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

WILLIAM MIDDLEBROOK,

Plaintiff,

No. CIV S-07-1663 DAD

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

ORDER

Defendant.

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This social security action was submitted to the court, without oral argument, for ruling on plaintiff’s motion for summary judgment and defendant’s cross-motion for summary judgment. For the reasons explained below, plaintiff’s motion is granted, the decision of the Commissioner of Social Security (Commissioner) is reversed, and this matter is remanded for further proceedings consistent with this order.

PROCEDURAL BACKGROUND

On July 23, 2004, plaintiff applied for Supplemental Security Income (SSI) under Title XVI of the Social Security Act (Act), alleging disability due to dyslexia, color blindness, and partial blindness.¹ (Transcript (Tr.) at 88-91, 101.) The application was denied initially on

¹ A previous application was denied in September 2002. (Tr. at 154.)

1 December 17, 2004, and upon reconsideration on January 14, 2005. (Tr. at 34-45.) Pursuant to
2 plaintiff's timely request, a hearing was held before an administrative law judge (ALJ) on
3 January 26, 2006. (Tr. at 220-59.) Although plaintiff did not appear at the hearing, a non-
4 attorney representative appeared on his behalf, and a vocational expert testified. (Tr. at 220-22.)
5 A second hearing was held before the ALJ on July 19, 2006. (Tr. at 260-91.) Plaintiff appeared
6 at that hearing, along with his non-attorney representative, and testified. (Tr. at 260-61.) A
7 vocational expert who was present at the second hearing did not testify. (Id.) In a decision
8 issued on November 16, 2006, the ALJ determined that plaintiff was not disabled at any time
9 through the date of the decision. (Tr. at 17-23.) The ALJ entered the following findings:

- 10 1. The claimant did not engage in substantial gainful activity
11 after June 23, 2004.
- 12 2. The medical evidence establishes that the claimant has
13 limited visual acuity related to nystagmus, but that he does
14 not have an impairment or combination of impairments
15 listed in, or medically equal to one listed in Appendix I,
16 Subpart P, Regulations No. 4.
- 17 3. The claimant's subjective complaints are not fully credible
18 and not supported by the evidence of record.
- 19 4. The claimant had the residual functional capacity to
20 perform work except for work involving more than
21 occasionally climbing stairs. He can not climb ropes,
22 ladders, and scaffolding. He cannot work around open
23 flames, unprotected heights, or dangerous machinery. The
24 claimant can not drive or work in dim light, and can
25 occasionally read and write. He cannot perform tasks
26 requiring fine visual acuity (such as threading a needle) or
the need to identify colors.
5. The claimant is 22 years old, and does not have past
relevant work. The claimant has a 12th grade education (20
CFR 416.965).
6. The framework of Medical-Vocational Rule 204.00, and
the testimony of the vocational expert, and Appendix 1,
Subpart P, Regulations No. 4, directs that the claimant is
not disabled, as there are a significant number of jobs that
he can perform. Examples of these jobs are laundry
laborer, agricultural packer, and light packager.

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1 In determining whether or not a claimant is disabled, the ALJ should apply the
2 five-step sequential evaluation process established under the Social Security regulations. Title 20
3 of the Code of Federal Regulations, Section 404.1520, sets forth the test used to assess disability.
4 See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The five-step process has been
5 summarized as follows:

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

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

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

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

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

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

17 The claimant bears the burden of proof in the first four steps of the sequential
18 evaluation process. Yuckert, 482 U.S. at 146 n.5. The Commissioner bears the burden if the
19 sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094, 1098
20 (9th Cir. 1999).

21 APPLICATION

22 Plaintiff seeks reversal of the Commissioner’s decision and remand for further
23 proceedings. In support of his motion for summary judgment, plaintiff argues that (1) the ALJ
24 should have obtained the opinion of a medical expert regarding the functional consequences of
25 plaintiff’s vision impairment, (2) the ALJ’s analysis at step three is flawed, (3) the ALJ should
26 have credited plaintiff’s subjective symptom allegations, (4) the ALJ should have found a severe

1 mental impairment, and (5) the ALJ should have taken the testimony of a vocational expert at the
2 second hearing and posed hypothetical questions based on plaintiff's testimony. The court finds
3 plaintiff's argument with respect to severe impairments dispositive and therefore addresses only
4 that argument below.

