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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

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|------------------------|---|------------------------------|
| MARGARET BELL CARLSEN, |) | Case No. EDCV 12-0234-MLG |
| |) | |
| Plaintiff, |) | MEMORANDUM OPINION AND ORDER |
| |) | |
| v. |) | |
| |) | |
| MICHAEL J. ASTRUE, |) | |
| Commissioner of the |) | |
| Social Security |) | |
| Administration, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Plaintiff Margaret Bell Carlsen seeks judicial review of the Commissioner's final decision denying her application for disability insurance benefits and for disabled widow's benefits. For the reasons stated below, the decision of the Commissioner is reversed, and the matter is remanded for further proceedings consistent with this opinion.

I. Background

Plaintiff was born on April 5, 1953, and was 55 years old at the time she filed her applications. (Administrative Record ("AR") at 146.) She has a high school education and past relevant work experience as a reservations agent. (AR at 151, 155.) Plaintiff filed her disability

1 insurance benefits and widow's benefits applications on June 12, 2008,
2 alleging disability beginning July 9, 2006, due to osteoporosis, a
3 spinal stress fracture and depression. (AR at 142, 150.)

4 Plaintiff's applications were denied initially on October 21, 2008,
5 and upon reconsideration on March 26, 2009. (AR at 82-86, 87-91.) An
6 administrative hearing was held on April 22, 2010, before Administrative
7 Law Judge ("ALJ") Michael D. Radensky. Plaintiff, represented by
8 counsel, testified, as did a Vocational Expert ("VE"). (AR at 43-77.)

9 On June 3, 2010, the ALJ issued an unfavorable decision. (AR at 22-
10 28.) He found that Plaintiff had not engaged in substantial gainful
11 activity since the disability onset date. (AR at 25.) The ALJ further
12 found that pursuant to 20 C.F.R. 416.920(c), the medical evidence
13 established that Plaintiff suffered from the following severe
14 impairments: degenerative disc disease of the lumbar spine, status post
15 compression fracture at L1, history of fracture of left tibia and
16 fibula, status post ORIF with intramedullary rodding, osteoporosis, and
17 atrial fibrillation. (Id.) However, the ALJ determined that Plaintiff's
18 impairments did not meet, or were not medically equal to, one of the
19 listed impairments in 20 C.F.R., Part 404, Subpart P, Appendix 1. (Id.)
20 The ALJ determined that Plaintiff retained the residual functional
21 capacity ("RFC") to:

22 perform light work as defined in 20 C.F.R. 416.967(b) except
23 she can lift and carry 20 pounds occasionally and 10 pounds
24 frequently, stand and walk for 2 hours of an 8-hour workday,
25 and sit for 6 hours with appropriate breaks. She can
26 occasionally perform postural activities.

27 (Id.)

28 //

1 The ALJ found that Plaintiff was capable of performing her past
2 relevant work as a reservationist and front desk clerk. Therefore, the
3 ALJ concluded that Plaintiff was not disabled within the meaning of the
4 Social Security Act. See 20 C.F.R. § 416.920(f). (Id.)

5 On January 20, 2012, the Appeals Council denied review. (AR at 1-
6 3.) Plaintiff then timely commenced this action for judicial review. On
7 September 6, 2012, the parties filed a Joint Stipulation ("Joint Stip.")
8 of disputed facts and issues. Plaintiff contends that the ALJ erred by
9 (1) improperly concluding that Plaintiff's mental impairment was not
10 severe and (2) failing to perform a proper credibility analysis. (Joint
11 Stip. at 4.) Plaintiff seeks reversal of the Commissioner's denial of
12 her applications and payment of benefits or, in the alternative, remand
13 for a new administrative hearing. (Joint Stip. at 23.) The Commissioner
14 requests that the ALJ's decision be affirmed. (Joint Stip. at 24.)

