**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| GREGORY TOBIAS,<br><br>Plaintiff,<br><br>v.<br><br>CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY,<br><br>Defendant. | ED CV 13-1703-E<br><br><br><br>**MEMORANDUM OPINION**<br><br>**AND ORDER OF REMAND** |

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS HEREBY ORDERED that Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

**PROCEEDINGS**

Plaintiff filed a complaint on September 19, 2013, seeking review of the Commissioner's denial of disability benefits. The parties filed a consent to proceed before a United States Magistrate Judge on November 4, 2013. Plaintiff filed a motion for summary judgment on

March 7, 2014. Defendant filed a motion for summary judgment on May 8, 2014. The Court has taken the motions under submission without oral argument. See L.R. 7-15; Minute Order, filed September 25, 2013.

**BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

Plaintiff asserts disability since January 29, 2010, based in part on the allegedly deleterious mental effects of having suffered strokes (Administrative Record ("A.R.") 85-86, 92-95, 108-09). An Administrative Law Judge ("ALJ") found Plaintiff has the following severe impairments: "history of strokes; status-post mitral valve replacement surgery; residual left side weakness; hypertension; and ulcerative colitis" (A.R. 19). However, the ALJ found Plaintiff's alleged mental problems are not severe (A.R. 20-21). Purporting to consider all of Plaintiff's impairments, the ALJ found: (1) Plaintiff retains an unlimited mental residual functional capacity; (2) Plaintiff retains a limited physical residual functional capacity sufficient for a restricted range of light work (A.R. 22);[1] and (3) a

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[1] Specifically, the ALJ found:

> [C]laimant can lift and/or carry 20 pounds occasionally and 10 pounds frequently; he can stand and/or walk for six hours out of an eight-hour workday with customary breaks; he can sit for six hours out of an eight-hour workday with customary breaks; he is unlimited with respect to pushing and/or pulling, other than as indicated for lifting and/or carrying; the claimant can perform on a frequent basis reaching in all directions, handling and fingering with the left upper extremity; he is not limited in the use of the right upper extremity; the claimant must avoid extreme exposure to cold, heat, vibrations, dust, fumes, odors, gases, and areas of poor ventilation; he must avoid moving

(continued...)

person with Plaintiff's residual functional capacity could perform certain jobs identified by the vocational expert (A.R. 28; see A.R. 432-35).

In denying benefits, the ALJ rejected the opinion of consultative psychological examiner, Dr. Douglas W. Larson, to the extent Dr. Larson's opinion was inconsistent with the ALJ's residual functional capacity determination (A.R. 20-27). The Appeals Council considered additional evidence submitted after the ALJ's adverse decision but denied review (A.R. 6-9 (referencing A.R. 306-405)).

**STANDARD OF REVIEW**

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used correct legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner of Social Sec. Admin., 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted);

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[1](...continued)
machinery and heights; the claimant can occasionally balance, stoop, kneel, crouch and crawl; and he can climb ramps or stairs, but he cannot climb ladders, ropes and scaffolds.

(A.R. 22, 26-27).

see also Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

Where, as here, the Appeals Council considered additional evidence but denied review, the additional evidence becomes part of the record for purposes of the Court's analysis. See Brewes v. Commissioner, 682 F.3d at 1163 ("[W]hen the Appeals Council considers new evidence in deciding whether to review a decision of the ALJ, that evidence becomes part of the administrative record, which the district court must consider when reviewing the Commissioner's final decision for substantial evidence."; expressly adopting Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993)); Taylor v. Commissioner, 659 F.3d 1228, 1231 (2011) (courts may consider evidence presented for the first time to the Appeals Council "to determine whether, in light of the record as a whole, the ALJ's decision was supported by substantial evidence and was free of legal error"); Penny v. Sullivan, 2 F.3d 953, 957 n.7 (9th Cir. 1993) ("the Appeals Council considered this information and it became part of the record we are required to review as a whole"); see generally 20 C.F.R. §§ 404.970(b), 416.1470(b).

**DISCUSSION**

The Administration materially erred in connection with the evaluation of Plaintiff's alleged mental problems. Remand is appropriate.

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## I. Summary of the Medical Records Relevant to Plaintiff's Alleged Mental Problems

Consultative examining psychologist Dr. Larson prepared a report dated June 29, 2010 (A.R. 168-74). Plaintiff complained of anxiety, depression, and difficulty with memory and concentration (A.R. 168-69). Plaintiff reportedly quit his job in January 2010 in part because he had been having increasing difficulties with his memory (A.R. 168-69). On examination, Plaintiff's affect was "somewhat bland," consistent with a history of stroke (A.R. 17-72). At times, Plaintiff's "word choices were a bit off," his "[t]hought processes were mildly slow," and memory results showed "significant scatter from the low average to average range" (A.R. 170, 172). Full-scale IQ testing indicated Plaintiff has "average" intelligence (Score 92), with "low average" working memory (Score 80), and "borderline" processing speed (Score 79) (A.R. 171). These results were consistent with Plaintiff's history of stroke (A.R. 172). Plaintiff's memory testing indicated some "significant memory deficits from his baseline level" and "difficulty processing auditory materials at times" (A.R. 172). Trails testing showed "significant errors" on Trails B, which was "very inconsistent" with Plaintiff's work history, but consistent with Plaintiff's history of stroke (A.R. 172-73).

