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

PATRECIA P.)	NO. SA CV 18-1589-E
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
NANCY A. BERRYHILL, Acting)	AND ORDER OF REMAND
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

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 6, 2018, seeking review
of the Commissioner's denial of benefits. The parties filed a consent
to proceed before a United States Magistrate Judge on October 1, 2018.
Plaintiff filed a motion for summary judgment on January 14, 2019.

1 Defendant filed a motion for summary judgment (entitled a "Memorandum
2 in Support of Defendant's Answer") on April 3, 2019. The Court has
3 taken both motions under submission without oral argument. See L.R.
4 7-15; "Order," filed September 11, 2018.

6 **BACKGROUND**

7
8 Plaintiff, a former certified nurse assistant and staffing
9 coordinator, alleges disability since June 26, 2013, based on, inter
10 alia, claimed mental impairments (Administrative Record ("A.R.") 37,
11 54, 477, 484, 493, 514, 634, 655, 1109). Plaintiff claims
12 significant, progressively worsening mental impairments following a
13 June, 2013 motor vehicle accident in which she suffered a serious head
14 injury (id.). Plaintiff testified she has "word-finding issues,"
15 anxiety, depression, memory problems and an inability to concentrate
16 (A.R. 477-500). Plaintiff earlier reported similar mental problems to
17 her licensed clinical social worker (A.R. 1621). An EEG revealed
18 moderate left temporal dysfunction and mild right temporal dysfunction
19 (A.R. 1110). Dr. Christopher A. Pierce, an examining
20 neuropsychologist, observed: "[I]t is clear that [Plaintiff] suffers
21 from considerable emotional distress with a great deal of anxiety and
22 some modest transitory symptoms of depression" (A.R. 1260). Dr.
23 Pierce diagnosed "history of head injury," "anxiety disorder," and
24 "depressive disorder." Id. Dr. Pierce recommended individual
25 psychotherapy and a psychiatric evaluation. Id. Dr. Pierce also
26 administered certain neuropsychological tests, the results of which
27 Dr. Pierce deemed invalid (A.R. 1259). Plaintiff "performed at least
28 adequately" on some of Dr. Pierce's tests, however, and those tests

1 reflected below average "executive functions," a severe level of
2 anxiety symptoms, a moderate level of depressive symptoms and a
3 moderate level of feelings of hopelessness (A.R. 1259). Dr. Allen J.
4 Fearey, a treating physician, included "memory loss" as among the
5 reasons Dr. Fearey believed that Plaintiff could not perform any
6 gainful employment (A.R. 1109). By contrast, a non-examining state
7 agency physician opined Plaintiff has no medically determinable mental
8 impairment whatsoever (A.R. 537-38).

9
10 In evaluating Plaintiff's alleged mental impairments, the ALJ
11 expressly declined to order a consultative examination of Plaintiff
12 (A.R. 40). Without further record development, the ALJ found
13 Plaintiff's mental impairments medically determinable, but not severe
14 (A.R. 43). The ALJ assessed a limited physical residual functional
15 capacity but an unlimited mental residual functional capacity (A.R.
16 45). The ALJ determined that a person having this capacity could
17 perform Plaintiff's past relevant work as a staffing coordinator (A.R.
18 54). The ALJ's decision finding Plaintiff not disabled is dated June
19 21, 2017 (A.R. 55).

20
21 Plaintiff submitted additional medical evidence to the Appeals
22 Council while seeking review of the ALJ's decision (A.R. 1-24). The
23 Appeals Council made some of this additional evidence part of the
24 administrative record (id.).

25
26 The additional evidence made part of the administrative record
27 included a "Neuropsychological Evaluation Report" based on testing
28 occurring in October-November of 2017 (A.R. 8-17). In this report,

1 Dr. Julia Evans, a licensed clinical psychologist, found significant
2 cognitive deficits "likely related" to Plaintiff's 2013 motor vehicle
3 accident (A.R. 13). The testing results, which Dr. Evans deemed
4 valid, revealed significant deficits in processing speed, language,
5 learning, memory and executive functioning (A.R. 12). Dr. Evans
6 determined that Plaintiff met the criteria for major neurocognitive
7 disorder and recommended, among other things, that Plaintiff receive
8 "supervision" at least part of the time (A.R. 13-14).