15 After reviewing the parties' respective contentions and the record
16 as a whole, the Court finds Plaintiff's contention regarding the ALJ's
17 non-severity finding to be meritorious and remands this matter for
18 further proceedings consistent with this opinion.¹

19
20 **II. Standard of Review**

21 Under 42 U.S.C. § 405(g), a district court may review the
22 Commissioner's decision to deny benefits. The Commissioner's or ALJ's
23 decision must be upheld unless "the ALJ's findings are based on legal
24 error or are not supported by substantial evidence in the record as a
25 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Batson*
26 *v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004);
27 *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
28

¹ The Court does not reach the remaining claim of error regarding the ALJ's credibility analysis and will not decide whether this issue would independently warrant relief.

1 means such evidence as a reasonable person might accept as adequate to
2 support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);
3 *Widmark v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more
4 than a scintilla, but less than a preponderance. *Robbins v. Soc. Sec.*
5 *Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). To determine whether
6 substantial evidence supports a finding, the reviewing court "must
7 review the administrative record as a whole, weighing both the evidence
8 that supports and the evidence that detracts from the Commissioner's
9 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If
10 the evidence can support either affirming or reversing the ALJ's
11 conclusion," the reviewing court "may not substitute its judgment for
12 that of the ALJ." *Robbins*, 466 F.3d at 882.

14 **III. Discussion**

15 The Court agrees with Plaintiff that remand is warranted based upon
16 the ALJ's erroneous finding that her mental impairment was non-severe,
17 because that decision is not supported by substantial evidence. The
18 existence of a severe impairment is demonstrated when the evidence
19 establishes that an impairment has more than a minimal effect on an
20 individual's ability to perform basic work activities. *Webb v. Barnhart*,
21 433 F.3d 683, 686-87 (9th Cir. 2005); *Smolen v. Chater*, 80 F.3d 1273,
22 1290 (9th Cir. 1996); 20 C.F.R. §§ 404.1521(a), 416.921(a). The
23 regulations define "basic work activities" as "the abilities and
24 aptitudes necessary to do most jobs," which include physical functions
25 such as walking, standing, sitting, pushing, carrying; capacities for
26 seeing, hearing and speaking; understanding and remembering simple
27 instructions; responding appropriately in a work setting; and dealing
28 with changes in a work setting. 20 C.F.R. § 404.1521(b). The inquiry at

1 this stage is "a de minimis screening device to dispose of groundless
2 claims." *Smolen*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137,
3 153-54 (1987)). An impairment is not severe *only* if it is a slight
4 abnormality with "no more than a minimal effect on an individual's
5 ability to work." See SSR 85-28; *Yuckert v. Bowen*, 841 F.2d 303, 306
6 (9th Cir. 1988). A "finding of no disability at step two" may only be
7 affirmed where there is a "total absence of objective evidence of severe
8 medical impairment." *Webb*, 433 F.3d at 688 (reversing a step two
9 determination "because there was not substantial evidence to show that
10 Webb's claim was 'groundless'").

11 Here, Plaintiff has offered sufficient evidence to demonstrate that
12 her mental impairment has more than a minimal effect on her ability to
13 perform work-related functions. Plaintiff testified at the
14 administrative hearing regarding her depression caused by her husband's
15 death and her chronic pain, her need to see a psychologist and
16 psychiatrist but her inability to afford their services, and her over
17 100 pound weight loss caused in part by her depression. (AR at 47, 50-
18 53.) In addition, the medical records indicate that Plaintiff had
19 consistently complained of depression and anxiety to her doctors
20 beginning in June 2007 and continuing through 2008. Plaintiff was
21 prescribed Lexapro² for her depression. (See, e.g. AR at 222, 233, 234,
22 235-36, 239, 241, 242, 243, 247, 253, 367, 370.) Plaintiff's medical
23 records documenting her ongoing mental health treatment as well as her
24 history of prescription medication used to treat mental health disorders
25 indicates a level of impairment that at least meets the "de minimis"
26 requirement at this stage of the inquiry. *Smolen*, 80 F.3d at 1290.

