O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DANIEL EDWARD BEEMAN, Plaintiff, vs. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	Case No. 2:16-CV-01811 (VEB) DECISION AND ORDER

I. INTRODUCTION

In February of 2014, Plaintiff Daniel Edward Beeman applied for Disability Insurance Benefits under the Social Security Act. The Commissioner of Social Security denied the application.[1] Plaintiff, represented by the Law Offices of

[1] On January 23, 2017, Nancy Berryhill took office as Acting Social Security Commissioner. The Clerk of the Court is directed to substitute Acting Commissioner Berryhill as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

Lawrence D. Rohlfing, Cyrus Safa, Esq., of counsel, commenced this action seeking judicial review of the Commissioner's denial of benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3).

The parties consented to the jurisdiction of a United States Magistrate Judge. (Docket No. 9, 10). On February 9, 2017, this case was referred to the undersigned pursuant to General Order 05-07. (Docket No. 20).

II. BACKGROUND

Plaintiff applied for benefits on February 20, 2014, alleging disability beginning July 1, 2012. (T at 159-62).[2] The application was denied initially and on reconsideration. Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). On July 24, 2015, a hearing was held before ALJ James Delphey. (T at 38). Plaintiff appeared with his attorney and testified. (T at 43-79). The ALJ also received testimony from Gail Maron, a vocational expert (T at 80-92).

On October 5, 2015, the ALJ issued a written decision denying the application for benefits. (T at 19-37). The ALJ's decision became the Commissioner's final decision on January 21, 2016, when the Appeals Council denied Plaintiff's request for review. (T at 1-7).

[2] Citations to ("T") refer to the administrative record at Docket No. 14.

On March 16, 2016, Plaintiff, acting by and through his counsel, filed this action seeking judicial review of the Commissioner's decision. (Docket No. 1). The Commissioner interposed an Answer on August 10, 2016. (Docket No. 13). The parties filed a Joint Stipulation on January 13, 2017. (Docket No. 19).

After reviewing the pleadings, Joint Stipulation, and administrative record, this Court finds that the Commissioner's decision must be reversed and this case remanded for further proceedings.

III. DISCUSSION

A. Sequential Evaluation Process

The Social Security Act ("the Act") defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant shall be determined to be under a disability only if any impairments are of such severity that he or she is not only unable to do previous work but cannot, considering his or her age, education and work experiences, engage in any other substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),

1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404. 1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether the claimant has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares the claimant's impairment(s) with a number of listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents the claimant from performing work which was performed in the past. If the

claimant is able to perform previous work, he or she is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual functional capacity (RFC) is considered. If the claimant cannot perform past relevant work, the fifth and final step in the process determines whether he or she is able to perform other work in the national economy in view of his or her residual functional capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once the claimant establishes that a mental or physical impairment prevents the performance of previous work. The burden then shifts, at step five, to the Commissioner to show that (1) plaintiff can perform other substantial gainful activity and (2) a "significant number of jobs exist in the national economy" that the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

B. Standard of Review

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is

supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

"The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the Commissioner, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th

Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or non-disability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

C. Commissioner's Decision

The ALJ determined that Plaintiff met the insured status requirements of the Social Security Act through December 31, 2017. (T at 24). The ALJ concluded that Plaintiff did engage in substantial gainful activity after December 13, 2013 (the application date). (T at 24). However, the ALJ decided not to deny the claim for benefits on that basis as Plaintiff's substantial gainful activity was inconsistent. As such, the ALJ continued the sequential evaluation process. (T at 24).

The ALJ found that Plaintiff's post-concussion syndrome, herniated disc in the neck, anxiety/depression, vitiligo, migraines, and lumbar degenerative disc disease with low back pain were medically determinable impairments. (Tr. 24).

However, the ALJ concluded that Plaintiff did not have an impairment or combination of impairments that were "severe" as defined under the Act. (T at 25).

As such, the ALJ found that Plaintiff was not entitled to benefits under the Social Security Act from July 1, 2012 (the alleged onset date) through October 8, 2015 (the date of the ALJ's decision). (T at 31-32). As noted above, the ALJ's decision became the Commissioner's final decision when the Appeals Council denied Plaintiff's request for review. (T at 1-7).

D. Disputed Issues

As set forth in the parties' Joint Stipulation (Docket No. 19), Plaintiff offers a single argument in support of his claim that the Commissioner's decision should be reversed. He contends that the ALJ did not adequately evaluate the severity of his mental impairments.

