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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONNA N. BROOKS-HENRIQUEZ,

Plaintiff,

No. CIV S-06-1866 DAD

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,¹

ORDER

Defendant.

_____ /

This social security action was submitted to the court, without oral argument, for ruling on plaintiff’s motion for remand and defendant’s cross-motion for summary judgment. For the reasons explained below, the court concludes that the decision of the Commissioner of Social Security (“Commissioner”) must be affirmed.

PROCEDURAL BACKGROUND

This action concerns plaintiff Donna Nell Brooks-Henriquez’s second application for Supplemental Security Income (SSI) under Title XVI of the Social Security Act (the Act).

Plaintiff previously applied for SSI on January 20, 1999, alleging disability since January 15, 1999. Her application was denied initially and on reconsideration. At plaintiff’s

_____ ¹ Michael J. Astrue has been substituted for Jo Anne B. Barnhart as defendant in this suit pursuant to 42 U.S.C. § 405(g) and Fed. R. Civ. P. 25(d)(1).

1 request, a hearing was held before an administrative law judge (“ALJ”) on December 6, 2000, at
2 which time plaintiff was represented. In a decision issued on April 24, 2001, ALJ L. Kalei Fong
3 determined that plaintiff was not disabled. The ALJ made the following findings: plaintiff had
4 not engaged in substantial gainful activity since the alleged onset of disability; plaintiff had
5 severe impairments; plaintiff’s medically determinable impairments did not meet or medically
6 equal any listed impairment; plaintiff’s allegations regarding her limitations were not totally
7 credible; plaintiff had the residual functional capacity to lift 20 pounds occasionally and 10
8 pounds frequently, to walk and/or stand for six hours, to sit for six hours, to perform postural
9 activities occasionally, except for climbing ropes, ladders and scaffolds, and to perform simple
10 repetitive tasks, i.e., unskilled work, with infrequent direct contact with co-workers and the
11 public; plaintiff’s past relevant work as a telephone clerk or telemarketer did not require
12 performance of work-related activities precluded by her residual functional capacity; plaintiff’s
13 dysthymia, neck and back pain, and pain disorder did not prevent her from performing past
14 relevant work; plaintiff was not under a “disability” as defined in the Social Security Act at any
15 time through the date of the decision. The ALJ’s decision became the Commissioner’s final
16 decision when the Appeals Council denied plaintiff’s request for review on August 9, 2002.
17 Plaintiff sought judicial review by filing her complaint in the action entitled Brooks-Henriquez v.
18 Barnhart, Case No. CIV S-02-2317 DAD, on October 22, 2002. By order filed March 23, 2004,
19 the undersigned denied plaintiff’s motion for summary judgment, granted defendant’s motion for
20 summary judgment, and affirmed the Commissioner’s final decision.²

21 Plaintiff filed a new application for SSI on January 23, 2004, alleging disability
22 since September 15, 1998. (Tr. at 53-55.) The Commissioner denied the application initially on
23 March 18, 2004, and upon reconsideration on July 1, 2004. (Tr. at 38-50.) Upon plaintiff’s
24 request for an administrative hearing, a hearing was held before ALJ Fong on November 9, 2005.

25 ² The facts set forth in this paragraph are taken from the court’s March 23, 2004 order in
26 Case No. CIV S-02-2317 DAD.

1 (Tr. at 11, 52, 141-58.) Plaintiff, represented by non-attorney Danielle Duarte, testified at the
2 hearing. (Tr. at 11, 24,141, 143-58.) In a decision dated March 21, 2006, the ALJ determined
3 that plaintiff was not disabled. (Tr. at 8-18.) The ALJ entered the following findings:

- 4 1. The claimant has not engaged in substantial gainful activity
5 at any time relevant to this decision (20 CFR 416.920(b)).
- 6 2. The claimant has the following severe impairments: degenerative
7 disc disease of the lumbar spine, a thyroid condition, degenerative
8 joint disease of both knees, and myofascial pain syndrome
9 involving the right shoulder and hip (20 CFR 416.920(c)).
- 10 3. The claimant does not have an impairment or combination of
11 impairments that meets or medically equals one of the listed
12 impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR
13 416.920(d), 416.925 and 416.926).
- 14 4. After careful consideration of the entire record, the
15 undersigned finds that the claimant has the residual
16 functional capacity to lift 10 pounds occasionally and
17 frequently walk/stand two hours, sit six hours, occasionally
18 perform postural activities, occasionally reach overhead,
19 and work in an environment where she is not exposed to
20 extreme cold and heat. She has no visual or communicative
21 limitations nor any other manipulative or environmental
22 limitations. She has no mental limitations. This residual
23 functional capacity is adopted from the prior decision.
- 24 5. The claimant is capable of performing past relevant work as a
25 telemarketer and sales associate. This work does not require the
26 performance of work-related activities precluded by the claimant's
residual functional capacity (20 CFR 416.965).
6. The claimant has not been under a "disability," as defined in the
Social Security Act, at any time through the date of this decision
(20 CFR 416.920(f)).

