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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CHARLES E. DAVIDSON,	)	NO. EDCV 07-00144-MAN
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	AND ORDER
	)	
MICHAEL J. ASTRUE, <sup>1</sup>	)	
Commissioner of the	)	
Social Security Administration,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff filed a Complaint on February 13, 2007, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for disability insurance benefits ("DIB"), and supplemental security income ("SSI"). On March 6, 2007, the parties consented to proceed before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint Stipulation on October 25, 2007, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, in the

<sup>1</sup> Michael J. Astrue became the Commissioner of the Social Security Administration on February 12, 2007, and is substituted in place of former Commissioner Joanne B. Barnhart as the Defendant in this action. (See Fed. R. Civ. P. 25(d)(1); Section 205(g) of the Social Security Act, last sentence, 42 U.S.C. § 405(g).)

1 alternative, remanding the matter for further administrative  
2 proceedings; and defendant seeks an order affirming the Commissioner's  
3 decision. The Court has taken the parties' Joint Stipulation ("J.S.")  
4 under submission without oral argument.

5  
6 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS AND DECISION**

7  
8 Plaintiff filed his applications for DIB and SSI on May 12, 2004.  
9 (Administrative Record ("A.R.") 94-96, 429-31.) Plaintiff alleges an  
10 inability to work since January 1, 1995, due to schizophrenia, hepatitis  
11 C, manic depression, and liver problems. (A.R. 77, 101.)  
12

13 Plaintiff's claims were denied initially and upon reconsideration,  
14 and on August 1, 2006, plaintiff, who was represented by counsel,  
15 testified at a hearing before Administrative Law Judge Joseph D. Schloss  
16 ("ALJ"). (A.R. 438-53.) On September 29, 2006, the ALJ denied  
17 plaintiff's claims, and the Appeals Council subsequently denied  
18 plaintiff's request for review of the ALJ's decision. (A.R. 6-8.)  
19

20 In his written decision, the ALJ found that plaintiff has the  
21 following severe impairments: schizoaffective disorder bipolar type,  
22 osteoarthritis of the cervical spine, and a history of polysubstance  
23 dependence. (A.R. 16.) The ALJ further found that plaintiff's  
24 "medically determinable impairments could reasonably be expected to  
25 produce the alleged symptoms, but [plaintiff's] statements concerning  
26 the intensity, persistence and limiting effects of these symptoms are  
27 not entirely credible." (A.R. 18.) The ALJ gave "significant weight to  
28 the opinion of Dr. Linda M. Smith, MD, a Board eligible psychiatrist,"

1 who performed a consultative psychiatric evaluation of plaintiff on  
2 August 3, 2004. (A.R. 19.) Finally, the ALJ found, based upon  
3 plaintiff's residual functional capacity and the vocational expert's  
4 testimony, that plaintiff is capable of performing his past relevant  
5 work as a warehouse worker. (A.R. 20.) Accordingly, the ALJ concluded  
6 that plaintiff was not under a disability from January 1, 1995, through  
7 the date of his decision. (*Id.*)

8  
9 **STANDARD OF REVIEW**

10  
11 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
12 decision to determine whether it is free from legal error and supported  
13 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
14 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
15 evidence as a reasonable mind might accept as adequate to support a  
16 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
17 a mere scintilla but not necessarily a preponderance." Connett v.  
18 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003)(citation omitted). While  
19 inferences from the record can constitute substantial evidence, only  
20 those "'reasonably drawn from the record'" will suffice. Widmark v.  
21 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006)(citation omitted).

22  
23 Although this Court cannot substitute its discretion for that of  
24 the Commissioner, the Court nonetheless must review the record as a  
25 whole, "weighing both the evidence that supports and the evidence that  
26 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
27 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*  
28 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is

1 responsible for determining credibility, resolving conflicts in medical  
2 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
3 1035, 1039-40 (9th Cir. 1995).

4  
5 The Court will uphold the Commissioner's decision when the evidence  
6 is susceptible to more than one rational interpretation. Burch v.  
7 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may  
8 review only the reasons stated by the ALJ in his decision "and may not  
9 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d  
10 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse  
11 the Commissioner's decision if it is based on harmless error, which  
12 exists only when it is "clear from the record that an ALJ's error was  
13 'inconsequential to the ultimate nondisability determination.'" Robbins  
14 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.  
15 Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400  
16 F.3d at 679.