5 Plaintiff asserts that reversal is required because the ALJ failed to find that he
6 suffered from any severe mental impairment at step two of the sequential evaluation process
7 "when listing-level cognitive problems were present." (Pl.'s Mot. for Summ. J. at 7.) In this
8 regard, plaintiff contends that his performance IQ of 70, visual memory index score of 74, and
9 digit symbol subscale score of 3 warranted the finding of a severe mental impairment. (Id. at 15.)
10 He argues that a digit symbol subscale score of 3 suggests organic brain damage, although he
11 concedes that the psychologist who administered the Wechsler Adult Intelligence Scale - III test
12 ascribed the score to plaintiff's visual impairments. (Id. at 2 n.3 & 9.) Plaintiff also argues that
13 his performance IQ of 70 is consistent with mild mental retardation. (Id. at 9, 12.)

14 At step two of the sequential evaluation process, the ALJ must determine if the
15 claimant has a medically severe impairment or combination of impairments. Smolen v. Chater,
16 80 F.3d 1273, 1289-90 (9th Cir. 1996) (citing Yuckert, 482 U.S. at 140-41). Under the
17 Commissioner's regulations, "[a]n impairment or combination of impairments is not severe if it
18 does not significantly limit [the claimant's] physical or mental ability to do basic work
19 activities."² 20 C.F.R. § 416.921(a). The severity regulation serves to "identify[] at an early
20 stage those claimants whose medical impairments are so slight that it is unlikely they would be
21 found to be disabled even if their age, education, and experience were taken into account."
22 Yuckert, 482 U.S. at 153. "Step two, then, is 'a de minimis screening device [used] to dispose of

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24 ² Basic work activities encompass "the abilities and aptitudes necessary to do most jobs,"
25 including (1) physical functions such as walking, standing, sitting, lifting and carrying, (2)
26 capacities such as seeing, hearing, and speaking, (3) understanding, carrying out, and
remembering simple instructions, (4) use of judgment, (5) responding appropriately to
supervision, co-workers, and usual work situations, and (6) dealing with changes in a routine
work setting. 20 C.F.R. § 416.921(b).

1 groundless claims[.]” Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (quoting Smolen, 80
2 F.3d at 1290). See also Edlund v. Massanari, 253 F.3d 1152, 1158-59 (9th Cir. 2001). “An
3 impairment or combination of impairments may be found ‘not severe *only if* the evidence
4 establishes a slight abnormality that has no more than a minimal effect on an individual’s ability
5 to work.’” Webb, 433 F.3d at 686 (quoting Smolen, 80 F.3d at 1290, and adding emphasis).

6 Here, the ALJ found that “the record reflects a history of nystagmus,³ resulting in
7 limited vision and some difficulty identifying color.” (Tr. at 18.) The ALJ determined that
8 plaintiff’s vision impairments had significantly limited his ability to perform basic work-related
9 activities on and after his alleged onset date, thereby establishing that plaintiff’s vision
10 impairments were severe at step two of the sequential evaluation process. Turning next to
11 plaintiff’s allegation of psychiatric symptoms, the ALJ noted that the record did not show that
12 plaintiff was undergoing any type of mental health treatment when he applied for SSI in 2004. In
13 the absence of any mental health treatment records or any opinion by a treating mental health
14 professional, the state agency obtained a comprehensive psychological evaluation by a
15 psychologist. (Tr. at 18-19.)

16 On October 28, 2004, Joanna T. Koulianos, Ph.D., a licensed psychologist,
17 assessed plaintiff and prepared a report. (Tr. at 183-88) The ALJ summarized the contents of the
18 report as follows:

19 The claimant alleged a history of attention deficit disorder and drug
20 abuse, however, he also reported that he has no current symptoms,
21 and in fact, has had no treatment or taken medication since he was
22 16 years old. The claimant admitted that he lives with his
23 girlfriend, and can cook, sweep, wash clothes, care for his personal
24 needs, handle his own finances, and take public transportation.
25 Moreover, he stated that he is currently working part time at a fast
26 food restaurant preparing food. He also indicated that he has
participated in many survival trips in the wilderness, and would
like to become survival guide. Upon mental status examination,
there were no serious findings. The claimant’s intelligence,

3 “Nystagmus” means “[a] rapid, involuntary oscillatory motion of the eyeball.”
Stedman’s Dictionary 568 (1995).