IV. ANALYSIS

At step two of the sequential evaluation process, the ALJ must determine whether the claimant has a "severe" impairment. See 20 C.F.R. §§ 404.1520(c), 416.920(c). The fact that a claimant has been diagnosed with and treated for a medically determinable impairment does not necessarily mean the impairment is "severe," as defined by the Social Security Regulations. *See, e.g.*, *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). To establish severity, the evidence must show the diagnosed impairment

significantly limits a claimant's physical or mental ability to do basic work activities for at least 12 consecutive months. 20 C.F.R. § 416.920(c).

The step two analysis is a screening device designed to dispose of *de minimis* complaints. *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). "[A]n impairment is found not severe . . . when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work." *Yuckert v. Bowen*, 841 F.2d 303 (9th Cir. 1988) (quoting SSR 85-28). The claimant bears the burden of proof at this stage and the "severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities, as required in most jobs." SSR 85-28. Basic work activities include: "walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; seeing, hearing, speaking; understanding, carrying out and remembering simple instructions; responding appropriately to supervision, coworkers, and usual work situations." *Id.*

In the present case, the ALJ concluded that Plaintiff suffered from several medically determinable impairments: post-concussion syndrome, herniated disc in the neck, anxiety/depression, vitiligo, migraines, and lumbar degenerative disc disease with low back pain. (T at 24). However, the ALJ found that these impairments, either singly or in combination, did not significantly limit Plaintiff's

ability to perform basic work-related activities and, as such, were not "severe" under the Social Security Act. (T at 25). The ALJ's decision was based on his consideration of the medical opinion evidence available in this case. Thus, this Court's review of that decision necessarily turns on whether the ALJ properly evaluated the available medical opinion evidence.

In disability proceedings, a treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion is given more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).

An ALJ satisfies the "substantial evidence" requirement by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014)(quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)).

"The ALJ must do more than state conclusions. He must set forth his own interpretations and explain why they, rather than the doctors,' are correct." *Id*.

This Court will summarize the medical opinion evidence and then analyze the ALJ's consideration of that evidence.

A. Dr. Simmons

Dr. Shakira M. Simmons, a treating psychologist, examined Plaintiff on a single occasion in June of 2015 and completed a mental impairment questionnaire. Dr. Simmons reviewed Plaintiff's chart and noted diagnoses of PTSD, major depressive disorder, and alcohol dependence. (T at 371). She described Plaintiff's presentation as depressed, fatigued, withdrawn, irritable, and prone to angry outbursts. (T at 371). Based on his treatment history, Dr. Simmons characterized Plaintiff's prognosis as poor. (T at 371).

Dr. Simmons opined that Plaintiff had no useful ability to function in the following areas: working in coordination with or proximity to others without being unduly distracted, completing a normal workday and workweek without interruptions from psychologically based symptoms, getting along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes, interacting appropriately with the general public, and dealing with normal work stress. (T at 373-74). She described Plaintiff as having marked restrictions with

respect to activities of dialing living, extreme difficulties in maintaining social functioning, and extreme difficulties in maintaining concentration, persistence, or pace. (T at 375). Dr. Simmons anticipated that Plaintiff would be absent from work more than 4 days per month due to his impairments or treatment. (T at 376).

B. Dr. Shabash

Dr. Elena Shabash, a psychiatrist, completed an examination and medical source statement in July of 2015.[3] She assessed significant limitations with regard to essentially all aspects of Plaintiff's understanding and memory, concentration, mental abilities, social interaction, and adaptive skills. (T at 378-79). Dr. Shabash opined that Plaintiff would miss more than 3 days of work each month due to his impairments or treatment. (T at 380). In her examination notes, Dr. Shabash described Plaintiff as guarded, irritable, anxious, and depressed, with chronic paranoid thoughts, delusions of reference, partial insight/judgment, and severe problems with memory and concentration. (T at 420).

C. Dr. Vaisman

Dr. Boris Vaisman, Plaintiff's primary care doctor, treated Plaintiff between July of 2012 and May of 2014. Dr. Vaisman provided a letter dated November 4,

[3] It appears Plaintiff only saw Dr. Shabash on a single occasion, possibly for the purpose of obtaining the above-referenced evaluation. (T at 30).

2014, in which he described Plaintiff as "unemployable" due to "debilitating depression and anxiety." (T at 369).

D. Dr. Zhu

Dr. Jenny Zhu, a neurologist, treated Plaintiff between February and August of 2014. Dr. Zhu submitted a letter dated October 31, 2014, explaining that Plaintiff suffered from chronic daily headaches, poor memory, difficulty concentrating, depression, lack of energy, and irritability. (T at 368). Dr. Zhu opined that Plaintiff was not able to work during the time period when he was being seen in her clinic. (T at 368).

