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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

SHIRLEY L. LEWIS)	No. EDCV 10-00119 CW
)	
Plaintiff,)	DECISION AND ORDER
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner, Social)	
Security Administration,)	
)	
Defendant.)	
_____)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned magistrate judge. Plaintiff seeks review of the denial of disability benefits. As discussed below, the court finds that the Commissioner's decision should be reversed and this matter remanded for further proceedings.

I. BACKGROUND

Plaintiff Shirley L. Lewis was born on May 19, 1957, and was fifty-two years old at the time of her first administrative hearing. [AR 16.] She has completed three years of college and has past relevant work experience as an eligibility technician, fine jewelry

1 sales specialist, and flight attendant. [AR 57, 16.] Plaintiff
2 alleges disability on the basis of severe depression, anxiety, panic
3 attacks, severe hypertension, irritable bowel syndrome, spastic colon,
4 a tear in the esophagus, asthma, and high blood pressure. [AR 181.]

5 **II. PROCEEDINGS IN THIS COURT**

6 Plaintiff's complaint was filed on January 22, 2010. On July 21,
7 2010, Defendant filed an Answer and Plaintiff's Administrative Record
8 ("AR"). On October 8, 2010, the parties filed their Joint Stipulation
9 ("JS") identifying matters not in dispute, issues in dispute, the
10 positions of the parties, and the relief sought by each party. This
11 matter has been taken under submission without oral argument.

12 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

13 Plaintiff applied for a period of disability and disability
14 insurance benefits, alleging disability beginning April 30, 2001. [AR
15 11.] After the claim was denied initially and upon reconsideration,
16 Plaintiff requested an administrative hearing. Two hearings were held
17 on April 22, 2009, and June 12, 2009, before an Administrative Law
18 Judge ("ALJ"). [Id.] Plaintiff was represented by counsel at both
19 hearings. [Id.] Testimony was taken from Plaintiff, medical expert
20 Samuel Landau, and vocational expert Sandra M. Fioretti. [Id.] The ALJ
21 denied benefits in a decision issued on September 30, 2009. [AR 11-
22 21.] When the Appeals Council denied review on November 24, 2009, the
23 ALJ's decision became the Commissioner's final decision. [AR 1.]

24 **IV. STANDARD OF REVIEW**

25 Under 42 U.S.C. § 405(g), a district court may review the
26 Commissioner's decision to deny benefits. The Commissioner's (or
27 ALJ's) findings and decision should be upheld if they are free of
28 legal error and supported by substantial evidence. However, if the

1 court determines that a finding is based on legal error or is not
2 supported by substantial evidence in the record, the court may reject
3 the finding and set aside the decision to deny benefits. See Aukland
4 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
5 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
6 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
7 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
8 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
9 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

10 "Substantial evidence is more than a scintilla, but less than a
11 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
12 which a reasonable person might accept as adequate to support a
13 conclusion." Id. To determine whether substantial evidence supports
14 a finding, a court must review the administrative record as a whole,
15 "weighing both the evidence that supports and the evidence that
16 detracts from the Commissioner's conclusion." Id. "If the evidence
17 can reasonably support either affirming or reversing," the reviewing
18 court "may not substitute its judgment" for that of the Commissioner.
19 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

20 **V. DISCUSSION**

21 **A. THE FIVE-STEP EVALUATION FOR SUBSTANCE ABUSE**

22 To be eligible for disability benefits a claimant must
23 demonstrate a medically determinable impairment which prevents the
24 claimant from engaging in substantial gainful activity and which is
25 expected to result in death or to last for a continuous period of at
26 least twelve months. Tackett v. Apfel, 180 F.3d at 1098; Reddick v.
27 Chater, 157 F.3d at 721; 42 U.S.C. § 423(d)(1)(A).

28 Disability claims are evaluated using a five-step test:

1 Step one: Is the claimant engaging in substantial
2 gainful activity? If so, the claimant is found not
3 disabled. If not, proceed to step two.

4 Step two: Does the claimant have a "severe" impairment?
5 If so, proceed to step three. If not, then a finding of not
6 disabled is appropriate.