1 including IQ scores, and concentration were noted to be in the low-
2 average range. The examiner suggested a learning disability,
3 however, he [sic] also stated that the claimant's ability to perform
4 the mental demands own [sic] work is intact.

5 (Tr. at 19.)

6 Plaintiff was 20 years old when Dr. Koulianos examined him. (Tr. at 183.) He
7 indicated to her that he "has no cognitive disability of which he is aware." (Id.) With regard to
8 other mental disabilities, he indicated that he was diagnosed at age 12 with attention deficit
9 disorder (ADD), for which Wellbutrin was prescribed. He took Wellbutrin off and on between
10 ages 12 and 16 but was abusive with multiple illicit substances and alcohol during that period of
11 time and eventually discontinued taking the psychotropic medication. He stated that he had not
12 sought or received treatment for ADD since age 16. Plaintiff himself was primarily focused on
13 his visual impairment, which he described as the reason he was not able to obtain or maintain
14 employment. Dr. Koulianos noted that plaintiff did not describe any significant disability related
15 to depression or anxiety. He was not taking any medication at the time of the examination. (Id.)

16 Dr. Koulianos indicated that plaintiff had no history of inpatient psychiatric
17 treatment. However, he was under psychiatric care for ADD between ages 12 and 16, and he
18 received counseling while in adolescent chemical dependency programs between ages 15 and 18.
19 By the age of 18, he had attained sobriety from alcohol and illicit substances, and has maintained
20 sobriety since that time. (Tr. at 183-84.) Plaintiff reported that he was a student at American
21 River College, where he had completed three semesters. He earned a GPA of 3.2 for the most
22 recent semester. During the three semesters, he earned two C's, but all other grades were A's
23 and B's. (Tr. at 184.)

24 Dr. Koulianos performed a complete psychological evaluation, which included the
25 administration of four tests. (Tr. at 185, 188.) She observed that plaintiff demonstrated adequate
26 ability to hear, understand, and respond to interview questions and test instruction. No
significant limitations in completing test items were identified as related to his color blindness.

1 One task, a subtest within the Wechsler Adult Intelligence Scale - III test, was difficult for
2 plaintiff to complete due to his vision impairment. In completing that task, the doctor noted,
3 plaintiff's face was inches from the paper. Nonetheless, test scores were interpreted as valid and
4 reliable. (Tr. at 185.)

5 Dr. Koulianos found that plaintiff's full-scale IQ placed him at the low-average
6 range of functioning, although there was a statistically significant discrepancy between his low-
7 average to average Verbal IQ of 98 and his borderline to low-average Performance IQ of 70. (Tr.
8 at 186.) Dr. Koulianos found plaintiff's low score of 3 on the Digit Symbol task most likely
9 related to his visual impairment rather than to processing or tracking difficulties. Plaintiff's
10 overall attention/concentration abilities appeared to be in the low-average range, while his
11 general fund of knowledge, social judgment, vocabulary, knowledge, and verbal abstract
12 reasoning abilities were all within normal limits. He obtained scores at the low-average to
13 average range in the verbal areas for tests of memory, while scores in the borderline range in
14 visual areas may have been related to his visual impairment. He demonstrated excellent planning
15 and organization abilities, committed no errors, and performed entirely within normal limits on
16 the Bender-Gestalt test. On the Wide Range Achievement Test - 3, his scores were at the
17 borderline to impaired range for Spelling and Arithmetic and were at the borderline to low-
18 average range for Reading. Because the scores in these three areas were significantly below
19 those that would be expected, given plaintiff's IQ outcomes, Dr. Koulianos concluded that
20 plaintiff's scores suggested learning disabilities in those areas. Dr. Koulianos rendered an Axis I
21 diagnosis of (1) learning disability, not otherwise specified; (2) reported history of attention
22 deficit hyperactivity disorder (ADHD); and (3) methamphetamine dependence, cannabis abuse,
23 and alcohol dependence, all in sustained full remission. With respect to plaintiff's mental
24 residual functional capacity, Dr. Koulianos opined that he should be able to do the following
25 without significant difficulty: (1) execute simple and uncomplicated routine one or two step job
26 instructions; (2) interact appropriately with peers, supervisors, and coworkers in a satisfactory

