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

OSCAR C. VALLEJO,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social
Security Administration,

Defendant.

Case No. EDCV 15-0499 SS

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

Oscar C. Vallejo ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying his application for 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

1 REVERSED and REMANDED for further administrative proceedings
2 consistent with this decision.

3
4 **II.**

5 **PROCEDURAL HISTORY**

6
7 On October 27, 2011, Plaintiff filed an application for SSI,
8 claiming that he became disabled on January 21, 1991.
9 (Administrative Record ("AR") 79-88; see also AR 31-32).
10 Plaintiff based his alleged disability on psychomotor
11 retardation, severe neck pain, severe left shoulder pain, severe
12 upper back pain, severe lower back pain, severe head pains,
13 diverticulosis, and dysthymia. (AR 103). The Agency denied
14 Plaintiff's application on May 24, 2012 (AR 38-42) and upon
15 reconsideration on November 29, 2012. (AR 43-37).

16
17 Plaintiff requested a hearing, which was held before
18 Administrative Law Judge ("ALJ") Jay E. Levine on February 5,
19 2014. (AR 285-303). Vocational expert ("VE") Joseph Torres also
20 testified. (AR 299-302). On July 29, 2014, the ALJ issued an
21 unfavorable decision. (AR 14-23). Plaintiff sought review
22 before the Appeals Council (AR 9), which the Council denied on
23 January 26, 2015. (AR 5-7). The ALJ's determination thus became
24 the final decision of the Commissioner. Plaintiff filed the
25 instant action on March 16, 2015.

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1 III.

2 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

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

15
16 To decide if a claimant is entitled to benefits, an ALJ
17 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.
18 The steps are:

- 19
- 20 (1) Is the claimant presently engaged in substantial
21 gainful activity? If so, the claimant is found
22 not disabled. If not, proceed to step two.
 - 23 (2) Is the claimant's impairment severe? If not, the
24 claimant is found not disabled. If so, proceed
25 to step three.
 - 26 (3) Does the claimant's impairment meet or equal one
27 of the specific impairments described in 20
28

1 C.F.R. Part 404, Subpart P, Appendix 1? If so,
2 the claimant is found disabled. If not, proceed
3 to step four.

4 (4) Is the claimant capable of performing his past
5 work? If so, the claimant is found not disabled.
6 If not, proceed to step five.

7 (5) Is the claimant able to do any other work? If
8 not, the claimant is found disabled. If so, the
9 claimant is found not disabled.

10

11 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
12 262 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20
13 C.F.R. §§ 404.1520(b)-(g) (1) & 416.920(b)-(g) (1).

14

15 The claimant has the burden of proof at steps one through
16 four, and the Commissioner has the burden of proof at step five.
17 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
18 affirmative duty to assist the claimant in developing the record
19 at every step of the inquiry. Id. at 954. If, at step four, the
20 claimant meets his burden of establishing an inability to perform
21 past work, the Commissioner must show that the claimant can
22 perform some other work that exists in "significant numbers" in
23 the national economy, taking into account the claimant's residual
24 functional capacity ("RFC"), age, education, and work experience.
25 Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20
26 C.F.R. §§ 404.1520(g) (1), 416.920(g) (1). The Commissioner may do
27 so by the testimony of a VE or by reference to the Medical-

28

1 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,
2 Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel,
3 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both
4 exertional (strength-related) and non-exertional limitations, the
5 Grids are inapplicable and the ALJ must take VE testimony. Moore
6 v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing Burkhart v.
7 Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).

8
9 **IV.**

10 **THE ALJ'S DECISION**

11
12 The ALJ employed the five-step sequential evaluation
13 process. At step one, the ALJ found that Plaintiff had not
14 engaged in substantial gainful employment since October 27, 2011,
15 the application date. (AR 16). At step two, the ALJ found that
16 Plaintiff had the severe impairments of lumbosacral myofascial
17 strain and depression not otherwise specified with lower average
18 intellectual ability. (Id.).

19
20 At step three, the ALJ found that Plaintiff did not have an
21 impairment or combination of impairments that met or medically
22 equaled the severity of an impairment listed in 20 C.F.R. Part
23 404, Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925,
24 404.926). (AR 16-17). The ALJ then found that Plaintiff had the
25 RFC to "to perform medium work as defined in 20 CFR 416.967(c)
26 except [Plaintiff] is limited to frequently climb[ing] ramps and
27 stairs, but he can occasionally stoop and bend; [and] he can
28

1 occasionally lift above the shoulder level with either upper
2 extremity.” (Id.).

3
4 At step four, the ALJ found that Plaintiff has no past
5 relevant work. (AR 22). At step five, the ALJ found that,
6 considering Plaintiff's age, education, work experience and RFC,
7 he could perform jobs that exist in significant numbers in the
8 national economy. (Id.). Based on the VE's testimony, the ALJ
9 concluded that Plaintiff could perform the requirements of
10 laundry worker, hand packager, and dining room attendant. (AR
11 22-23). Accordingly, the ALJ found that Plaintiff was not
12 disabled. (AR 23).

13
14 **V.**

15 **STANDARD OF REVIEW**

16
17 Under 42 U.S.C. § 405(g), a district court may review the
18 Commissioner's decision to deny benefits. The court may set the
19 decision aside when the ALJ's findings are based on legal error
20 or are not supported by substantial evidence in the record as a
21 whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001)
22 (citing Tackett, 180 F.3d at 1097). “Substantial evidence is
23 more than a scintilla, but less than a preponderance.” Reddick,
24 157 F.3d at 720 (citing Jamerson v. Chater, 112 F.3d 1064, 1066
25 (9th Cir. 1997)). It is “relevant evidence which a reasonable
26 person might accept as adequate to support a conclusion.” Id.