7 Step three: Does the claimant's impairment or
8 combination of impairments meet or equal an impairment
9 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
10 so, the claimant is automatically determined disabled. If
11 not, proceed to step four.

12 Step four: Is the claimant capable of performing his
13 past work? If so, the claimant is not disabled. If not,
14 proceed to step five.

15 Step five: Does the claimant have the residual
16 functional capacity to perform any other work? If so, the
17 claimant is not disabled. If not, the claimant is disabled.

18 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
19 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
20 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett v. Apfel, 180 F.3d at
21 1098-99; 20 C.F.R. § 404.1520, § 416.920. If a claimant is found
22 "disabled" or "not disabled" at any step, there is no need to complete
23 further steps. Tackett v. Apfel, 180 F.3d 1098; 20 C.F.R. § 404.1520.

24 Claimants have the burden of proof at steps one through four,
25 subject to the presumption that Social Security hearings are non-
26 adversarial, and to the Commissioner's affirmative duty to assist
27 claimants in fully developing the record even if they are represented
28 by counsel. Tackett v. Apfel, 180 F.3d at 1098 and n.3; Smolen v.
Chater, 80 F.3d at 1288. If this burden is met, a prima facie case of
disability is made, and the burden shifts to the Commissioner (at step
five) to prove that, considering residual functional capacity
("RFC")¹, age, education, and work experience, a claimant can perform

¹ Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to

1 other work which is available in significant numbers. Tackett v.
2 Apfel, 180 F.3d at 1098, 1100; Reddick v. Chater, 157 F.3d at 721; 20
3 C.F.R. § 404.1520, § 416.920.

4 However, "a finding of 'disabled' under the five-step inquiry
5 does not automatically qualify a claimant for disability benefits."
6 Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007)(quoting Bustamante
7 v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001)). A claimant is not
8 eligible to receive disability benefits if drug or alcohol addiction
9 is a "contributing factor material to the Commissioner's determination
10 that the individual is disabled." 42 U.S.C. § 423(d)(2)(C); 20 C.F.R.
11 §§ 404.1535(a), 416.935(a). The claimant bears the burden of proving
12 that drug or alcohol addiction is not a contributing factor material
13 to his or her disability. Parra v. Astrue, 481 F.3d at 748. If the
14 Commissioner finds that the claimant is disabled and has medical
15 evidence of the claimant's drug addiction or alcoholism, "the ALJ must
16 conduct a drug and alcoholism analysis ('DAA Analysis') by determining
17 which of the claimant's disabling limitations would remain if the
18 claimant stopped using drugs or alcohol." Id., 481 F.3d at 747; 20
19 C.F.R. §§ 404.1535(b)(2), 416.935(b)(2); see also Bustamante v.
20 Massanari, 262 F.3d at 954; Ball v. Massanari, 254 F.3d 817, 821 (9th
21 Cir. 2001); Sousa v. Callahan, 143 F.3d 1240, 1245 (9th Cir. 1998).
22 If the remaining limitations would still be disabling, then drug
23 addiction or alcohol is not a contributing factor material to his
24 disability. Parra v. Astrue, 481 F.3d at 747. If the remaining

25 _____
26 work without directly limiting strength, and include mental, sensory,
27 postural, manipulative, and environmental limitations. Penny v.
28 Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 limitations would not be disabling, then the claimant's substance
2 abuse is material and benefits must be denied. Id.

3 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

4 Here, the ALJ found that the Plaintiff had not engaged in
5 substantial gainful activity since her alleged disability onset date
6 (step one); that Plaintiff had the following "severe" impairments:
7 hypertension, fatty accumulation in the liver, right hip degenerative
8 disease, alcohol dependence, prescription drug abuse, depression, and
9 irritable bowel syndrome (step two); and that Plaintiff did not have
10 an impairment or combination of impairments that met or equaled a
11 listing (step three). [AR 13-14.] The ALJ determined that based on all
12 these impairments, including substance use disorders, Plaintiff has an
13 RFC for sedentary work, except she is unable to sustain an eight-hour
14 workday and a forty-hour workweek. [AR 16.] Plaintiff was unable to
15 perform her past relevant work (step four). [Id.] The vocational
16 expert testified that there are no jobs that exist in significant
17 numbers in the national economy which a person with Plaintiff's RFC
18 could perform (step five). [Id.]