17  
18 **DISCUSSION**

19  
20 Plaintiff alleges the following issues: (1) whether the ALJ  
21 properly considered the treating psychiatrists' evaluations; (2) whether  
22 the ALJ complied with SSR 96-7p, which requires that the ALJ consider  
23 the type, dosage, effectiveness, and side effects of plaintiff's  
24 medications; (3) whether the ALJ posed a complete hypothetical question  
25 to the vocational expert; and (4) whether the ALJ properly developed the  
26 record. (J.S. at 3.) The Court addresses these issues below.

27 ///

28 ///

1 **I. The ALJ Failed To Provide Specific And Legitimate Reasons For**  
2 **Disregarding The Opinions Of Plaintiff's Treating Psychiatrists And**  
3 **Psychologists.**  
4

5 A treating physician's conclusions "must be given substantial  
6 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). "If a  
7 treating or examining doctor's opinion is contradicted by another  
8 doctor's opinion, an ALJ may only reject it by providing specific and  
9 legitimate reasons that are supported by substantial evidence." Ryan v.  
10 Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008)(citations  
11 omitted).  
12

13 In this case, the ALJ gives "significant weight" to the opinion of  
14 consultative psychiatrist, Dr. Smith, but the ALJ fails to provide any  
15 reasons for rejecting the opinions of plaintiff's treating psychiatrists  
16 and psychologists at the Loma Linda Veterans Administration Medical  
17 Center ("LLVAMC"), the California Department of Corrections, and the  
18 Parole Outpatient Clinic. (A.R. 19.) Although the Court believes that  
19 the ALJ's reliance on Dr. Smith's opinion may be reasonable, the ALJ's  
20 silent disregard of the opinions of plaintiff's mental health  
21 professionals contravenes Ninth Circuit precedent to which this Court  
22 must adhere.<sup>2</sup>  
23

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24  
25 <sup>2</sup> As Dr. Smith's opinion is based upon objective and independent  
26 clinical findings, it properly may constitute substantial evidence upon  
27 which the ALJ may rely. See Andrews, 53 F.3d at 1041. However, the ALJ  
28 nonetheless is required to state specific and legitimate reasons for  
rejecting the opinions of plaintiff's treating psychiatrists and  
psychologists, and his failure to do so constitutes error. See Lester  
v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1995).

1 In his portion of the Joint Stipulation, defendant advances various  
2 bases for the ALJ's rejection of the findings and opinions of  
3 plaintiff's physicians and psychologists at the LLVAMC. (See A.R. 5-7.)  
4 However, a reviewing court cannot affirm the denial of benefits based on  
5 a reason not stated or finding not made by the ALJ, and defendant's  
6 after-the-fact attempt to supply acceptable bases for the ALJ's decision  
7 is unavailing. See, e.g., Connett, 340 F.3d at 874 (noting that a  
8 reviewing court is "constrained to review the reasons the ALJ asserts,"  
9 and an ALJ's decision cannot be affirmed on the basis of evidence he did  
10 not discuss); Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir.  
11 2001)(an agency decision cannot be affirmed on the basis of a ground  
12 that the agency did not invoke in making its decision); see also Barbato  
13 v. Comm'r of Soc. Sec. Admin., 923 F. Supp. 1273, 1276 n.2 (C.D. Cal.  
14 1996)(remand is appropriate when a decision does not adequately explain  
15 how a decision was reached, "[a]nd that is so even if [the Commissioner]  
16 can offer proper post hoc explanations for such unexplained  
17 conclusions," because "the Commissioner's decision must stand or fall  
18 with the reasons set forth in the ALJ's decision, as adopted by the  
19 Appeals Council")(citation omitted).

20  
21 Further, in advancing his post hoc rationales, defendant asserts  
22 that the records of the LLVAMC "do not support a finding of disability  
23 that would exist absent drug/alcohol abuse." (J.S. at 6.) However,  
24 defendant does not, and can not, assert that plaintiff's substance abuse  
25 bars his recovery of benefits, because the ALJ did not undertake the  
26 two-step analysis necessary to draw that conclusion. In Bustamante v.  
27 Massanari, 262 F.3d 949 (9th Cir. 2001), the Ninth Circuit addressed the  
28 interrelationship between a claimant's substance abuse and the