27
28 ² Lexapro is used to treat depression and generalized anxiety
disorder. <http://www.nlm.nih.gov>.

1 In addition, the consultative examining psychiatrist, Dr. Ana Maria
2 Andia, M.D. diagnosed Plaintiff with "bereavement, mood disorder
3 secondary to medical condition (chronic pain) with major depressive-like
4 features." (AR at 302.) Dr. Andia noted that Plaintiff's mood was
5 depressed and that she was "tearful throughout most of the interview."
6 (AR at 301.) Dr. Andia gave Plaintiff a Global Assessment of Functioning
7 ("GAF") score of 55, which indicates moderate symptoms or moderate
8 difficulty in social, occupational, or school functioning. (AR at 302.)

9 The ALJ found that Plaintiff's depression was not severe, primarily
10 relying on the fact that "the only psychiatric record is the
11 consultative examination and Dr. Andia who says she has bereavement, but
12 with no limitations." (AR at 26.) Although it is accurate that there
13 were no psychiatric records, the ALJ omitted the fact that Plaintiff
14 repeatedly stated in her medical records that she wished to see a
15 psychiatrist but could not afford one. The medical records also show
16 that Plaintiff went to Coos County Mental Health Services when she lived
17 in Oregon but that they apparently could not provide her any psychiatric
18 treatment. (AR at 338.) See *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th
19 Cir. 1996) (noting that "it is common knowledge that depression is one
20 of the most underreported illnesses in the country because those
21 afflicted with often do not recognize that their condition reflects a
22 potentially serious mental illness" and that "nearly 17 million adult
23 Americans suffer from depression in a given year and that two-thirds of
24 them do not get treatment").

25 Given the minimal threshold required to show that an impairment is
26 severe, the ALJ's determination that Plaintiff's mental impairment is
27 not severe was not supported by substantial evidence. The ALJ did not
28 sufficiently articulate any reason to reject Plaintiff's longitudinal

1 history of complaining to her medical providers of her depression as
2 well as her history of taking Lexapro for her depression. Nor does the
3 fact that there were no psychiatric records, without more, provide a
4 sufficient reason for finding Plaintiff's mental impairment nonsevere,
5 particularly given that Plaintiff repeatedly stated that she cannot
6 afford psychiatric care. Accordingly, the ALJ's non-severity finding at
7 step two of the evaluative process was not supported by substantial
8 evidence and warrants remand for further proceedings.

9 10 **IV. Conclusion**

11 The decision whether to remand for further proceedings is within
12 this Court's discretion. *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th
13 Cir. 2000). Where no useful purpose would be served by further
14 administrative proceedings, or where the record has been fully
15 developed, it is appropriate to exercise this discretion to direct an
16 immediate award of benefits. *Id.* at 1179; *Benecke v. Barnhart*, 379 F.3d
17 587, 593 (9th Cir. 2004). However, where there are outstanding issues
18 that must be resolved before a determination of disability can be made,
19 and it is not clear from the record that the ALJ would be required to
20 find the claimant disabled if all the evidence were properly evaluated,
21 remand is appropriate. *Bunnell v. Barnhart*, 336 F.3d 1112, 1115-16 (9th
22 Cir. 2003); see also *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir.
23 2003)(remanding case for reconsideration of credibility determination).

24 Here, the evidence shows a mental impairment that can be considered
25 "severe" within the meaning of the Social Security Regulations, but
26 which might not prevent Plaintiff from performing either her past work
27 or some work in the national economy. However, that is not a
28 determination that this Court can make. Accordingly, the case is

1 remanded for further evaluation in accordance with the five-step
2 sequential process.

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DATED: September 14, 2012

MARC L. GOLDMAN
Marc L. Goldman
United States Magistrate Judge