21 (Tr. at 14-17.)

22 On June 21, 2006, the Appeals Council denied plaintiff's request for review of the
23 ALJ's decision. (Tr. at 4-6.) Plaintiff sought judicial review pursuant to 42 U.S.C. § 405(g) by
24 filing the complaint in this action on August 21, 2006.

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1 **LEGAL STANDARD**

2 The Commissioner’s decision that a claimant is not disabled will be upheld if the
3 findings of fact are supported by substantial evidence in the record as a whole and the proper
4 legal standards were applied. Schneider v. Comm’r of the Soc. Sec. Admin., 223 F.3d 968, 973
5 (9th Cir. 2000); Morgan v. Comm’r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).
6 The findings of the Commissioner as to any fact, if supported by substantial evidence, are
7 conclusive. See Miller v. Heckler, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is
8 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
9 Morgan, 169 F.3d at 599; Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985) (citing Richardson
10 v. Perales, 402 U.S. 389, 401 (1971)).

11 A reviewing court must consider the record as a whole, weighing both the
12 evidence that supports and the evidence that detracts from the ALJ’s conclusion. See Jones, 760
13 F.2d at 995. The court may not affirm the ALJ’s decision simply by isolating a specific quantum
14 of supporting evidence. Id.; see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If
15 substantial evidence supports the administrative findings, or if there is conflicting evidence
16 supporting a finding of either disability or nondisability, the finding of the ALJ is conclusive, see
17 Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an
18 improper legal standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d
19 1335, 1338 (9th Cir. 1988).

20 In determining whether or not a claimant is disabled, the ALJ should apply the
21 five-step sequential evaluation process established under Title 20 of the Code of Federal
22 Regulations, §§ 404.1520 and 416.920. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).
23 This five-step process can be summarized as follows:

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

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1 Step two: Does the claimant have a “severe” impairment? If so,
2 proceed to step three. If not, then a finding of not disabled is
appropriate.

3 Step three: Does the claimant’s impairment or combination of
4 impairments meet or equal an impairment listed in 20 C.F.R., Pt.
404, Subpt. P, App. 1? If so, the claimant is automatically
5 determined disabled. If not, proceed to step four.

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

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

9 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

10 The claimant bears the burden of proof in the first four steps of the sequential
11 evaluation process. Yuckert, 482 U.S. at 146 n.5. The Commissioner bears the burden if the
12 sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094, 1098
13 (9th Cir. 1999).

14 APPLICATION

15 Plaintiff’s sole argument in support of remand is that the ALJ completely failed to
16 fulfill his duty to develop the record regarding plaintiff’s disability. Plaintiff alleges that neither
17 the Social Security field office nor the ALJ attempted to obtain any of plaintiff’s current medical
18 records or the medical records on which the findings of the prior decision were based.³ Plaintiff
19 argues that the ALJ’s failure to develop the record deprived her of a fair and meaningful hearing
20 regarding her disability and that therefore the final decision of the Commissioner should be
21 reversed.

22 Defendant responds that it is the ALJ’s duty to develop the record, not to create
23 one, and that the ALJ in this case fulfilled his duty to fully and fairly develop the record.

24
25 ³ In her second SSI application, plaintiff alleged a 1998 disability onset date. However,
26 the decision on plaintiff’s first SSI application is res judicata on the issue of her disability
through March 11, 2003. Plaintiff has not demonstrated that the ALJ had a duty to request the
medical records that were relevant to her first SSI application.

1 The ALJ has a duty throughout the proceedings “to fully and fairly develop the
2 record and to assure that the claimant’s interests are considered.” Brown v. Heckler, 713 F.2d
3 441, 443 (9th Cir. 1983). See also 20 C.F.R. §§ 416.912(e) & 416.1444. Rather than proceeding
4 as a “mere umpire” at the administrative hearing, the ALJ has an independent duty to fully
5 develop the record. Higbee v. Sullivan, 975 F.2d 558, 561 (9th Cir. 1992). See De Lorme v.
6 Sullivan, 924 F.2d 841, 849 (9th Cir. 1991) (the ALJ’s duty to develop the record is present even
7 if the claimant is represented by counsel, and the duty is especially important in cases of mental
8 impairments); Brown v. Heckler, 713 F.2d 441, 443 (1983) (where the ALJ feels that more
9 evidence, or more reliable evidence, is necessary, he has a duty to fully and fairly develop the
10 record, even when the claimant is represented by counsel). However, the ALJ’s duty to develop
11 the record is “triggered only when there is ambiguous evidence or when the record is inadequate
12 to allow for proper evaluation of the evidence.” Mayes v. Massanari, 276 F.3d 453, 459-60 (9th
13 Cir. 2001).