19 The ALJ then considered whether Plaintiff would still be disabled
20 if she stopped her substance abuse. The ALJ found that Plaintiff
21 would continue to have a severe impairment or combination of
22 impairments, but would not have an impairment or combination of
23 impairments that meets or medically equals a listing. [AR 17.] The ALJ
24 determined that if Plaintiff's substance abuse discontinued, Plaintiff
25 would have an RFC to perform light work, except she is limited to
26 stand and/or walk for four hours of an eight-hour workday and sit six
27 hours of an eight-hour workday. Additionally, Plaintiff cannot climb
28 ramps, stairs, ladders, scaffolds or ropes frequently, cannot run

1 and/or jump, cannot work around dangerous and/or fast moving
2 machinery, and cannot operate motorized vehicles and/or equipment.
3 Plaintiff cannot work at unprotected heights or around fumes, odors
4 dust, gases or chemicals, and must be afforded an air conditioned work
5 place. Plaintiff cannot work at a high quota production, rate and/or
6 pace, cannot work where she is responsible for the safety of others,
7 and cannot perform work requiring hyper-vigilance. [AR 18.] The ALJ
8 concluded that if Plaintiff's substance abuse stopped, Plaintiff's
9 impairments would not preclude her from performing her past relevant
10 work as an eligibility technician (step four). [AR 21.] Accordingly,
11 Plaintiff was not found "disabled" as defined by the Social Security
12 Act. [Id.]

13 C. ISSUE IN DISPUTE

14 The parties' Joint Stipulation sets out a single disputed issue:
15 "Whether the ALJ has properly considered the relevant medical evidence
16 of record as it pertains to Plaintiff's mental impairments including
17 the effect if any of Plaintiff's substance use disorder." [JS 3.]

18 Plaintiff contends that the ALJ's finding regarding Plaintiff's
19 RFC without a substance use disorder was not supported by the record.
20 [JS 4.] Plaintiff contends that there is no basis within the record
21 from which to make a determination regarding the effect of alcohol or
22 prescription drug use on Plaintiff's mental conditions and resulting
23 RFC. [Id.] Plaintiff further alleges that the ALJ erred in failing to
24 obtain an assessment from a mental health examiner or expert regarding
25 the extent and severity of Plaintiff's mental limitations. [JS 6.]

26 Defendant contends that Plaintiff's failure to produce objective
27 evidence of functional limitations due to a mental impairment does not
28 trigger a responsibility for the ALJ to "create such evidence." [JS

1 9.] Defendant also asserts that the ALJ was entitled to draw an
2 inference that Plaintiff would have an RFC to perform a range of light
3 work activity without substance abuse, if it flowed logically from the
4 evidence. [JS 15.]

5 **Background**

6 Although the record provides sufficient evidence of Plaintiff's
7 physical and mental limitations, the record is sparse and conflicting
8 with regard to the effect of Plaintiff's alcohol and prescription drug
9 abuse. On February 22, 2007, Plaintiff was admitted to Menifee Valley
10 Medical Center with a two-day history of abdominal discomfort, nausea,
11 vomiting, and blood in her stools. [AR 313.] A consultation report
12 from the visit noted that Plaintiff has "significant alcohol
13 consumption [] in the past few months drinking about a pint or quart
14 of tequila . . . definitely an every day drinker and she was told to
15 quit alcohol. She also takes over the counter nonsteroidal anti[-
16]inflammatory agents in the form of Ecotrin." [Id.] The report also
17 noted that Plaintiff suffers from alcoholism and alcoholic liver
18 disease, and that chemical dependency counseling and alcohol
19 rehabilitation is required. [AR 314.] A physical exam report from the
20 same visit noted that Plaintiff drinks alcohol every day, and has an
21 alcohol dependency and ETOH abuse (referring to ethanol). Plaintiff
22 was counseled about her ethanol use and a rehabilitation program was
23 recommended. [AR 310-311.] The discharge record, dated March 15,
24 2007, diagnosed Plaintiff with ethyl alcohol use and alcoholic
25 hepatitis, which is inflammation of the liver due to excessive intake
26 of alcohol. This record also noted that Plaintiff has a "history of
27 ethyl alcohol use, [and] she drinks alcohol heavily." [AR 308.] It
28 also noted that "patient wanted to go for outpatient rehabilitation