9
10 Defendant concedes that, in the present case, the Appeals Council
11 considered the "Neuropsychological Evaluation Report" (Defendant's
12 Motion at 6). The Appeals Council nevertheless denied review (A.R. 1-
13 3). The Appeals Council apparently disagreed with Dr. Evans'
14 conclusion that the "Neuropsychological Evaluation Report" confirmed
15 the existence of significant mental impairments "likely related" to
16 Plaintiff's 2013 motor vehicle accident. The Appeals Council stated
17 rather that the report did not "relate to the period at issue" and did
18 not "affect the decision about whether [Plaintiff was] disabled
19 beginning on or before June 21, 2017" (A.R. 2).

20 21 **STANDARD OF REVIEW**

22
23 Under 42 U.S.C. section 405(g), this Court reviews the
24 Administration's decision to determine if: (1) the Administration's
25 findings are supported by substantial evidence; and (2) the
26 Administration used correct legal standards. See Carmickle v.
27 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,
28 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,

1 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such
2 relevant evidence as a reasonable mind might accept as adequate to
3 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401
4 (1971) (citation and quotations omitted); see also Widmark v.
5 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

6
7 Where, as here, the Appeals Council "considers new evidence in
8 deciding whether to review a decision of the ALJ, that evidence
9 becomes part of the administrative record, which the district court
10 must consider when reviewing the Commissioner's final decision for
11 substantial evidence." Brewes v. Commissioner, 682 F.3d at 1163. "As
12 a practical matter, the final decision of the Commissioner includes
13 the Appeals Council's denial of review, and the additional evidence
14 considered by that body is evidence upon which the findings and
15 decision complained of are based." Id. (citations and quotations
16 omitted).¹ Thus, this Court reviews the newly submitted
17 "Neuropsychological Evaluation Report," not under sentence six of 42

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25 ¹ And yet, the Ninth Circuit sometimes had stated that
26 there exists "no jurisdiction to review the Appeals Council's
27 decision denying [the claimant's] request for review." See,
28 e.g., Taylor v. Commissioner, 659 F.3d 1228, 1233 (9th Cir.
2011); see also Warner v. Astrue, 859 F. Supp. 2d 1107, 1115 n.10
(C.D. Cal. 2012) (remarking on the seeming irony of reviewing an
ALJ's decision in the light of evidence the ALJ never saw).

1 U.S.C. section 405(g), but under sentence four thereof.²

2
3 **DISCUSSION**

4
5 Social Security Ruling ("SSR") 85-28 governs the evaluation of
6 whether an alleged impairment is "severe":

7
8 An impairment or combination of impairments is found "not
9 severe" . . . when medical evidence establishes only a
10 slight abnormality or a combination of slight abnormalities
11 which would have no more than a minimal effect on an
12 individual's ability to work . . . i.e., the person's
13 impairment(s) has no more than a minimal effect on his or
14 her physical or mental ability(ies) to perform basic work
15 activities.

16
17 If such a finding [of non-severity] is not clearly
18 established by medical evidence, however, adjudication must
19 continue through the sequential evaluation process.

20
21 * * *

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25 ² A reviewing court also may consider new evidence made a
26 part of the administrative record where the Appeals Council
27 should have considered such evidence but failed to do so. See
28 Taylor v. Commissioner, 659 F.3d at 1232-33 (Appeals Council
erroneously failed to consider newly submitted evidence; Ninth
Circuit considered the new evidence in reversing administrative
decision).

1 Great care should be exercised in applying the not severe
2 impairment concept. If an adjudicator is unable to
3 determine clearly the effect of an impairment or combination
4 of impairments on the individual's ability to do basic work
5 activities, the sequential evaluation process should not end
6 with the not severe evaluation step. Rather, it should be
7 continued.