1 determination of his disability, and held that the five-step sequential  
2 evaluation must first be conducted "without separating out the impact of  
3 alcoholism or drug addiction." Bustamante, 262 F.3d at 955. Here, the  
4 ALJ found that the plaintiff is not disabled under the five-step inquiry  
5 and not entitled to benefits; thus, the ALJ did not undertake an  
6 analysis of whether plaintiff's substance abuse is a contributing factor  
7 material to his disability determination. If after properly addressing  
8 plaintiff's treating records, the ALJ concludes that plaintiff is  
9 disabled *and* there is evidence of his continuing drug addiction or  
10 alcohol abuse, then the ALJ must determine whether the claimant would  
11 still be found disabled if he stopped using drugs and/or alcohol. Given  
12 the ALJ's contradictory statements regarding plaintiff's substance  
13 abuse,<sup>3</sup> further development of the record on this issue would be required  
14 before a proper disability determination could be made. (A.R. 18-19.)  
15

16 In sum, this Court cannot confidently conclude that the ALJ's  
17 implicit rejection of the opinions of plaintiff's psychiatrists and  
18

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19 <sup>3</sup> Regarding plaintiff's substance abuse, the ALJ states:

20 [Plaintiff's] history of polysubstance abuse is  
21 also well documented as well as his recent  
22 consumption of cocaine. (Exhibit B4F, B10F, p. 13)  
23 With the exception of his recent substance abuse,  
24 the evidence shows that his polysubstance abuse was  
25 in full remission for a substantial period of time.  
26 The [plaintiff] is now in a dual treatment program  
27 for his schizoaffective disorder and cocaine use  
28 (Exhibit B10F and B11F). [Plaintiff's] past and  
recent substance abuse was taken into consideration  
relative to his residual functional capacity; and I  
find that [plaintiff's] polysubstance abuse, both  
past and recent, does not change [plaintiff's]  
residual functional capacity as described herein.

(A.R. 18-19.) Although the ALJ states that plaintiff's "past and recent  
substance abuse was taken into consideration," the ALJ did not undertake  
the two-step analysis as required under Bustamante.

1 psychologists at LLVAMC, the California Department of Corrections, and  
2 the Parole Outpatient Clinic constitutes harmless error. The Court will  
3 not reverse the Commissioner's decision if it is based on harmless  
4 error, which exists when it is clear from the record that "the ALJ's  
5 error was 'inconsequential to the ultimate nondisability  
6 determination.'" Robbins, 466 F.3d at 885 (quoting Stout, 454 F.3d at  
7 1055-56). In this case, however, it is unclear whether the ALJ's error  
8 is "nonprejudicial to [plaintiff] or irrelevant to the ALJ's ultimate  
9 disability conclusion." Stout, 454 F.3d at 1055.

10  
11 For the reasons stated above, remand is required to allow the ALJ  
12 to remedy this error.

13  
14 **II. The ALJ Failed To Consider Properly The Side Effects Of Plaintiff's**  
15 **Medications On His Ability To Work.**

16  
17 When an ALJ evaluates a claimant's limitations, he must consider  
18 evidence regarding the side effects of medications. Social Security  
19 Ruling 96-7p indicates that the "type, dosage, effectiveness, and side  
20 effects of any medication the individual takes or has taken to alleviate  
21 pain or other symptoms" should be considered in the disability  
22 evaluation. See also 20 C.F.R. § 404.1529(c)(3)(iv). The Ninth Circuit  
23 has observed that an ALJ must "consider all factors that might have a  
24 significant impact on an individual's ability to work." Erickson v.  
25 Shalala, 9 F.3d 813, 817 (9th Cir. 1993)(citation omitted). Such  
26 factors "may include side effects of medications as well as subjective  
27 evidence of pain." Id. at 818.



1 In his decision, the ALJ briefly acknowledges plaintiff's testimony  
2 and records regarding the side effects of his medications, but the ALJ  
3 does not expressly consider the impact of these side effects on  
4 plaintiff's ability to work. Although the ALJ mentions that plaintiff's  
5 medications "make him 'jumpy;' [that plaintiff] frequently has racing  
6 thoughts; and has difficulty sleeping at night," the ALJ neither  
7 properly dismisses the significance of these side effects nor, in his  
8 hypothetical to the vocational expert, references them.<sup>4</sup> (A.R. 18, 449-  
9 51.) The ALJ is required to consider those side effects in evaluating  
10 plaintiff's disability claim, and his failure to do so constitutes  
11 error.

