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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEBORAH T.,¹
Plaintiff,
v.
ANDREW SAUL,² Commissioner
of Social Security Administration,
Defendant.

Case No. 2:18-cv-09600-JC
MEMORANDUM OPINION AND
ORDER OF REMAND

I. SUMMARY

On November 14, 2018 , plaintiff Deborah Thornton, who is proceeding *pro se*, filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before the undersigned United States Magistrate Judge.

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¹Plaintiff’s name is partially redacted to protect her privacy in compliance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

²Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Commissioner Andrew Saul is hereby substituted for Acting Commissioner Nancy A. Berryhill as the defendant in this action.

1 This matter is before the Court on the parties' cross motions for summary
2 judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion")
3 (collectively "Motions"). The Court has taken the Motions under submission
4 without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; November 16, 2018
5 Case Management Order ¶ 5.

6 Based on the record as a whole and the applicable law, the decision of the
7 Commissioner is REVERSED AND REMANDED for further proceedings
8 consistent with this Memorandum Opinion and Order of Remand.

9 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
10 **DECISION**

11 On April 30, 2014, plaintiff protectively filed an application for
12 Supplemental Security Income, alleging disability beginning on August 2, 2012,
13 due to depression, low back pain, headaches, glaucoma and insomnia.
14 (Administrative Record ("AR") 28, 247-52, 272-73).³ An ALJ examined the
15 medical record and heard testimony from plaintiff (who was represented by
16 counsel) and a vocational expert. (AR 70-93).

17 On January 26, 2016, the ALJ determined that plaintiff was not disabled
18 from April 30, 2014 through the date of the decision. (AR 28-35). Specifically,
19 the ALJ found: (1) plaintiff suffered from the following severe impairments:
20 tendonitis of the shoulder and low back pain (AR 30); (2) plaintiff's impairments,
21 considered individually or in combination, did not meet or medically equal a listed
22 impairment (AR 31); (3) plaintiff retained the residual functional capacity to
23 perform a limited range of medium work (20 C.F.R. §§ 404.1567(c), 416.967 (c))
24 (AR 31-35); (4) plaintiff could perform her past relevant work as a home health
25 aid and therefore is not disabled (AR 35); and (5) plaintiff's statements regarding
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27 ³Plaintiff previously applied for disability benefits and was found not disabled from the
28 alleged onset date through July 26, 2012. (AR 122-35).

1 the intensity, persistence, and limiting effects of subjective symptoms were not
2 entirely credible. (AR 33).

3 On August 16, 2017, the Appeals Council denied plaintiff's application for
4 review. (AR 1-6). Plaintiff thereafter filed a complaint with this Court in
5 Thornton v. Berryhill, C.D. Cal. Case No. 17-7271-JC, which resulted in a
6 stipulated remand for a new administrative hearing and consideration of all of
7 plaintiff's medical evidence. (AR 535-38, 599-602, 605-06).

8 On remand, a new ALJ examined the medical record and heard testimony
9 from plaintiff, two medical experts, and a vocational expert. (AR 503-14). On
10 November 2, 2018, the ALJ found plaintiff not disabled from the April 30, 2014
11 application date through the date of the decision. (AR 470-80). The ALJ found:
12 (1) plaintiff suffered from the following severe impairments: hypertension,
13 lumbar strain, shoulder tendonitis, and major depressive disorder (AR 473);
14 (2) plaintiff's impairments, considered individually or in combination, did not
15 meet or medically equal a listed impairment (AR 474-75 (giving weight to the
16 medical expert opinions at AR 509-10)); (3) plaintiff retained the residual
17 functional capacity to perform medium work (20 C.F.R. §§ 404.1567(c), 416.967
18 (c)) limited to no climbing ladders or ropes, occasional postural activities, and
19 simple repetitive work with no contact with the general public (AR 475-78
20 (adopting medical expert opinions at AR 509-11)); (4) plaintiff is unable to
21 perform her past relevant work as a home health aid (AR 478); (5) there are jobs
22 that exist in significant numbers in the national economy that plaintiff could
23 perform, specifically hand packager, conveyor feeder off bearer, and machine
24 packager and therefore is not disabled (AR 478-79 (adopting vocational expert
25 testimony at AR 511-12)); and (6) plaintiff's statements regarding the intensity,
26 persistence, and limiting effects of subjective symptoms were not consistent with
27 the medical evidence of record, which reportedly showed fairly good response to
28 treatment (AR 478).