E. Dr. Sherrill/R.E. Brooks

Dr. Lou Ellen Sherrill, a clinical psychologist, completed a psychological consultative examination in May of 2014. Dr. Sherrill diagnosed dysthymia, and anxiety disorder, secondary to medical problems. (T at 312-13). She opined that Plaintiff could perform simple and repetitive tasks with minimal supervision and with appropriate persistence and pace over a normal work cycle. (T at 313). Dr. Sherrill concluded that Plaintiff could understand, remember, and carry out simple to moderately complex verbal instructions without difficulty; tolerate ordinary work pressures; interact with others without difficulty; and observe basic work and safety standards without difficulty. (T at 313).

The non-examining State Agency review consultant, Dr. R.E. Brooks, opined in June of 2014, that Plaintiff did not have any severe psychological impairments. (T at 101-102).

F. ALJ's Consideration of Medical Opinion Evidence

The ALJ afforded great weight to the opinions of Dr. Sherrill and Dr. Brooks, and rejected the assessments of Drs. Simmons, Shabash, Vaisman, and Zhu. (T at 28-31).

This case is rather confounding in that there is a dramatic divergence between the two groups of opinions – on the one hand, Drs. Sherrill and Brooks found no severe impairment and virtually no limitation, while the other doctors (Simmons/Shabash/Vaisman/Zhu) assessed very significant limitations that would practically preclude Plaintiff from performing basic work activities.

This Court recognizes that it is the role of the Commissioner, not this Court, to resolve conflicts in evidence. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). If the evidence supports more than one rational interpretation, this Court may not substitute its judgment for that of the Commissioner. *Allen v. Heckler*, 749 F.2d 577, 579 (9th 1984). If there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either

disability or nondisability, the Commissioner's finding is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

With that said, the ALJ's rationale for relying on the Sherrill/Brooks opinions, while discounting entirely the Simmons/Shabash/Vaisman/Zhu assessments, was inadequate, and cannot be sustained.

First, the opinions of Dr. Vaisman and Dr. Zhu were presumptively entitled to greatest weight, as they actually treated Plaintiff over an extended period of time. This Court recognizes that neither physician is a mental health professional and their opinions were rather conclusory in nature. However, their conclusions were consistent with those rendered by a psychologist (Dr. Simmons) and psychiatrist (Dr. Shabash). The ALJ does not appear to have considered this consistency when deciding to reject the two treating physician opinions.

Moreover, the ALJ's primary reason for discounting the treating physicians' opinions was flawed. The ALJ noted that Plaintiff had three jobs during 2013 and 2014, the period during which Dr. Vaisman and Dr. Zhu opined that he was unemployable. The ALJ concluded that the physicians were "presumably unaware" of Plaintiff's employment and assumed that, if they were aware of it, they would have changed their assessments. (T at 29-30). However, Plaintiff was fired from all three jobs after a few weeks. (T at 44-45, 343). Thus, it is entirely possible the

treating physicians were aware of these failed employment attempts and viewed them as evidence that Plaintiff could not sustain basic work activities due to his mental health symptoms. The ALJ gives no indication that he accounted for this possibility. Rather, he (1) assumed ignorance on the part of the treating physicians (without contacting them to verify his assumption) and (2) viewed Plaintiff's brief, failed employment attempts as *ipso facto* contradicting his treating physicians' conclusions. This was error.

Second, the ALJ's consideration of the examining physicians' opinions was flawed. The ALJ discounted the opinions of Dr. Simmons and Dr. Shabash because they only saw Plaintiff on one occasion. This is, however, also true of Dr. Sherrill, whose opinion was given great weight by the ALJ. (T at 29). Moreover, he ALJ "affirm[ed]" the opinion of Dr. Brooks, who never saw Plaintiff. (T at 29). The ALJ provides no rationale for finding a single examination limitation problematic with respect to Dr. Simmons and Dr. Shabash, but not as to Dr. Sherrill and that of Dr. Brooks, who never saw Plaintiff.

The ALJ does not appear to have accounted for the fact that the Simmons/Shabash opinions, although based on single examinations, were consistent with the assessments of the treating physicians (Vaisman and Zhu). This

consistency would tend to enhance the credibility of the Simmons/Shabash opinions, but it does not appear the ALJ considered this.

The ALJ also discounted Dr. Simmons's opinion on the grounds that "she appears to have been consulted for forensic purposes of the present claim rather than as a source for treatment." (T at 30). However, "[t]he purpose for which medical reports are obtained does not provide a legitimate basis for rejecting them," unless there is evidence demonstrating impropriety, and the ALJ identified no such evidence. *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995); *see also Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998).