1 manner; (3) execute basic daily activity routines; and (4) manage adequately the transitions or
2 minor stressors associated with employment in most entry level job situations. (Tr. at 186-87.)

3 The ALJ evaluated plaintiff's alleged mental impairment or impairments in
4 accordance with 20 C.F.R. § 416.920a. First, he considered the impact of any mental
5 impairments on plaintiff in four broad functional areas: (1) activities of daily living; (2) social
6 functioning; (3) concentration, persistence, or pace; and (4) episodes of decompensation.
7 20 C.F.R. § 416.920a(c)(3). The ALJ found that plaintiff did not report difficulty in any
8 activities of daily living to any examiner and did not allege that a mental impairment caused an
9 impact on such activities. The ALJ found no evidence of record showing that plaintiff was
10 restricted in his social functioning, noting that the examining psychologist described plaintiff as
11 cooperative, that no examiner noted any difficulty in this area, and that the record reflects that
12 plaintiff socializes and works. The ALJ found that the record did not contain any objective
13 evidence of significant impairment in plaintiff's concentration, persistence, or pace and that no
14 examiner described any difficulty in this area. The ALJ also found that no doctor has noted any
15 problem with plaintiff's memory or concentration and that plaintiff is independent in all of his
16 daily activities, handles his own finances, and cares for his girlfriend. The ALJ found no
17 evidence of episodes of decompensation in a work or work-like setting. The ALJ determined
18 that no mental impairment had an impact on plaintiff in any of the functional areas and there was
19 no evidence of a chronic organic mental disorder of at least two years duration that caused more
20 than minimal limitations. (Tr. at 19.) The ALJ then concluded that plaintiff does not have any
21 mental impairments that significantly limit his ability to perform basic work-related activities and
22 that therefore he does not have a severe mental impairment. (Tr. at 20.)

23 The administrative record before this court contains only two medical records
24 related to plaintiff's mental impairments: the psychological evaluation report prepared by Dr.
25 Koulianos in October 2004 (tr. at 183-88) and the Psychiatric Review Technique Form first
26 completed by a state agency physician in December 2004 and affirmed by a second state agency

1 physician in January 2005 for purposes of reconsideration (tr. at 189-202). The state agency
2 physicians determined that plaintiff had no severe impairment in the category of organic mental
3 disorders, did not consider the category of mental retardation, and found no functional limitation
4 other than mild difficulties in maintaining concentration, persistence, or pace. (Tr. at 189-90,
5 193, 199.) The medical records pertaining to plaintiff's vision impairments shed no light on his
6 mental impairments.⁴ The ALJ did not address the effect of plaintiff's mental impairments
7 combined with his vision impairments.

8 Despite the scanty nature of the administrative record, the court finds evidence
9 that plaintiff has mental impairments that constitute more than slight abnormalities and have
10 more than a minimal effect on plaintiff's ability to work. In reaching this conclusion, the
11 undersigned is mindful that the step-two inquiry is but "a de minimis screening device to dispose
12 of groundless claims." Smolen, 80 F.3d at 1290 (citing Yuckert, 482 U.S. at 153-54). See also
13 Edlund, 253 F.3d at 1158.

