements: "He was also administered the
18 Test of Memory Malingering (TOMM), a measure of malingered memory
19 deficits. Two of the three TOMM indices sensitive to malingering were
20 positive;" and "As noted, a degree of motivational artifact was present,
21 a caution is advised with the following medical source statement."]).
22 However, as Plaintiff notes, (see Joint Stip. at 10), the ALJ did not
23 address the validity of the full scale IQ score. Moreover, it is not
24 clear to the Court that Dr. Wylie's statements concerning malingering
25 and "motivational artifact" were directed to the results of Plaintiff's
26 IQ testing. See Thresher v. Astrue, 283 Fed.Appx. 473, 475 (9th Cir.
27 2008)("We do not doubt that an ALJ can decide that an IQ score is
28 invalid. The regulations' inclusion of the word 'valid' in Listing
12.05C makes the ALJ's authority clear. . . . [W]e remand to the
Commissioner for clarification regarding the nature the considerations
applied at step 3 and, particularly, precisely what was decided and
why.").

1 Finally, Defendant asserts that the ALJ did not err in failing to
2 consider Listing 12.05C because "Plaintiff did not allege this mental
3 impairment in his application materials or to the ALJ" and "[h]e has
4 consistently maintained that he is disabled due to a seizure disorder
5 and physical problems (AR 149, 310)." (See Joint Stip. at 7).
6 Defendant cites Gregor v. Barnhart, 464 F.3d 968, 973 (9th Cir. 2006)
7 for the proposition that an ALJ "does not err by not considering an
8 alleged mental impairment that was not raised with the ALJ" (see Joint
9 Stip. at 7). In Gregor, supra, the court found that, because the
10 claimant, "who was represented by counsel at all times, failed to claim
11 PTSD as a basis for his disability[,]" the issue was waived. Here,
12 unlike the claimant in Gregor, Plaintiff was not represented by counsel
13 at the time of his hearing (see AR 16) or at the time he requested the
14 Appeals Council to review the ALJ's decision (see AR 7). Moreover,
15 although Plaintiff may not have specifically alleged intellectual
16 disability as an impairment (see AR 149 [In the Disability Report -
17 Adult report, Plaintiff alleged that seizures, left broken shoulder,
18 back problems and neck pain limited his ability to work], 310-11 [Dr.
19 Wylie noted that "no family members have apparently been hospitalized
20 for treatment of mental disorder"]), the ALJ clearly was aware of
21 Plaintiff's full scale IQ score (see SAR 730), and considered whether
22 Plaintiff had a severe mental impairment (cognitive disorder) (see SAR
23 727-28). Therefore, Plaintiff's failure to specifically allege
24 intellectual disability as an impairment did not relieve the ALJ from
25 the duty to address whether Plaintiff's impairment or combination of
26 impairments met or equaled Listing 12.05C. See Smolen v. Chater, 80
27 F.3d 1273, 1288 (9th Cir. 1996)("In Social Security Cases the ALJ has a
28 special duty to fully and fairly develop the record and to assure that
the claimant's interests are considered.")(quoting Brown v. Heckler, 713
F.2d 441, 443 (9th Cir. 1983)).

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1 **B. Remand Is Warranted**

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3 The decision whether to remand for further proceedings or order an
4 immediate award of benefits is within the district court's discretion.
5 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
6 useful purpose would be served by further administrative proceedings, or
7 where the record has been fully developed, it is appropriate to exercise
8 this discretion to direct an immediate award of benefits. Id. at 1179
9 ("[T]he decision of whether to remand for further proceedings turns upon
10 the likely utility of such proceedings."). However, where, as here, the
11 circumstances of the case suggest that further administrative review
12 could remedy the Commissioner's errors, remand is appropriate. McLeod
13 v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); Harman v. Apfel, supra,
14 211 F.3d at 1179-81.

15 Since the ALJ failed to properly consider whether Plaintiff's
16 impairments meet listing 12.05C, remand is appropriate. Because
17 outstanding issues must be resolved before a determination of disability
18 can be made, and "when the record as a whole creates serious doubt as to
19 whether the [Plaintiff] is, in fact, disabled within the meaning of the
20 Social Security Act," further administrative proceedings would serve a
21 useful purpose and remedy defects. Burrell v. Colvin, 775 F.3d 1133,
22 1141 (9th Cir. 2014)(citations omitted).⁵

23 ⁵ The Court has not reached any other issue raised by Plaintiff
24 except insofar as to determine that reversal with a directive for the
25 immediate payment of benefits would not be appropriate at this time.
26 "[E]valuation of the record as a whole creates serious doubt that
27 Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
28 1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
claims regarding the ALJ's alleged failure to properly assess the
opinion of the neuropsychological consultative examiner (see Joint Stip.
at 11-13, 18-19), the ALJ's alleged failure to properly consider all of
Plaintiff's severe impairments (see Joint Stip. at 20-22, 27-30), and
the ALJ's alleged failure to properly assess Plaintiff's testimony
regarding his pain and limitations (see Joint Stip. at 30-33, 39-41).
Because this matter is being remanded for further consideration, these
issues should also be considered on remand, if necessary.

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ORDER

For the foregoing reasons, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: November 5, 2015.

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE