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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

TAMARA MCCANN,)	NO. EDCV 09-01432 SS
)	
Plaintiff,)	
)	
v.)	MEMORANDUM DECISION AND ORDER
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

**I.
INTRODUCTION**

Tamara McCann ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying her application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is AFFIRMED.

1 Commissioner. (AR 683). Plaintiff then requested judicial review by
2 filing this action.

3
4 **IV.**

5 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

6
7 To qualify for disability benefits, a claimant must demonstrate
8 a medically determinable physical or mental impairment that prevents him
9 from engaging in substantial gainful activity¹ and that is expected to
10 result in death or to last for a continuous period of at least twelve
11 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
12 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
13 incapable of performing the work he previously performed and incapable
14 of performing any other substantial gainful employment that exists in
15 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
16 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

17
18 To decide if a claimant is entitled to benefits, an ALJ conducts
19 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are as
20 follows:

- 21
22 (1) Is the claimant presently engaged in substantial gainful
23 activity? If so, the claimant is found not disabled.
24 If not, proceed to step two.

25
26 _____
27 ¹ Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 (2) Is the claimant's impairment severe? If not, the
2 claimant is found not disabled. If so, proceed to step
3 three.

4
5 (3) Does the claimant's impairment meet or equal one of a
6 list of specific impairments described in 20 C.F.R. Part
7 404, Subpart P, Appendix 1? If so, the claimant is
8 found disabled. If not, proceed to step four.

9
10 (4) Is the claimant capable of performing her past work? If
11 so, the claimant is found not disabled. If not, proceed
12 to step five.

13
14 (5) Is the claimant able to do any other work? If not, the
15 claimant is found disabled. If so, the claimant is
16 found not disabled.

17
18 Tackett, 180 F.3d at 1098-99; see also 20 C.F.R. §§ 404.1520(b)-(g)(1),
19 416.920(b)-(g)(1); Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th
20 Cir. 2001) (citations omitted).

21
22 The claimant has the burden of proof at steps one through four, and
23 the Commissioner has the burden of proof at step five. Bustamante, 262
24 F.3d at 953-54. If, at step four, the claimant meets his burden of
25 establishing an inability to perform past work, the Commissioner must
26 show that the claimant can perform some other work that exists in
27 "significant numbers" in the national economy, taking into account the
28

1 claimant's residual functional capacity ("RFC"),² age, education, and
2 work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
3 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may
4 do so by the testimony of a VE or by reference to the Medical-Vocational
5 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2
6 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157,
7 1162 (9th Cir. 2001). When a claimant has both exertional (strength-
8 related) and nonexertional limitations, the Grids are inapplicable and
9 the ALJ must take the testimony of a VE. Moore v. Apfel, 216 F.3d 864,
10 869 (9th Cir. 2000).

11
12 **V.**

13 **THE ALJ'S DECISION**

14
15 The ALJ employed the five-step sequential evaluation process and
16 concluded that Plaintiff was not disabled within the meaning of the
17 Social Security Act. (AR 693). At the first step, the ALJ observed
18 that Plaintiff had not engaged in substantial gainful activity since
19 January 12, 2004, the date of Plaintiff's application. (AR 687). At
20 step two, the ALJ found that Plaintiff had the severe impairments of
21 mild degenerative changes in the musculoskeletal system, a diagnosis of
22 fibromyalgia, minor esophageal abnormalities, and depression. (Id.).
23 However, the ALJ specifically found Plaintiff's depression did not
24

25
26 _____
27 ² Residual functional capacity is "the most [one] can still do
28 despite [one's] limitations" and represents an assessment "based on all
the relevant evidence in [one's] case record." 20 C.F.R. §§
404.1545(a), 416.945(a).

1 amount to more than a minimal limitation after considering the four
2 broad functional areas. (AR 688).

3
4 At the third step, the ALJ found that the severe impairments at
5 step two did not meet or medically equal a listed impairment. (AR 689).
6 Next, at step four, the ALJ found that Plaintiff had no past relevant
7 work, had a limited education, was able to communicate in English, and
8 at 35, was a "younger individual." (AR 692). The ALJ found that
9 Plaintiff had the RFC to lift and carry twenty pounds occasionally and
10 ten pounds frequently, and was able to sit, stand or walk for six hours
11 in an eight hour day. (AR 689). However, Plaintiff was precluded from
12 prolonged walking, "working at heights, around dangerous unguarded
13 moving machinery, or similar hazards," and was limited to entry-level,
14 simple, repetitive, minimally stressful work requiring no contact with
15 the general public. (Id.).

16
17 Finally, at step five, the ALJ concluded that, based on Plaintiff's
18 RFC, age, education, and work experience, there were jobs in the
19 national economy that Plaintiff could perform. According to the
20 testimony of the VE, Plaintiff could perform work as an assembler or
21 sorter. (AR 693). Accordingly, the ALJ found that Plaintiff was not
22 disabled, as defined in the Social Security Act. (Id.).

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VI.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The court may set aside the Commissioner's decision when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, the court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing that conclusion, the court may not substitute its judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21.

VII.

DISCUSSION

Plaintiff contends that the ALJ failed to comply with the remand order issued by the Appeals Council. (Memorandum In Support Of Plaintiff's Complaint ("Complaint Memo.") at 2, 4). Specifically, she

1 contends that the ALJ failed to “obtain evidence from a medical expert
2 to clarify the nature and severity of the claimant’s impairment” as
3 ordered by the Appeals Council and failed to comply with the Appeals
4 Council’s order to evaluate Plaintiff’s obesity. (Id.). This Court
5 disagrees with Plaintiff on both issues.

6
7 **A. Plaintiff’s Failure To Attend The Consultative Doctor Appointments**
8 **Compels A Negative Disability Determination**
9

10 Plaintiff contends that the ALJ erred in failing to obtain the
11 opinion of medical experts as to the severity of Plaintiff’s impairment.
12 (Complaint Memo. at 2). Upon remand from this Court, the Appeals
13 Council instructed the ALJ to obtain evidence from a medical expert to
14 clarify the nature and severity of the claimant’s impairment. (AR 703-
15 04). In response, the ALJ ordered two consultative examinations, one
16 neurological and one psychiatric. (AR 687-90). However, Plaintiff
17 failed to keep her appointments or respond to attempts to reschedule.
18 (AR 687-88, 751-52). Plaintiff does not dispute her failure to keep her
19 appointments, but claims that the ALJ erred in failing to obtain the
20 testimony of a medical expert based on the available medical records or
21 question Plaintiff regarding her failure to keep her appointments.
22 (Complaint Memo. at 3-4). This Court disagrees with Plaintiff on both
23 points.

24
25 The ALJ has an independent duty to “fully and fairly develop the
26 record to assure that [a plaintiff’s] interests are considered,” and may
27 schedule consultative examinations in order to fulfill this obligation.
28 Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996). However, Social

1 Security regulations state that if a claimant does not have a "good
2 reason" for failing or refusing to take part in consultative
3 examinations or tests arranged by the ALJ, then the ALJ may make a
4 negative disability determination based solely on their failure to
5 appear. 20 C.F.R. § 416.918(a) ("If you are applying for benefits and
6 do not have a good reason for failing or refusing to take part in a
7 consultative examination or test which we arrange for you to get
8 information we need to determine your disability or blindness, we may
9 find that you are not disabled."); see also Kreidler v. Barnhart, 385
10 F. Supp. 2d 1034, 1037 (C.D. Cal. 2005) ("Plaintiff's repeated failures
11 to attend the consultative examinations scheduled for her constitute a
12 failure to cooperate sufficient to warrant termination of her disability
13 benefits."); Keach v. Barnhart, 2004 WL 859331, at *6 (N.D. Cal. 2004)
14 ("an individual who refuses to attend a consultative examination may,
15 as a consequence, be found not disabled."). If a claimant has a good
16 reason for failing to appear, the Agency will reschedule the
17 examination. § 416.918. It is up to the claimant to provide good cause
18 for failing to appear at scheduled appointments. Id. An ALJ has no
19 obligation to search for an explanation for the claimant's failure to
20 appear. See id.

21
22 Here, Plaintiff failed to appear for either of the two consultative
23 examinations schedule by the ALJ and failed to respond to attempts to
24 reschedule. On August 5, 2008, the Agency notified Plaintiff of the
25 time and place of her consultative appointments. (AR 688, 753). On
26 September 4, 2008, the Agency sent Plaintiff a letter to remind her of
27 these appointments. (AR 752). When the Agency learned that Plaintiff
28 had failed to appear at the consultative examinations, (AR 688, 690,

1 751, 752), it sent Plaintiff and her legal representative a letter
2 regarding her failure to go to the scheduled appointments and instructed
3 her to call to reschedule. (AR 688, 752). There is no evidence that
4 Plaintiff attempted to reschedule the missed appointments. Neither
5 Plaintiff nor her attorney have established, or even attempted to argue,
6 that she had "good cause" for missing the scheduled appointments.
7 (See Complaint Memo. at 3-4). Therefore, the ALJ was entitled to deny
8 Plaintiff's application for benefits solely for this reason.

9
10 Furthermore, the ALJ fulfilled his duty to develop the record by
11 scheduling consultative examinations to evaluate Plaintiff's alleged
12 impairments. Although the Appeals Council ordered the ALJ to "[o]btain
13 evidence from a medical expert to clarify the nature and severity of the
14 claimant's impairment," (AR 704) the ALJ was prevented from doing so by
15 Plaintiff's failure to attend her scheduled examinations. (AR 690).
16 Based on the medical records that were available, the ALJ determined
17 that there was no ambiguity or inadequacy in the evidence that would
18 require him to conduct further inquiry. (AR 690-91). Because there was
19 no new medical evidence due to Plaintiff's failure to attend her
20 consultative examinations, it was unnecessary for the ALJ to take
21 further steps, such as call an additional medical expert. See
22 Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001) (stating that
23 the ALJ's duty to develop the record is triggered by ambiguous evidence
24 or the ALJ's finding that the record is inadequate for proper evaluation
25 of the evidence).

26
27 In sum, the ALJ was entitled to make a negative disability
28 determination based upon Plaintiff's failure to attend the consultative

1 examinations and her failure to offer any explanation or good cause for
2 missing those examinations. Moreover, the ALJ was not required to call
3 an additional medical expert because there was no new medical evidence
4 in the record due to Plaintiff's failure to attend her consultative
5 examinations. Accordingly, remand is not required.

6
7 **B. The ALJ Was Not Required To Analyze The Impact Of Plaintiff's**
8 **Obesity**

9
10 Plaintiff also contends that remand is required because the ALJ
11 failed to specifically address the limitations caused by Plaintiff's
12 obesity. (Complaint Memo. at 4).

13
14 As an initial matter, regardless of her impairments, the ALJ was
15 entitled to deny benefits as a sanction for Plaintiff's failure to
16 appear at her consultative examinations. See 20 C.F.R. § 416.918(a).
17 Accordingly, any error in failing to consider Plaintiff's obesity was
18 harmless. See Carmickle v. Comm'r, Social Sec. Admin., 533 F.3d 1155,
19 1162 (9th Cir. 2008) (holding that an ALJ's error in a Social Security
20 benefits hearing is harmless where it does not change the outcome of the
21 benefits determination).

22
23 Moreover, even without Plaintiff's missed appointments, the ALJ
24 only has the duty to independently consider Plaintiff's alleged obesity
25 when certain factors are met. See Celaya v. Halter, 332 F.3d 1177, 1182
26 (9th Cir. 2003). Obesity should be considered as a factor in a claim
27 of disability if it was implicitly raised by the plaintiff's reported
28 symptoms, clear from the record that the plaintiff's obesity was at

1 least close to the listing criterion and was a condition that would
2 exacerbate her reported illnesses, and, in light of the plaintiff's pro
3 se status, the ALJ's observation of the plaintiff and the information
4 on the record should have alerted him to the need to develop the record
5 in respect to her obesity. Id.

6
7 Plaintiff does not meet the Celaya requirements. Plaintiff did not
8 explicitly or implicitly allege obesity as a factor in her disability
9 claim. There was no evidence before the ALJ, and none in the record,
10 indicating that Plaintiff's weight limited her functioning in a way that
11 would require the ALJ to independently consider the impact of her
12 weight. See Burch v. Barnhart, 400 F.3d 676, 682 (9th Cir. 2002)
13 (stating that where the record was silent as to whether and how a
14 plaintiff's obesity might have exacerbated her condition, plaintiff did
15 not specify which listing she believed she would have met or equaled had
16 her obesity been considered, and she did not present other evidence at
17 the hearing that her obesity impaired her ability to work, then the ALJ
18 need not independently consider the impact of a plaintiff's obesity).
19 Indeed, at the time of the hearing, Plaintiff was not considered obese.
20 During the hearing she stated that she was 5'6" tall and weighed 180
21 pounds. (AR 1121). As Plaintiff notes in her brief, to be medically
22 obese, Plaintiff needed a "BMI" of 30.0 or above. (Complaint Memo. at
23 5). At 5'6' and 180 pounds, Plaintiff concedes that her BMI was 29.0,
24 which does not establish obesity. (Id.). Furthermore, Plaintiff was
25 represented by counsel at the second hearing, who did not seek to have
26 the ALJ address the impact of Plaintiff's obesity. (AR 1120); see also
27 Celaya, 332 F.3d at 1182.

28 \\