14 Here, the examining psychologist's diagnosis includes learning disability not
15 otherwise specified and reported history of ADHD. (Tr. at 186.) The diagnosis of learning
16 disability resulted from plaintiff's scores on the Wide Range Achievement Test - 3, which placed
17 him at sixth grade level for reading and fourth grade level for spelling and arithmetic. (Tr. at
18 186, 188.) Dr. Koulianos noted that the test results in all three areas were significantly below the
19 results that would be expected, given plaintiff's verbal IQ of 98 and full scale IQ of 85, and she
20 opined that these scores suggested learning disabilities. (Tr. at 186.) Dr. Koulianos also noted
21 the statistically significant discrepancy between plaintiff's verbal IQ of 98, which falls in the
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23 ⁴ The records pertaining to plaintiff's vision impairments consist of a visual assessment
24 report dated June 20, 1994, from Pia Hoenig, O.D., M.A. (tr. at 166-68); a medical report dated
25 August 18, 2004, from consulting examiner James M. Reece, Jr., M.D. (tr. at 169-74); a Residual
26 Functional Capacity Assessment - Physical, dated August 24, 2004, completed by a state agency
physician (tr. at 175-82); treatment records for the period from January 31, 2002 to May 10,
2005, from the University of California Berkeley (tr. at 203-15); and state agency summaries (tr.
at 154-65).

1 low-average to average range, and his performance IQ of 70, which falls in the borderline to low-
2 average range. (Tr. at 186, 188.)

3 Dr. Koulianos did not diagnose mental retardation. However, the American
4 Psychiatric Association defines “[s]ignificantly subaverage intellectual functioning” as “an IQ of
5 about 70 or below,” and mild mental retardation is usually reflected by “IQ level 50-55 to
6 approximately 70.” Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental
7 Disorders (DSM IV) 39-40 (4th ed. 1994). The Commissioner’s own regulations provide that
8 “[a] valid verbal, performance, or full scale IQ of 60 through 70” meets the listed impairment for
9 mental retardation if the claimant meets the additional requirements specified in Listing 12.05.
10 See 20 C.F.R. Pt. 404, Subpt. P., App. 1 Listing 12.05. Based upon the record before this court,
11 it appears that plaintiff may even meet the listing.

12 In any event, it is evident from the examining psychologist’s report that she was
13 of the opinion that plaintiff’s mental impairments did, in fact, affect his ability to work. For
14 example, in her medical source statement, Dr. Koulianos indicated that plaintiff could, “without
15 significant difficulty,” execute “simple and uncomplicated routine one or two-step job
16 instructions” and “basic daily activity routines” and could, “without significant difficulty,”
17 manage “transitions or the minor stressors associated with employment . . . adequately for most
18 entry level job situations.” (Tr. at 186-87.) These limitations incorporated into Dr. Koulianos’
19 medical source statement demonstrate that plaintiff’s mental impairments have more than a
20 minimal effect on his ability to work. Based on this record, the court cannot find that plaintiff’s
21 mental impairments are “not severe” because the evidence does not establish that those
22 impairments are merely slight abnormalities having no more than a minimal effect on his ability
23 to work. Certainly, this is not an instance in which a finding of no impairment at step two of the
24 sequential evaluation process was justified by a total absence of objective evidence of a the
25 severe impairment or where even a claimant’s own doctor was hesitant to conclude that the
26 condition in question was legitimate. See Webb, 433 F.3d at 688. The ALJ’s determination with

1 impairments do not meet or equal any listing, the ALJ shall reconsider plaintiff's subjective
2 testimony and re-determine plaintiff's residual functional capacity in light of all of his
3 impairments and the entire record. If the sequential evaluation proceeds to step five, the ALJ
4 shall hold a hearing at which plaintiff testifies and hypothetical questions are presented to the
5 vocational expert in a manner that properly takes into account all of his limitations on plaintiff's
6 ability to engage in work-related functions. See Holohan v. Massanari, 246 F.3d 1195, 1208-09
7 (9th Cir. 2001) (explaining that testimony from a vocational expert was necessary because the
8 claimant suffered from a severe mental impairment).

9 Accordingly, IT IS HEREBY ORDERED that:

- 10 1. Plaintiff's May 8, 2008 motion for summary judgment (Doc. No. 20) is
11 granted;
12 2. Defendant's June 25, 2008 cross-motion for summary judgment (Doc. No. 24)
13 is denied;
14 3. The decision of the Commissioner of Social Security is reversed; and
15 4. This case is remanded for further proceedings consistent with this order.

16 DATED: August 28, 2009.

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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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