12  
13 **III. Until The ALJ Has Assessed Properly The Opinions Of Plaintiff's**  
14 **Treating Physicians And The Side Effects Of Plaintiff's**  
15 **Medications, The Court Can Not Assess The Adequacy Of The**  
16 **Hypothetical Posed To The Vocational Expert.**

17  
18 In posing a hypothetical to a vocational expert, the ALJ must  
19 accurately reflect all of the claimant's limitations. Embrey, 849 F.2d  
20 at 422-24. In order for the vocational expert's testimony to constitute  
21 substantial evidence, the hypothetical question posed must "consider all

22  
23 <sup>4</sup> On May 5, 2004, plaintiff reported to California Department of  
24 Corrections, Parole Outpatient Clinic Psychiatrist, William Lawrence,  
25 M.D., that plaintiff experiences decreased appetite, tremor, and  
26 jumpiness as a result of the side effects of his medications, which  
27 include Buspar, Prozac, Serzone, Zxyprexa, and Neurontin. (A.R. 173.)  
28 In a May 19, 2004 Disability Report - Adult, plaintiff stated that:  
Buspirone makes him drowsy; Risperdal causes nervousness and shaking;  
and Zyprexa causes him to have slurred speech. (A.R. 105.) Further, at  
the hearing, plaintiff testified that he experiences fatigue, has to  
take a lot of naps, and when [he] take[s] [his] medication it escalates  
[his fatigue]." (A.R. 443-44.)

1 of the claimant's limitations." Andrews, 53 F.3d at 1044. However, the  
2 ALJ is not required to include limitations for which there was no  
3 evidence. See Osenbrock v. Apfel, 240 F.3d 1157, 1164-65 (9th Cir.  
4 2001).

5  
6 Here, the hypothetical may be incomplete to the extent that it does  
7 not reflect the opinions of plaintiff's treating psychiatrists and  
8 psychologists or any of plaintiff's reported medication side effects.  
9 (A.R. 449-51.) On remand, the ALJ should either properly reject the  
10 opinions of plaintiff's treating psychiatrists and psychologists, and  
11 discount or dismiss the claimed side effects of plaintiff's medications,  
12 in accordance with the appropriate legal standards, or the ALJ must  
13 incorporate them into the hypothetical posed to the vocational expert.  
14

15 **IV. The ALJ Failed To Develop The Record Adequately.**

16  
17 The ALJ has a "special duty to fully and fairly develop the  
18 record." Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996). "An  
19 ALJ's duty to develop the record further is triggered . . . when the  
20 record is inadequate to allow for proper evaluation of the evidence."  
21 Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001).

22  
23 Plaintiff contends that the ALJ failed to develop the record  
24 adequately, because the ALJ incorporated in his decision the prior ALJ's  
25 decision *and accompanying exhibits* but those exhibits are not included  
26  
27  
28

1 in the present record.<sup>5</sup> The Court agrees. Given the possibly  
2 progressive nature of plaintiff's mental impairment(s), it is critical  
3 that the ALJ meet his affirmative duty to ensure the record is not  
4 "inadequate to allow for proper evaluation of the evidence." Mayes,  
5 276 F.3d at 459-60.

6  
7 In the prior decision, the relevant, referenced exhibits include:  
8 (1) plaintiff's medical records from the San Bernardino County  
9 Department of Mental Health from 2/99, through 5/99; (2) records  
10 reflecting State Agency findings from 3/98 and 5/98; (3) records  
11 relating to a consultative internal medicine examination and evaluation  
12 of plaintiff in or about January 1998; (4) records relating to a  
13 consultative psychiatric examination and evaluation of plaintiff dated  
14 1/30/98; (5) plaintiff's medical records from the Department of  
15 Corrections, State of California, from 11/95, through 10/97; and (6)  
16 plaintiff's medical records from LLVAMC from 2/98, through 4/98. These  
17 exhibits, as indicated in the Court Transcript Index, "are not available  
18 for inclusion [in the present record] but are incorporated by reference  
19 with the current decision." (A.R. 1.)

20  
21 Defendant contends that the ALJ had no duty to further develop the  
22 record, because the ALJ incorporated by reference the prior decision and  
23 accompanying exhibits only as a threshold step, which permitted him to  
24 conclude that plaintiff demonstrated "changed circumstances" and, thus,  
25

26  
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<sup>5</sup> Plaintiff has had five separate applications for disability  
28 insurance benefits denied, the most recent of which, other than the  
instant denial, occurred on July 27, 1999, and is the prior decision to  
which the ALJ refers. (A.R. 13, 41-50, 53-71.)