8
9 SSR 85-28 at *3-4;³ see also Smolen v. Chater, 80 F.3d 1273, 1290
10 (9th Cir. 1996) (the severity concept is "a de minimis screening
11 device to dispose of groundless claims"); accord Webb v. Barnhart, 433
12 F.3d 683, 686-87 (9th Cir. 2005).

13
14 In the present case, the Court's review of the record concludes
15 that the medical evidence does not "clearly establish" the
16 non-severity of Plaintiff's alleged mental impairments. Especially in
17 light of the "Neuropsychological Evaluation Report," this conclusion
18 is nearly inescapable. Although the record contains conflicting
19 evidence regarding the severity of Plaintiff's mental problems, no
20 such conflict "clearly establish[es]" the non-severity of those
21 problems during the relevant time frame. At a minimum, therefore, the
22 Administration's "non-severity" finding violated SSR 85-28 and the
23 Ninth Circuit authorities cited above. See id.; see also Nguyen v.
24 Chater, 100 F.3d 1462, 1465 (9th Cir. 1996) ("it is a questionable
25 practice to chastise one with a mental impairment for the exercise of

26
27 ³ Social Security rulings are binding on the
28 Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1
(9th Cir. 1990).

1 poor judgment in seeking rehabilitation") (citation and quotations
2 omitted).

3
4 Respondent argues that the Administration's non-severity finding
5 was harmless because the Administration was required to consider even
6 non-severe medically determinable impairments when assessing
7 Plaintiff's residual functional capacity. The Court is unable to find
8 the error harmless under the circumstances of the present case.

9
10 First, the Administration further erred by failing fully and
11 fairly to develop the record concerning Plaintiff's alleged mental
12 impairments. "The ALJ has a special duty to fully and fairly develop
13 the record to assure that the claimant's interests are considered.
14 This duty exists even when the claimant is represented by counsel."
15 Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983); accord Garcia v.
16 Commissioner, 768 F.3d 925, 930 (9th Cir. 2014); see also Sims v.
17 Apfel, 530 U.S. 103, 110-11 (2000) ("Social Security proceedings are
18 inquisitorial rather than adversarial. It is the ALJ's duty to
19 investigate the facts and develop the arguments both for and against
20 granting benefits. . . ."); Widmark v. Barnhart, 454 F.3d at 1068
21 (while it is a claimant's duty to provide the evidence to be used in
22 making a residual functional capacity determination, "the ALJ should
23 not be a mere umpire during disability proceedings") (citations and
24 internal quotations omitted). The Administrations's duty to develop
25 the record is "especially important" "in cases of mental impairments."
26 DeLorme v. Sullivan, 924 F.2d 841, 849 (9th Cir. 1991). Given the
27 evidence in the record, including the reported invalidity of the
28 initial neuropsychological testing, the Administration should have

1 ordered a consultative examination of Plaintiff by a mental health
2 professional. See id.

3
4 Second, the newly submitted evidence suggests that fuller
5 development of the record might well have altered the residual
6 functional capacity assessment so as to include at least some mental
7 limitations. See Taylor v. Commissioner, 659 F.3d at 1233
8 (appropriate to remand for the ALJ to reconsider the decision in light
9 of new and material evidence submitted to the Appeals Council and made
10 a part of the record); see also Gardner v. Berryhill, 856 F.3d 652,
11 658 (9th Cir. 2017) (“we have affirmed district court denials of
12 remand notwithstanding the existence of new evidence only when there
13 would be substantial evidence supporting the ALJ’s denial of
14 disability benefits even if the new evidence were credited and
15 interpreted as argued by the claimant”); see generally McLeod v.
16 Astrue, 640 F.3d 881, 887 (9th Cir. 2011) (error not harmless where
17 “the reviewing court can determine from the circumstances of the case
18 that further administrative review is needed to determine whether
19 there was prejudice from the error”) (citations and quotations
20 omitted).

21
22 Remand is appropriate because the circumstances of this case
23 suggest that further development of the record and further
24 administrative review could remedy the Administration’s errors.
25 McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura, 537 U.S.
26 12, 16 (2002) (upon reversal of an administrative determination, the
27 proper course is remand for additional agency investigation or
28 explanation, except in rare circumstances); Dominguez v. Colvin, 808

