UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUAN PABLO PANIAGUA, Plaintiff, v. CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	NO. CV 16-3513-JLS(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Josephine L. Staton, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On May 20, 2016, Plaintiff filed a complaint, seeking review of the Administration's denial of disability benefits. On October 21, 2016, Plaintiff filed a "Motion for Remand, etc." On January 11, 2017, Defendant filed a "Motion for Summary Judgment and Opposition to Plaintiff's Motion for Remand." The Court has taken the matter under

submission without oral argument. See L.R. 7-15; "Order," filed May 26, 2016.

BACKGROUND

Plaintiff asserts disability since April 27, 2009, based on a combination of alleged physical and mental/psychological problems (Administrative Record ("A.R.") 52-56, 73-76, 98, 200-12). In denying benefits, the Administrative Law Judge ("ALJ") found severe physical impairments but no severe mental/psychological impairments (A.R. 21-35). The Appeals Council considered additional evidence, but denied review (A.R. 1-6).

STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner, 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); see also Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

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> If the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ. But the Commissioner's decision cannot be affirmed simply by isolating a specific quantum of supporting evidence. Rather, a court must consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [administrative] conclusion.

Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and quotations omitted).

Where, as here, the Appeals Council considered additional evidence but denied review, the additional evidence becomes part of the record for purposes of the Court's analysis. See Brewes v. Commissioner, 682 F.3d at 1163 ("[W]hen the Appeals Council considers new evidence in deciding whether to review a decision of the ALJ, that evidence becomes part of the administrative record, which the district court must consider when reviewing the Commissioner's final decision for substantial evidence"; expressly adopting Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993)); Taylor v. Commissioner, 659 F.3d 1228, 1231 (2011) (courts may consider evidence presented for the first time to the Appeals Council "to determine whether, in light of the record as a whole, the ALJ's decision was supported by substantial evidence and was free of legal error"); Penny v. Sullivan, 2 F.3d 953, 957 n.7 (9th Cir. 1993) ("the Appeals Council considered this information and it became part of the record we are required to review as a whole"); see generally 20 C.F.R. §§ 404.970(b), 416.1470(b).

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DISCUSSION

After consideration of the record as a whole, the Magistrate Judge recommends that the Court reverse the Administration's decision in part and remand the matter for further administrative proceedings. As discussed below, the Administration materially erred in the evaluation of whether Plaintiff's alleged mental/psychological impairments are "severe."

Social Security Ruling ("SSR") 85-28 governs the evaluation of whether an alleged impairment is "severe":

> An impairment or combination of impairments 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 . . . i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities. . . .
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> If such a finding [of non-severity] is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process.

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> Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued.

SSR 85-28 at *3-4;[1] see also Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996) (the severity concept is "a de minimis screening device to dispose of groundless claims"); accord Webb v. Barnhart, 433 F.3d 683, 686-87 (9th Cir. 2005).

In the present case, the medical evidence does not "clearly establish" the non-severity of Plaintiff's alleged mental/ psychological impairments. On examination, Plaintiff's treating psychiatrist, Dr. Daniel P. Flynn found impaired recent memory and "somewhat dysphoric" mental status (A.R. 510). Dr. Flynn diagnosed "adjustment disorder" and "depressive disorder," prescribed anti-depressant and anti-anxiety medications, and rated Plaintiff's global

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[1] Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990).

assessment of functioning ("GAF") at 42.[2] (A.R. 510-12, 533, 546). A GAF of 42 may well denote a mental/psychological impairment of disabling severity. See, e.g., Casteneda v. Apfel, 2001 WL 210175, at *3 (D. Or. Jan. 18, 2001) (GAF of 45 "is indicative of a disabling level of impairment"). Other physicians disagreed with Dr. Flynn's assessments, but even Dr. Gary D. Bartell (the only other physician who examined Plaintiff for purposes of evaluating Plaintiff's mental impairments) conceded that Plaintiff's "ability to deal with stress in the work situation due to depression is mild to moderately impair[ed]" (A.R. 525). At a minimum, therefore, the ALJ's "non-severity" finding with respect to Plaintiff's alleged mental psychological impairments violated SSR 85-28 and the Ninth Circuit authorities cited above. Given the lack of clarity in the medical evidence, Plaintiff's alleged mental/psychological impairments should not have fallen victim to the "de minimis screening device" designed to "dispose of groundless claims." See Smolen v. Chater, 80 F.3d at 1290.

Defendant suggests, inter alia, that the treatment notes in the record do not justify Dr. Flynn's assessments. Assuming arguendo that this suggestion may have some force on the present record, the ALJ erred by failing to develop the record further concerning the actual bases for Dr. Flynn's assessments before deciding that those

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[2] Clinicians use the GAF scale to rate "psychological, social, and occupational functioning on a hypothetical continuum of mental health-illness." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 34 (4th Ed. 2000 (Text Revision)). A GAF between 41 and 50 indicates "[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." Id.

assessments did not even justify a "severity" finding. "The ALJ has a special duty to fully and fairly develop the record and to assure that the claimant's interests are considered. This duty exists even when the claimant is represented by counsel." Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983); accord Garcia v. Commissioner, 768 F.3d 925, 930 (9th Cir. 2014); see also Sims v. Apfel, 530 U.S. 103, 110-11 (2000) ("Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits. . . ."); Widmark v. Barnhart, 454 F.3d at 1068 (while it is a claimant's duty to provide the evidence to be used in making a residual functional capacity determination, "the ALJ should not be a mere umpire during disability proceedings") (citations and internal quotations omitted); Smolen v. Chater, 80 F.3d at 1288 ("If the ALJ thought he needed to know the basis of Dr. Hoeflich's opinions in order to evaluate them, he had a duty to conduct an appropriate inquiry, for example, by subpoenaing the physicians or submitting further questions to them. He could also have continued the hearing to augment the record.") (citations omitted). An ALJ's duty to develop the record is "especially important" "in cases of mental impairments." DeLorme v. Sullivan, 924 F.2d 841, 849 (9th Cir. 1991).

The weight the law generally accords to the opinion of a treating physician buttresses the conclusion that the Administration erred. See Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988) (treating physician's conclusions "must be given substantial weight"); Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987) (even where the treating physicians opinions are contradicted, "if the ALJ wishes to disregard

the opinion[s] of the treating physician [the ALJ] . . . must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record").

The Court is unable to deem the Administration's errors to have been harmless. See generally McLeod v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012) (an error "is harmless where it is inconsequential to the ultimate nondisability determination") (citations and quotations omitted). Because the circumstances of this case suggest that further administrative review could remedy the errors, remand is appropriate. Id. at 888; see also INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative determination, the proper course is remand for additional agency investigation or explanation, except in rare circumstances); Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district court concludes that further administrative proceedings would serve no useful purpose, it may not remand with a direction to provide benefits"); Treichler v. Commissioner, 775 F.3d 1090, 1101 n.5 (9th Cir. 2014) (remand for further administrative proceedings is the proper remedy "in all but the rarest cases"); Harman v. Apfel, 211 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038 (2000) (remand for further proceedings rather than for the immediate payment of benefits is appropriate where there are "sufficient unanswered questions in the record").

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RECOMMENDATION

For the foregoing reasons,[3] IT IS RECOMMENDED that the Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered reversing in part the decision of the Administration and remanding the matter for further administrative action consistent with this Report and Recommendation.

DATED: January 19, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[3] The Court need not and does not reach any other issue raised by Plaintiff.

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.