1 **III. APPLICABLE LEGAL STANDARDS**

2 **A. Administrative Evaluation of Disability Claims**

3 To qualify for disability benefits, a claimant must show that she is unable
4 “to engage in any substantial gainful activity by reason of any medically
5 determinable physical or mental impairment which can be expected to result in
6 death or which has lasted or can be expected to last for a continuous period of not
7 less than 12 months.” Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
8 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted); 20 C.F.R.
9 §§ 404.1505(a), 416.905. To be considered disabled, a claimant must have an
10 impairment of such severity that she is incapable of performing work the claimant
11 previously performed (“past relevant work”) as well as any other “work which
12 exists in the national economy.” Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
13 1999) (citing 42 U.S.C. § 423(d)).

14 To assess whether a claimant is disabled, an ALJ is required to use the five-
15 step sequential evaluation process set forth in Social Security regulations. See
16 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
17 Cir. 2006) (describing five-step sequential evaluation process) (citing 20 C.F.R.
18 §§ 404.1520, 416.920). The claimant has the burden of proof at steps one through
19 four – *i.e.*, determination of whether the claimant was engaging in substantial
20 gainful activity (step 1), has a sufficiently severe impairment (step 2), has an
21 impairment or combination of impairments that meets or medically equals one of
22 the conditions listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (“Listings”)
23 (step 3), and retains the residual functional capacity to perform past relevant work
24 (step 4). Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citation omitted).
25 The Commissioner has the burden of proof at step five – *i.e.*, establishing that the
26 claimant could perform other work in the national economy. Id.

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1 **B. Federal Court Review of Social Security Disability Decisions**

2 A federal court may set aside a denial of benefits only when the
3 Commissioner’s “final decision” was “based on legal error or not supported by
4 substantial evidence in the record.” 42 U.S.C. § 405(g); Trevizo v. Berryhill, 871
5 F.3d 664, 674 (9th Cir. 2017) (citation and quotation marks omitted). The
6 standard of review in disability cases is “highly deferential.” Rounds v.
7 Commissioner of Social Security Administration, 807 F.3d 996, 1002 (9th Cir.
8 2015) (citation and quotation marks omitted). Thus, an ALJ’s decision must be
9 upheld if the evidence could reasonably support either affirming or reversing the
10 decision. Trevizo, 871 F.3d at 674-75 (citations omitted). Even when an ALJ’s
11 decision contains error, it must be affirmed if the error was harmless. See
12 Treichler v. Commissioner of Social Security Administration, 775 F.3d 1090,
13 1099 (9th Cir. 2014) (ALJ error harmless if (1) inconsequential to the ultimate
14 nondisability determination; or (2) ALJ’s path may reasonably be discerned
15 despite the error) (citation and quotation marks omitted).

16 Substantial evidence is “such relevant evidence as a reasonable mind might
17 accept as adequate to support a conclusion.” Trevizo, 871 F.3d at 674 (defining
18 “substantial evidence” as “more than a mere scintilla, but less than a
19 preponderance”) (citation and quotation marks omitted). When determining
20 whether substantial evidence supports an ALJ’s finding, a court “must consider the
21 entire record as a whole, weighing both the evidence that supports and the
22 evidence that detracts from the Commissioner’s conclusion[.]” Garrison v.
23 Colvin, 759 F.3d 995, 1009 (9th Cir. 2014) (citation and quotation marks omitted).

24 Federal courts review only the reasoning the ALJ provided, and may not
25 affirm the ALJ’s decision “on a ground upon which [the ALJ] did not rely.”
26 Trevizo, 871 F.3d at 675 (citations omitted). Hence, while an ALJ’s decision need
27 not be drafted with “ideal clarity,” it must, at a minimum, set forth the ALJ’s

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1 reasoning “in a way that allows for meaningful review.” Brown-Hunter v. Colvin,
2 806 F.3d 487, 492 (9th Cir. 2015) (citing Treichler, 775 F.3d at 1099).