1 rebutted successfully the presumption of continuing non-disability.<sup>6</sup>  
2 (J.S. at 19-20.) While defendant's contention may be correct, it does  
3 not fully address the issue. The Court believes that the ALJ still had  
4 an affirmative duty to make efforts to obtain missing exhibits, which,  
5 although incorporated by reference in the ALJ's decision at issue, are  
6 not now available for review. At present, the record is "inadequate to  
7 allow for proper evaluation of the evidence" (Mayes, 276 F.3d at 459-  
8 60), and there is no indication that the ALJ made any attempt to develop  
9 an adequate record by securing these missing exhibits.

10  
11 Finally, although defendant argues that the ALJ properly discharged  
12 his duty to develop the record by leaving the record open after the  
13 hearing for the submission of additional records from LLVAMC, simply  
14 "leaving the record open" was insufficient to discharge the ALJ's duty  
15 to fully and fairly develop the record.<sup>7</sup> (J.S. at 20.) Both plaintiff  
16 and the Court are entitled to review the entirety of the evidence relied  
17 upon by the ALJ in support of his challenged decision and cannot do so  
18 here. Accordingly, the ALJ's failure to make any affirmative effort to  
19 obtain the missing exhibits constitutes error.

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20  
21 <sup>6</sup> It is well-settled that a prior final determination that a claimant  
22 is not disabled creates a presumption of continuing non-disability with  
23 respect to any subsequent unadjudicated period of alleged disability.  
24 Taylor v. Heckler, 765 F.2d 872, 875 (9th Cir. 1985); Lyle v. Sec'y, 700  
25 F.2d 566, 568 (9th Cir. 1983). The claimant can, however, overcome this  
26 burden by proving "changed circumstances," such as the existence of an  
27 impairment not previously considered, an increase in the severity of an  
28 impairment, or a change in the claimant's age category. Chavez v.  
Bowen, 844 F.2d 691, 693 (9th Cir. 1988).

26 <sup>7</sup> Moreover, the transcript of the August 1, 2006 hearing before the  
27 ALJ makes clear that the record was actually being left open for the  
28 submission of more current, not past, records of plaintiff's treatment  
by LLVAMC, *i.e.*, for the submission of any treatment records from  
October or November of 2005, through July 2006. (A.R. 451-52.)

1 **V. Remand Is Required.**

2  
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 ("the decision of whether to remand for further proceedings turns upon  
10 the likely utility of such proceedings"). However, where there are  
11 outstanding issues that must be resolved before a determination of  
12 disability can be made, and it is not clear from the record that the ALJ  
13 would be required to find the claimant disabled if all the evidence were  
14 properly evaluated, remand is appropriate. *Id.* See, e.g., Benecke v.  
15 Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for further  
16 proceedings is appropriate if enhancement of the record would be  
17 useful).

18  
19 Where, as in this case, the opinions of treating physicians were  
20 rejected without having been addressed in accordance with the governing  
21 legal standards, remand is appropriate to allow the ALJ the opportunity  
22 to provide the proper reasons, if such reasons exist, for this  
23 rejection. In addition, the ALJ should ensure that the hypothetical  
24 provided to the vocational expert reflects all the plaintiff's  
25 limitations, including those resulting from the side effects of  
26 medication, as discussed above. See, e.g., Light v. Soc. Sec. Admin.,  
27 119 F.3d 789, 793-94 (9th Cir. 1997)(remanding where vocational expert's  
28 testimony did not address all limitations).

1 **CONCLUSION**

2  
3 Accordingly, for the reasons stated above, IT IS ORDERED that the  
4 decision of the Commissioner is REVERSED, and this case is REMANDED for  
5 further proceedings consistent with this Memorandum Opinion and Order.  
6

7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
8 copies of this Memorandum Opinion and Order and the Judgment on counsel  
9 for plaintiff and for defendant.  
10

11 **LET JUDGMENT BE ENTERED ACCORDINGLY.**  
12

13 DATED: September 29, 2008

14 \_\_\_\_\_ /s/  
MARGARET A. NAGLE  
15 UNITED STATES MAGISTRATE JUDGE  
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