14 Here, the medical records included in the administrative transcript consist of only
15 thirty-two pages: disability case activity logs printed March 18, 2004 and July 1, 2004 (tr. at 109-
16 15); an internal medicine consultative evaluation dated March 7, 2004, by Robert Mattos, M.D.
17 (tr. at 116-19); a physical residual functional capacity assessment by an agency physician dated
18 March 16, 2004 (tr. at 120-27); a consultation request dated March 18, 2004 (tr. at 128-30); a
19 consultation request dated June 30, 2004 (tr. at 131); and a comprehensive neurologic evaluation
20 by Ethelynda Jaojoco, M.D. dated December 17, 2005 (tr. at 132-40). No treatment records are
21 included in the administrative record.

22 The case activity logs demonstrate that requests for medical records were issued to
23 Sacramento County Primary Care and to Kaiser Permanente/Sacramento South on February 10,
24 2004. (Tr. at 114.) Requests were re-issued to both treating sources on February 24, 2004. (Tr.
25 at 112.) Requests were re-issued to Sacramento County Primary Care on May 20 and on June 22,
26 2004. (Tr. at 109.) Follow up phone calls were made at intervals. (Tr. at 109, 111-12.) At the

1 administrative hearing on November 9, 2005, the ALJ questioned plaintiff about medical
2 treatment she received at County Primary Care, inquired about any consultations with specialists,
3 and then advised plaintiff and her representative that he was going to order a neurologic
4 evaluation:

5 ALJ: I want to check the nerves. What's going on
6 with your legs, your back, your shoulder. All these problems that
you are being treated for at Primary Care.

7 CLMT: Um-hum.

8 ALJ: By a specialist that deals with nerve damage.

9 CLMT: Okay.

10 ALJ: Okay? See if there is anything from a neurological
11 standpoint that is affecting you. Because at Primary Care it's kind
of real basic like just give you medication.

12 CLMT: Right.

13 ALJ: It's not really specialized in trying to figure out
14 what is wrong I think –

15 CLMT: Okay.

16 ALJ: – it seems like. And if you can get me copies of her
Primary Care records?

17 ATTY: Sure.

18 ALJ: Because that would give me a longitudinal view –

19 ATTY: Um-hum.

20 ALJ: – of what kind of treatment even if it's standard
21 medication refill. It gives me an idea of treatment. I know you're
22 not going often[,] it's when they can schedule you, but at least it'll
23 help me understand a little more. And with those records I want to
24 send to the neurologist too just so he or she can get a better picture
25 of the kind of treatment you've been receiving. And then I'll keep
26 the record open until I can get these documents back and I can
review because you have hardly any records really other than
Primary Care and I want to get those records. Okay. Anything
further, Ms. Duarte?

ATTY: No, Your Honor.

1 ALJ: Okay. So we'll keep the record open. I want to
2 give you the benefit of the doubt. You came to see me before, but
3 you didn't have any records at that time too or very little and so I
4 want to develop the case a bit more because it's an ongoing
5 problem for you and if what you tell me is true that you stay at
6 home most of the time and have all these pains I want to find out
7 what's going on.

8 CLMT: I do, too.

9 (Tr. at 155-57.)

10 Despite the assurance of plaintiff's representative that copies of the Primary Care
11 records would be provided, plaintiff failed to provide any treatment records. The ALJ ordered a
12 neurological evaluation, and plaintiff was examined by Dr. Jaojoco on December 17, 2005. (Tr.
13 at 132.) On January 9, the ALJ forwarded a copy of Dr. Jaojoco's evaluation to Richard Shore,
14 plaintiff's attorney, and advised counsel that he could submit "any additional records . . .
15 (including a report from the treating physician)." (Tr. at 108.) Again, no treatment records or
16 reports were submitted.

17 Plaintiff interprets the ALJ's statements at the administrative hearing as a finding
18 that the record was incomplete, and, on that basis, plaintiff argues that the ALJ had a duty to
19 secure past and current medical records before reaching a decision. While it is true that the ALJ
20 indicated his desire "to develop the case a bit more," the undersigned finds that the ALJ wanted
21 to develop the case record by obtaining a neurological evaluation. The ALJ stated that he wanted
22 to find out "[w]hat's going on" with plaintiff's legs, back, and shoulder, i.e., the problems for
23 which she was being treated at Primary Care, and that he intended to develop the case by
24 ordering an evaluation by "a specialist that deals with nerve damage." (Tr. at 156.) The ALJ
25 believed that the Primary Care records would be "real basic," reflecting routine prescription of
26 medicines rather than containing specialized diagnostic efforts. (*Id.*) The ALJ wanted the
treatment records for a "longitudinal view" of plaintiff's treatment, even if consisted of little
more than "standard medication refill," because the information might help him "understand a
little more" and give the specialist "a better picture of the kind of treatment [plaintiff had] been