3 A reviewing court may not conclude that an error was harmless based on
4 independent findings gleaned from the administrative record. Brown-Hunter, 806
5 F.3d at 492 (citations omitted). When a reviewing court cannot confidently
6 conclude that an error was harmless, a remand for additional investigation or
7 explanation is generally appropriate. See Marsh v. Colvin, 792 F.3d 1170, 1173
8 (9th Cir. 2015) (citations omitted).

9 **IV. DISCUSSION**

10 Plaintiff generally contends that the ALJ erred in considering the evidence
11 of record and that the ALJ’s decision is not supported by substantial evidence.
12 See Plaintiff’s Motion at 1-5. Plaintiff has provided medical records postdating
13 the ALJ’s adverse decision. Id. at 6-21. Defendant argues that the ALJ’s decision
14 is supported by substantial evidence. See Defendant’s Motion at 12-18. Plaintiff
15 has contested much of defendant’s characterization of the record. See Plaintiff’s
16 Response to Defendant’s Motion, filed on May 10, 2019.

17 For the reasons discussed below, the Court finds that the ALJ failed
18 adequately to consider plaintiff’s headaches in reaching a disability determination.
19 Since the Court cannot find that the ALJ’s error was harmless, a remand is
20 warranted.

21 **A. Pertinent Law**

22 When determining disability, an ALJ is required to consider a claimant’s
23 impairment-related pain and other subjective symptoms at each step of the
24 sequential evaluation process. 20 C.F.R. § 416.929(a), (d).

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1 At step two a claimant essentially must present objective medical evidence⁴
2 which establishes that she has a sufficiently severe medically determinable
3 physical or mental impairment that satisfies the duration requirement (*i.e.*, an
4 impairment that has lasted or can be expected to last for a continuous period of
5 twelve months or more). 20 C.F.R. §§ 404.1509, 404.1520(a)(4)(ii), 404.1521,
6 416.909, 416.920(a)(4)(ii), 416.921; see also 42 U.S.C. §§ 423(d), 1382c(a)(3);
7 see also Bowen v. Yuckert, 482 U.S. 137, 140-41 (1987); Ukolov v. Barnhart, 420
8 F.3d 1002, 1004-05 (9th Cir. 2005) (citation omitted).

9 Step two “is a de minimis screening device [used] to dispose of groundless
10 claims.” Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing Bowen, 482
11 U.S. at 153-54), superseded, in part, on unrelated grounds, 20 C.F.R.
12 §§ 404.1529(c)(3), 416.929(c)(3). “An impairment . . . may be found ‘not severe
13 only if the evidence establishes a slight abnormality that has no more than a
14 minimal effect on an individual’s ability to work.’” Webb v. Barnhart, 433 F.3d
15 683, 686 (9th Cir. 2005) (quoting id.) (emphasis in original); see also 20 C.F.R.
16 §§ 404.1522(a); 416.922(a) (impairment “not severe” only when it does not
17 “significantly limit [a claimant’s] physical or mental ability to do basic work
18 activities”); Social Security Ruling (“SSR”) 96-4p, 1996 WL 374187, *2
19 (substantial evidence supports ALJ’s determination that a claimant is not disabled
20 at step two only where “there are no medical signs or laboratory findings to
21 substantiate the existence of a medically determinable physical or mental
22 impairment”). Hence, when reviewing an ALJ’s findings at step two, the district
23 court essentially “must determine whether the ALJ had substantial evidence to find
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25 ⁴“Objective medical evidence” consists of “signs, laboratory findings, or both.”
26 20 C.F.R. §§ 404.1502(f), 416.902(f). “Signs” are “anatomical, physiological, or psychological
27 abnormalities that can be . . . shown by medically acceptable clinical diagnostic techniques.”
28 20 C.F.R. §§ 404.1502(g), 416.902(g). “Laboratory findings” are “anatomical, physiological, or
psychological phenomena that can be shown by the use of medically acceptable laboratory
diagnostic techniques.” 20 C.F.R. §§ 404.1502(c), 416.902(c).