Dr. Larson diagnosed Plaintiff with a cognitive disorder, not otherwise specified, and assigned a Global Assessment of Functioning ("GAF") score of 55 because of the consequences of Plaintiff's strokes

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(A.R. 173).[2] Dr. Larson opined that Plaintiff would have mild limitations in his ability to: (1) understand, remember and complete simple commands; (2) interact appropriately with supervisors, co-workers or the public; and (3) comply with job rules such as safety and attendance (A.R. 174). According to Dr. Larson, Plaintiff would have moderate limitations in his ability to: (1) understand, remember and complete complex tasks; (2) respond to changes in the normal workplace setting; and (3) maintain persistence and pace in a normal workplace setting (A.R. 174).

Non-examining state agency physicians reviewed Dr. Larson's report, but opined that Plaintiff: (1) is capable of understanding, remembering, and carrying out simple one- and two-step tasks; (2) can maintain concentration, persistence, and pace throughout a normal workday/workweek as related to simple tasks; (3) is able to interact adequately with coworkers and supervisors but may have difficulty dealing with the demands of "general public contact"; and (4) is able to "make adjustments" and avoid hazards in the workplace (A.R. 182-83, 194, 196-98; see also A.R. 221-22). A non-examining reviewer's Psychiatric Review Technique form dated July 16, 2010, indicated that Plaintiff has a cognitive disorder, and would have mild restrictions

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[2] Clinicians use the GAF scale to report an individual's overall psychological functioning. The scale does not evaluate impairments caused by physical or environmental factors. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") 34 (4th Ed. 2000 (Text Revision)). A GAF score of 51-60 indicates "[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers)." Id.

in activities of daily living, moderate difficulties maintaining social functioning, and moderate difficulties maintaining concentration, persistence or pace (A.R. 185, 192). Other medical records document that Plaintiff has a history of "CVA" (cerebrovascular accident, i.e., stroke) in 2005 and 2007 (A.R. 159-60).

## II. Analysis

Social Security Ruling ("SSR") 85-28[3] governs the evaluation of whether an alleged impairment is "severe":

> An impairment or combination of impairments is found "not severe" . . . when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work . . . i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities. . . .
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> Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work

[3] Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990).

> activities, the sequential evaluation process should not end with the not severe evaluation step.
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> If such a finding [of non-severity] is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process. SSR 85-28 at 22-23.

See also Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996) (the severity concept is "a de minimis screening device to dispose of groundless claims"); accord Webb v. Barnhart, 433 F.3d 683, 686-87 (9th Cir. 2005).

In the present case, the medical evidence does not "clearly establish [ ]" the non-severity of Plaintiff's alleged mental problems. Rather, the medical evidence, including the opinion of an examining physician, appears to suggest that Plaintiff's alleged mental problems cause more than "minimal" effects on Plaintiff's mental ability to perform certain basic work activities. Yet, the ALJ not only found that Plaintiff has no severe mental impairment but also found that Plaintiff retains an unlimited mental residual functional capacity. The ALJ's findings violated SSR 85-28 and the Ninth Circuit authorities cited above.

The respect ordinarily owed to examining physicians' opinions buttresses the Court's conclusion that the ALJ erred. "The opinion of an examining physician is . . . entitled to greater weight than the opinion of a non-examining physician." Lester v. Chater, 81 F.3d 821,

830 (9th Cir. 1995); see also Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (consultative examiner opinion's based on independent examination of the claimant constitutes substantial evidence). The ALJ does not appear to have given great weight[4] to Dr. Larson's opinion that Plaintiff has significant mental limitations. Rather, the ALJ appears largely to have rejected Dr. Larson's opinion, stating the following reasons for this rejection: (1) the absence of evidence of "treatment for mental health issues"; (2) Plaintiff's own "Adult Function Report," which purportedly "showed that the claimant enjoy [sic] a full range of activities of daily living"; (3) "generally unremarkable" findings from mental status examinations; and (4) the ALJ's purported observation that, during the hearing, Plaintiff "did not demonstrate or manifest any difficulty concentrating" (A.R. 20-22, 24). These stated reasons are not supported by substantial evidence.