The ALJ likewise speculated that Dr. Shabash was consulted "in an effort to generate evidence for this claim on appeal," rather than "in an attempt to seek treatment for symptoms." (T at 30). However, Dr. Shabash examined Plaintiff through the Veteran's Administration, where Plaintiff regularly received medical treatment. (T at 419-21).

In sum, this Court finds that the ALJ's decision cannot be sustained. It is important to recognize that the ALJ found that Plaintiff did not satisfy the "low bar" of establishing a severe impairment. *Gardner v. Astrue*, 257 F. App'x 28, 29 (9th Cir. 2007). This finding required the ALJ to accept entirely the opinions of Dr. Sherrill and Dr. Brooks and discount completely the findings of Drs. Vaisman, Zhu,

Shabash, and Simmons. This Court finds that the ALJ did not provide legally sufficient reasons to justify such an extreme finding.

If the ALJ had synthesized the findings of the various providers in a manner supported by substantial evidence and found severe impairments with at least some degree of limitation (albeit perhaps not as severe as the Vaisman/Zhu/Shabash/Simmons assessments), this Court's conclusion might have been different.

There does appear to be a lack of consistent mental health treatment and the opinions of Dr. Sherrill and Dr. Brooks do provide support for a finding of less extreme limitations than those assessed by the other providers. For example, Dr. Sherrill performed a mental status examination and found Plaintiff oriented in all dimensions, showing adequate effort, able to speak clearly and understand instructions and questions without difficulty, not showing any symptoms of cognitive impairment, normal mood and affect, relatively good common sense judgment, friendly disposition, and adequate intelligence, memory, and emotional stability. (T at 310-312).

Although this is not sufficient to sustain the ALJ's conclusion that Plaintiff has no severe impairments, it is not clear from the record that Plaintiff is disabled. In other words, while it is clear from the record that Plaintiff has a severe mental

health impairment or combination of impairments, it is not clear from the record that Plaintiff is disabled within the meaning of the Social Security Act.

For this reason, this Court finds that a remand for further proceedings is the appropriate remedy. *See Strauss v. Comm'r of Soc. Sec.*, 635 F.3d 1135, 1138 (9th Cir. 2011)("Ultimately, a claimant is not entitled to benefits under the statute unless the claimant is, in fact, disabled, no matter how egregious the ALJ's errors may be."). On remand, the ALJ should review the evidence and determine whether further development of the record is necessary (i.e. by asking the treating physicians to provide further detail as to their knowledge of Plaintiff's sporadic employment and as to the basis for their opinions). In addition, the ALJ should carefully consider whether the seemingly conflicting range of opinions can be synthesized to form a conclusion about Plaintiff's residual functional capacity

Given the ALJ's serious errors and failure to properly develop the record, as outlined above, remand to a different ALJ is necessary and is hereby directed. *See Reed v. Massanari*, 270 F.3d 838, 845 (9th Cir. 2001); *Balladarez v. Colvin*, No. CV 13-9490-MAN, 2014 U.S. Dist. LEXIS 174444, at *43-44 (C.D. Cal. Dec. 16, 2014).

The Court also finds time to be of the essence. Plaintiff has waited more than three years for a proper adjudication of his application. Accordingly, it is ordered

that within 180 days of the date of this Decision and Order, the Commissioner shall conduct further proceedings as outlined above and issue a decision that accords proper weight to all of the medical source opinions of record and provides legally sufficient reasons for its conclusions regarding whether Plaintiff is disabled within the meaning of the Social Security Act. *See Butts v. Barnhart*, 416 F.3d 101, 103-06 (2d Cir. 2005) (affirming imposition of time limits for a decision on the remand); *Baldree v. Colvin*, 2015 U.S. Dist. LEXIS 127169 *15 (C.D. Cal. Sept. 21, 2015)(collecting cases recognizing court's authority to impose time limits).

V. ORDERS

IT IS THEREFORE ORDERED that:

Judgment be entered REVERSING the Commissioner's decision and REMANDING this case for further proceedings as outlined above, including assignment to a different ALJ and compliance with the deadline established herein; and

The Clerk of the Court shall file this Decision and Order, serve copies upon counsel for the parties, and CLOSE this case without prejudice to a timely application for attorneys' fees.

DATED this 25th day of July, 2017,

/s/Victor E. Bianchini
VICTOR E. BIANCHINI
UNITED STATES MAGISTRATE JUDGE