1 program. She was advised to avoid aspirin, nonsteroidal anti-
2 inflammatory drugs and alcohol." [AR 309.] Plaintiff was admitted to
3 Menifee Valley Medical Center again approximately one year later, on
4 March 17, 2008, complaining of abdominal pain, nausea, vomiting and
5 diarrhea. [AR 400.] The report noted that Plaintiff "drinks half a
6 pint of alcohol every other day" and was "advised to avoid alcohol."
7 [AR 402.]

8 The remainder of the record does not clearly indicate Plaintiff's
9 medical history or functional capacity. Dr. John Harsany was
10 Plaintiff's personal physician prior to 2001. [AR 43.] During his
11 treatment, he prescribed medications to Plaintiff for her physical
12 problems, as well as psychiatric medications when she was not in
13 treatment with a psychiatrist. [AR 33-34.] Dr. Harsany's records
14 consist of various tests and client notes, most of which are
15 illegible, and do not provide any evidence of Plaintiff's functional
16 limitations. [AR 338-379.]

17 Plaintiff testified that Dr. Harsany advised her to see a
18 psychiatrist, and so he referred her to Dr. Prakashchondra Patel. [AR
19 32.] It is unclear when Dr. Patel began to treat Plaintiff, and for
20 how long. Plaintiff testified that she began seeing Dr. Patel in 2000
21 or 2001, but Dr. Patel's records include a New Patient Form as well as
22 other documents for Plaintiff dated June 14, 2005. [AR 43, 435, 442.]
23 Additionally, Plaintiff did not clearly indicate how long she was
24 actually treated by Dr. Patel. However, Plaintiff testified that she
25 switched from Dr. Patel to Dr. Cathy Chance, who began treating her in
26 approximately 2000. Plaintiff testified that she was treated by Dr.
27 Chance until 2008, but later testified that the treating relationship
28 lasted a little over a year. [AR 65, 32.]

1 Plaintiff's medical record was reviewed by the medical expert,
2 Dr. Samuel Landau for purposes of the administrative hearing. At the
3 first hearing, Dr. Landau opined that Plaintiff has a history of
4 asthma, hypertension, a fatty liver, mild degenerative arthritis of
5 the right hip, and psychiatric diagnoses. [AR 58.] Dr. Landau was not
6 consulted regarding Plaintiff's substance abuse and was not present at
7 the supplemental hearing. [AR 24.]

8 As previously stated, the only documents available from Dr. Patel
9 are a New Patient Form and assessment as well as a medication and
10 treatment record. [AR 436-442.] The only date on any of these records
11 is June 14, 2005. These documents indicate that Dr. Patel diagnosed
12 Plaintiff with "Major Depressive Disorder, recurrent severe without
13 psychotic features" and "panic disorder with agoraphobia." [AR 437.]
14 However, he also noted that Plaintiff was awake and oriented, had
15 normal speech, good concentration, her thought processes were goal
16 directed, and she was of average intelligence. [AR 439.] With regard
17 to alcohol, he noted that Plaintiff drinks one glass of wine in the
18 evening, and was previously admitted to the Betty Ford Clinic in 1994
19 for an alcohol dependency problem. [Id.]

20 There is little evidence in the record in the way of prescription
21 drug abuse other than the reference to nonsteroidal anti-inflammatory
22 drugs in the Menifee Valley Medical Center records. At the
23 supplemental hearing, the ALJ referenced a treatment note dated
24 September 13, 2007 indicating that "patient is using two (2)
25 pharmacies." [AR 46, 416.] Plaintiff claims this was in reference to
26 the fact that she and her husband were using two different pharmacies,
27 although the ALJ seemed doubtful because the notation was in
28 Plaintiff's own treatment records. [AR 46.]