With regard to reason (1), the Ninth Circuit has observed that "it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation." Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996) (citations and quotations omitted). Perhaps more significantly in the present case, when the alleged mental impairments are the result of a stroke, there may be no efficacious treatment to address the impairments. See Trefcer v. Astrue, 2012 WL 2522147, at *4 (E.D. Cal. June 27, 2012) (observing there were no treatment records for claimant's stroke most likely because "any permanent effects of a

[4] The ALJ expressly gave "only some weight" to Dr. Larson's opinion (A.R. 21).

stroke would not be treatable") (citing http://www.webmd.com/stroke/guide/stroke-treatment-overview). Dr. Larson found that Plaintiff is impaired by deficits in Plaintiff's working memory and processing speed. See A.R. 170-73. Dr. Larson noted that Plaintiff might benefit from vocational rehabilitation for "other useful work" that would accommodate Plaintiff's limitations (A.R. 173-74). However, Dr. Larson did not suggest any kind of treatment that might improve Plaintiff's mental performance. Indeed, there is no medical opinion in the record suggesting that any effective treatment exists for Plaintiff's reported memory and processing speed deficits. The Administration cannot properly infer the nonexistence of the reported deficits from a failure to obtain ineffective or nonexistent treatment. See Lapierre-Gutt v. Astrue, 382 Fed. App'x 662, 664 (9th Cir. 2010) ("A claimant cannot be discredited for failing to pursue non-conservative treatment options where none exist.")

With regard to reason (2), the ALJ indicated that Plaintiff: (1) could perform certain household chores, although Plaintiff required more time than normal to perform these activities; (2) could read, draw, watch television, use a computer and play dominoes; and (3) reported no difficulty paying attention or "implementing" written or spoken instructions (A.R. 24). In fact, Plaintiff reported that he sometimes needs to be given spoken instructions two or three times (A.R. 131). In any event, Plaintiff's reported daily activities are not necessarily incompatible with Dr. Larson's opinion that Plaintiff is mentally limited due to significant deficits in memory and processing speed.

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With regard to reason (3), the ALJ's characterization of Dr. Larson's findings on examination as "generally unremarkable" constitutes a mischaracterization of the record. In fact, Dr. Larson found "significant" abnormalities. Dr. Larson found that Plaintiff exhibited "significant memory deficits from his baseline," "borderline" processing speed, difficulty processing auditory materials at times, and "significant errors" in trails testing, all of which were consistent with the effects of stroke. (A.R. 170-73 (emphasis added)). An ALJ's material mischaracterization of the record can warrant remand. See, e.g., Regennitter v. Commissioner, 166 F.3d 1294, 1297 (9th Cir. 1999).

Finally, with regard to reason (4), the ALJ's purported observation that Plaintiff "did not demonstrate or manifest any difficulty concentrating" during the hearing does not constitute substantial evidence under the circumstances of this case. An ALJ's reliance on his or her personal observations of a claimant at the hearing has sometimes been condemned as "sit and squirm" jurisprudence. See Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985); but see Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) ("Although this Court has disapproved of so-called 'sit and squirm' jurisprudence, the inclusion of the ALJ's personal observations does not render the decision improper.") (citations and internal quotations omitted). Cases condemning "sit and squirm" jurisprudence express a concern that the ALJ, who is not a medical expert, may substitute his or her own lay judgment in the place of a medical diagnosis. See, e.g., Graham v. Bowen, 786 F.2d 1113, 1115 (11th Cir. 1986) (ALJ improperly substituted his own opinion based on observations at the

hearing for the medical evidence presented); Van Horn v. Schweiker, 717 F.2d 871, 874 (3d Cir. 1983) (addressing the "roundly condemned 'sit and squirm' method of deciding disability," and stating that "an ALJ is not free to set his own expertise against that of physicians who present competent medical evidence") (citations omitted); compare Nyman v. Heckler, 779 F.2d 528, 531 & n.1 (9th Cir. 1985) (finding no error where the ALJ's "observation of [the claimant's] demeanor was relevant to his credibility and was not offered or taken as a substitute for medical diagnosis"). The reported fact that Plaintiff appeared to the ALJ to be able to concentrate and respond timely to questioning at the hearing is no substitute for the objective tests Dr. Larson performed, and provides scant support for the ALJ's ultimate conclusion that Plaintiff is not disabled.

The Court is unable to deem the above-discussed errors to have been harmless. The residual functional capacity the ALJ adopted and included in the hypothetical questioning of the vocational expert assumed that Plaintiff has no mental limitations whatsoever. See A.R. 22, 432-35. The vocational expert did not testify whether there would be any jobs performable by a person having significant mental limitations in combination with Plaintiff's significant physical limitations. See A.R. 432-39.

Because the circumstances of this case suggest that further administrative review could remedy the ALJ's errors, remand is appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of an administrative determination, the proper course is remand for

additional agency investigation or explanation, except in rare circumstances).

**CONCLUSION**

For all of the foregoing reasons,[5] Plaintiff's and Defendant's motions for summary judgment are denied and this matter is remanded for further administrative action consistent with this Opinion.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 30, 2014.

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CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

[5] The Court has not reached any other issue raised by Plaintiff except insofar as to determine that reversal with a directive for the immediate payment of benefits would not be appropriate at this time.