1 that the medical evidence clearly established that [the claimant] did not have a
2 medically severe impairment or combination of impairments.” Webb, 433 F.3d at
3 687 (citing Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988) (“Despite the
4 deference usually accorded to the Secretary’s application of regulations, numerous
5 appellate courts have imposed a narrow construction upon the severity regulation
6 applied here.”)).

7 Additionally, when a claimant presents “objective medical evidence of an
8 underlying impairment which might reasonably produce the pain or other
9 symptoms [the claimant] alleged,” the ALJ is required to determine the extent to
10 which the claimant’s statements regarding the intensity, persistence, and limiting
11 effects of his subjective symptoms (“subjective statements” or “subjective
12 complaints”) are consistent with the record evidence as a whole and, consequently,
13 whether any of the individual’s symptom-related functional limitations and
14 restrictions are likely to reduce the claimant’s capacity to perform work-related
15 activities. 20 C.F.R. § 416.929(a), (c)(4); SSR 16-3p, 2017 WL 5180304, at *4-
16 *10. When an individual’s subjective statements are inconsistent with other
17 evidence in the record, an ALJ may give less weight to such statements and, in
18 turn, find that the individual’s symptoms are less likely to reduce the claimant’s
19 capacity to perform work-related activities. See SSR 16-3p, 2017 WL 5180304, at
20 *8. In such cases, when there is no affirmative finding of malingering, an ALJ
21 may “reject” or give less weight to the individual’s subjective statements “only by
22 providing specific, clear, and convincing reasons for doing so.” Brown-Hunter,
23 806 F.3d at 488-89; see also Trevizo, 871 F.3d at 678-79 & n.5 (same) (citations
24 omitted). This requirement is very difficult to satisfy. See Trevizo, 871 F.3d at
25 678 (“The clear and convincing standard is the most demanding required in Social
26 Security cases.”) (citation and quotation marks omitted).

27 An ALJ’s decision “must contain specific reasons” supported by substantial
28 evidence in the record for giving less weight to a claimant’s statements. SSR

1 16-3p, 2017 WL 5180304, at *10. An ALJ must clearly identify each statement
2 being rejected and the particular evidence in the record which purportedly
3 undermines the statement. Treichler, 775 F.3d at 1103 (citation omitted).

4 If an ALJ's evaluation of a claimant's statements is supported by substantial
5 evidence, "the court may not engage in second-guessing." Chaudhry v. Astrue,
6 688 F.3d 661, 672 (9th Cir. 2012) (citation omitted). When an ALJ fails properly
7 to discuss a claimant's subjective complaints, the error may not be considered
8 harmless "unless [the Court] can confidently conclude that no reasonable ALJ,
9 when fully crediting the testimony, could have reached a different disability
10 determination." Marsh, 792 F.3d at 1173 (quoting Stout, 454 F.3d at 1055-56);
11 see also Brown-Hunter, 806 F.3d at 492 (ALJ's erroneous failure to specify
12 reasons for rejecting claimant testimony "will usually not be harmless").

13 **B. Analysis**

14 Plaintiff testified that she last worked in 2006, and could not work due to
15 depression, anxiety, headaches that cause her to have to lie down for a few hours,
16 hypertension, eyesight problems/glaucoma, and low back issues that cause her leg
17 to cramp when she climbs stairs. (AR 508). Plaintiff said that her shoulder
18 problems had resolved. (AR 508). At an earlier administrative hearing in July
19 2012, plaintiff testified that she had "post-concussive syndrome" and ongoing
20 headaches which cause her to have to lie down. (AR 699, 706-08). At a hearing
21 in December 2015, plaintiff testified that she has headaches three to four times a
22 week for which she lies down for a couple of hours at a time. (AR 723-24, 729-
23 31). A vocational expert testified that if a person required a two-hour unscheduled
24 break, three to four times a week, there would be no gainful employment for that
25 person. (AR 733).