1 (citing Jamerson, 112 F.3d at 1066; Smolen v. Chater, 80 F.3d
2 1273, 1279 (9th Cir. 1997)).

3
4 To determine whether substantial evidence supports a
5 finding, the court must “consider the record as a whole,
6 weighing both evidence that supports and evidence that detracts
7 from the [Commissioner’s] conclusion.” Aukland, 257 F.3d at
8 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.
9 1993)). If the evidence can reasonably support either affirming
10 or reversing that conclusion, the court may not substitute its
11 judgment for the Commissioner’s. Reddick, 157 F.3d at 720-21
12 (citing Flaten v. Sec’y, 44 F.3d 1453, 1457 (9th Cir. 1995)).

13
14 **VI.**

15 **DISCUSSION**

16
17 **A. Plaintiff’s Hearing Loss Is A Severe Impairment**

18
19 Among Plaintiff’s contentions is that the ALJ erred in
20 failing to consider that his hearing loss was a severe
21 impairment, and thus the VE’s testimony that Plaintiff could
22 perform the occupations of laundry worker, hand packager, and
23 dining room attendant was error. ((Plaintiff’s Memorandum in
24 Support of Complaint (the “MSC”), Dkt. No. 18, at 9-12). The
25 Court agrees in this respect.

1 By its own terms, the evaluation at step two is a de minimis
2 test intended to weed out the most minor of impairments. See
3 Bowen v. Yuckert, 482 U.S. 137, 153-54 (1987); Edlund v.
4 Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001) (quoting Smolen,
5 80 F.3d at 1290) (stating that the step two inquiry is a de
6 minimis screening device to dispose of groundless claims). An
7 impairment is not severe only if the evidence establishes "a
8 slight abnormality that has no more than a minimal effect on an
9 individual['s] ability to work." Smolen, 80 F.3d at 1290
10 (internal quotations marks omitted). Here, although the ALJ
11 discussed Plaintiff's audiological evaluation in his decision (AR
12 20), he did not discuss whether Plaintiff's hearing loss
13 constituted a severe impairment; nor did the ALJ include any
14 limitations in the RFC due to hearing loss. The Court finds that
15 the ALJ's failure to do so was error because substantial evidence
16 existed in the record to demonstrate that Plaintiff's hearing
17 loss was severe.

18
19 A January 15, 2014 audiological evaluation revealed that
20 Plaintiff had "[t]innitus [in] both ears for several years with
21 hearing loss" and an audiometry testing showed "[m]ild
22 sensorineural loss." (AR 261-62). As a result, Plaintiff was
23 referred to "IEHP hearing aid dispenser for hearing aids."
24 (Id.). These records constitute significant medical evidence to
25 demonstrate that Plaintiff's hearing was impaired. 20 C.F.R.
26 § 416.927(a)(2) ("Medical opinions . . . that reflect judgments
27 about the nature and severity of [a plaintiff's] impairment(s),
28

1 including symptoms, diagnosis and prognosis," are evidence that a
2 plaintiff may submit in support of his disability claim).
3 Accordingly, the ALJ applied more than a de minimis test at step
4 two concerning Plaintiff's hearing impairment and the error
5 cannot be considered harmless as it impacted the remainder of the
6 five-step process.

7
8 Upon remand, the ALJ must reevaluate Plaintiff's RFC with
9 the finding that Plaintiff's hearing loss is a severe impairment,
10 in which case additional testimony from a VE will be needed to
11 determine what work, if any, Plaintiff can perform.

12
13 **B. The ALJ Failed To Identify The Specific Testimony He Found**
14 **Not Credible**

15
16 In order to reject Plaintiff's subjective testimony, the ALJ
17 must make specific findings stating clear and convincing reasons
18 for rejecting the testimony. Smolen, 80 F.3d at 1281. The ALJ
19 "must identify what testimony is not credible and what evidence
20 undermines the claimant's complaints." Lester v. Chater, 81 F.3d
21 821, 834 (9th Cir. 1996).

22
23 The ALJ summarized Plaintiff's subjective testimony and
24 other statements by Plaintiff in the record. (AR 18). He then
25 summarized the medical evidence. (Id.). However, while the ALJ
26 briefly notes Plaintiff's general pain testimony (AR 19), he does
27 not identify specifically which allegations of disabling symptoms
28

1 he finds not credible and what evidence specifically undermines
2 those complaints. On remand, the ALJ shall more specifically
3 identify the testimony that the ALJ finds not credible and the
4 evidence that undermines that particular testimony.

5
6 **VII.**

7 **CONCLUSION**

8
9 Accordingly, IT IS ORDERED that judgment be entered
10 REVERSING the decision of the Commissioner and REMANDING this
11 matter for further proceedings consistent with this decision. IT
12 IS FURTHER ORDERED that the Clerk of the Court serve copies of
13 this Order and the Judgment on counsel for both parties.

14
15 DATED: December 30, 2015

16
17 /s/
18 SUZANNE H. SEGAL
19 UNITED STATES MAGISTRATE JUDGE

20 **NOTICE**

21 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS/NEXIS,**
22 **WESTLAW OR ANY OTHER LEGAL DATABASE.**