1 **Discussion**

2 42 U.S.C. 423(d)(2)(c) provides that "an individual shall not be
3 considered to be disabled for purposes of this subchapter if
4 alcoholism or drug addiction would (but for this subparagraph) be a
5 contributing factor material to the Commissioner's determination that
6 the individual is disabled." If a finding of disability is made, the
7 materiality determination involves a process of separating the effects
8 of the substance abuse and its impact on any other impairments,
9 physical or mental. Bustamante v. Massanari, 262 F.3d at 955. The
10 claimant has the burden of proving that substance abuse is not a
11 contributing factor material to the finding of disability. Parra v.
12 Astrue, 481 F.3d at 749. Inconclusive evidence as to the issue of
13 materiality is insufficient to satisfy the claimant's burden of proof
14 under the Act. Id. On the other hand, the ALJ has a duty to fully
15 and fairly develop the record and to assure that the claimant's
16 interests are considered, even when the claimant is represented by
17 counsel. Celaya v. Halter, 332 F.3d 1177, 1183 (9th Cir. 2003); see
18 also Sousa v. Callahan, 143 F.3d at 1245 (remanding to give claimant
19 an opportunity to present evidence relevant to this issue).

20 In this case, the Commissioner's finding that substance abuse was
21 a contributing factor material to the finding of disability was not
22 supported by substantial evidence. As detailed above, the record is
23 inadequate to determine Plaintiff's limitations without her substance
24 abuse. For example, many of Plaintiff's limitations are psychological
25 and mental, whereas the only documented result of her alcohol
26 dependency is nausea, vomiting, and abdominal and rectal bleeding.
27 Additionally, Plaintiff's own testimony did not provide any indication
28 as to her abilities independent of the substance abuse. Although both

1 the ALJ and Plaintiff appeared to have made reasonable efforts to
2 secure more medical records from both Drs. Chance and Patel, they were
3 unable to do so. (AR 24, 60-61, 72-74, 398). Finally, although the
4 ALJ took the testimony of a medical expert, he offered no opinion as
5 to the effect of Plaintiff's substance abuse on her disability.
6 Accordingly, the record does not contain a clear statement from a
7 medical professional as to the effect on Plaintiff's claimed mental
8 impairment if she were to abstain from all substance abuse. Cf. Parra
9 v. Astrue, 481 F.3d at 750 (finding substantial evidence to support
10 finding of non-disability where medical expert testified that
11 abstinence generally ameliorates the effects of liver cirrhosis); see
12 also Tagger v. Astrue, 536 F. Supp. 2d 1170, 1181 (C.D. Cal. 2008)
13 (suggesting that ALJ solicit opinion from a treating physician and/or
14 have a medical expert testify about what limitations, if any, claimant
15 would continue to experience if his substance abuse ceased). Under
16 these circumstances, remand for further development of the record is
17 appropriate.

18 **D. REMAND FOR FURTHER PROCEEDINGS**

19 The decision whether to remand for further proceedings is within
20 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
21 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
22 further proceedings, or where the record has been fully developed, it
23 is appropriate to exercise this discretion to direct an immediate
24 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
25 remand for further proceedings turns upon their likely utility).
26 However, where there are outstanding issues that must be resolved
27 before a determination can be made, and it is not clear from the
28 record that the ALJ would be required to find the claimant disabled if

1 all the evidence were properly evaluated, remand is appropriate. Id.
2 Here, as set out above, outstanding issues remain before a finding of
3 disability can be made. Accordingly, remand is appropriate.

4 **VI. ORDERS**

5 Accordingly, **IT IS ORDERED** that:

6 1. The decision of the Commissioner is **REVERSED**.

7 2. This action is **REMANDED** to defendant, pursuant to Sentence
8 Four of 42 U.S.C. § 405(g), for further proceedings as discussed
9 above.

10 3. The Clerk of the Court shall serve this Decision and Order
11 and the Judgment herein on all parties or counsel.

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13 DATED: November 15, 2010



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15 CARLA M. WOHRLE
16 United States Magistrate Judge
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