26 The record shows that plaintiff reportedly suffered a head injury in 2011
27 which has caused her to suffer chronic headaches. (AR 371, 831, 874). A CT
28 scan of plaintiff's brain from September 2014 showed advanced atrophy for her

1 age. (AR 381, 387, 392). Plaintiff has been treated for chronic headaches “with
2 fluctuating frequency,” by neurologist Dr. Ivan Fras who had an EEG test done in
3 April of 2017 (which does not appear to be included in the record) and prescribed
4 medications. (AR 557-59, 561-63, 572-74, 843-48, 903-05, 911-13, 922-24).

5 A treatment note from January 2016, reports that plaintiff complained of
6 “constant headaches.” (AR 1140-41). A May 2017 treatment note reports that
7 plaintiff was having increased headaches for a few months with no indication of
8 the frequency. (AR 814). Treatment notes from June and August 2017 report that
9 plaintiff then was having headaches about two days per week since having her
10 Topomax dose increased. (AR 807, 846). A January 2018 treatment note reports
11 that plaintiff was having headaches three to four times per week. (AR 922). In
12 April 2018, plaintiff reported to her therapist that she was still having headaches
13 despite her medications. (AR 938). In June 2018, plaintiff reported to her
14 therapist that she was having headaches that last all day and all night despite her
15 medications. (AR 928).⁵

16 In finding plaintiff’s headaches non-severe at Step 2 of the disability
17 analysis, the ALJ described plaintiff’s headaches as “occasional” and “sporadic,”
18 treated by anti-inflammatory medications “with good response,” and on that basis
19 concluded that plaintiff’s headaches do not result in any functional limitations.
20 (AR 473). In summary fashion, the ALJ stated that he had considered plaintiff’s
21 subjective complaints, however, “such complaints are inconsistent with the
22 medical evidence of record, which shows fairly good response to treatment.” (AR
23 478).

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26 ⁵When plaintiff presented for an internal medicine evaluation in July 2014, there is no
27 indication that she reported suffering from headaches. See AR 363-67. She did, however, report
28 to the psychologist who evaluated her in July 2014 that she suffers from severe headaches that
can cause blackouts. (AR 370).

1 The ALJ's determination that plaintiff's headaches are not severe is not
2 supported by substantial evidence. The ALJ did not adequately consider the
3 reports in the medical record and plaintiff's related testimony suggesting that
4 plaintiff suffered from regular headaches from two to four times per week. The
5 ALJ's failure adequately to consider both the reports of plaintiff's headaches and
6 her subjective complaints calls into question the validity of the ALJ's evaluation
7 of the medical evidence and the ALJ's decision as a whole. See Reddick v.
8 Chater, 157 F.3d 715, 722-23 (9th Cir. 1998) (error for ALJ to paraphrase medical
9 evidence in manner that is "not entirely accurate regarding the content or tone of
10 the record"). If the ALJ wished to disregard plaintiff's complaints of frequent
11 headaches for which she must lie down, the ALJ should have discussed this
12 testimony and explained his basis for rejecting it. Treichler, 775 F.3d at 1103.

13 The Court cannot confidently conclude that the ALJ's failure to adequately
14 consider plaintiff's subjective complaints was inconsequential to the ultimate
15 nondisability determination (*i.e.*, harmless), in light of the vocational expert's
16 testimony that the need to take unscheduled breaks three to four times per week
17 would preclude employment. (AR 733).

18 Accordingly, a remand is warranted so that the ALJ can reevaluate
19 plaintiff's subjective complaints of headaches and the related medical evidence.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the decision of the Commissioner of Social
3 Security is REVERSED and this matter is REMANDED for further administrative
4 action consistent with this Opinion.⁶

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: October 25, 2019

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/s/
Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

⁶When a court reverses an administrative determination, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and quotations omitted); Treichler, 775 F.3d at 1099 (noting such “ordinary remand rule” applies in Social Security cases) (citations omitted). The Court need not, and has not adjudicated plaintiff’s other challenges to the ALJ’s decision, except insofar as to determine that a reversal and remand for immediate payment of benefits would not be appropriate.