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

BAO MOUA,

Plaintiff,

No. CIV S-08-1941 DAD

vs.

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 the matter is remanded for further proceedings consistent with this opinion.

PROCEDURAL BACKGROUND

In August 2003, plaintiff Bao Moua, also known as Bao Moua Lee, applied for Supplemental Security Income (SSI) under Title XVI of the Social Security Act (the Act). (Transcript (Tr.) at 42.) She alleged that she became disabled on January 7, 2000, due to pain, depression, headaches, and dizziness. (Id.) The application was denied by the agency initially and upon reconsideration, and Administrative Law Judge (ALJ) Plauche F. Villere, Jr. found

1 plaintiff not disabled on June 21, 2005. (Tr. at 42-47.) The ALJ determined that plaintiff had the
2 medically determinable impairment of anemia but did not have any impairment that would
3 significantly limit her ability to perform work-related activities. (Tr. at 46.) On August 16,
4 2005, the Appeals Council denied plaintiff's request for review of the ALJ's decision and
5 plaintiff did not seek judicial review of that decision. (Tr. at 8, 88.)

6 On September 30, 2005, plaintiff filed a new application for SSI, again alleging
7 disability beginning January 7, 2000. (Tr. at 74-81.) At that time she alleged that she was unable
8 to work because of pain, dizziness, blurred vision, and depression. (Tr. at 51.) The application
9 was denied initially on March 9, 2006, and upon reconsideration on December 15, 2006. (Tr. at
10 51-60.) Upon plaintiff's request, a hearing was held before ALJ Mark C. Ramsey on December
11 11, 2007. (Tr. at 17-36, 61.) Plaintiff was represented by an attorney and testified at the hearing
12 through an interpreter. In a decision issued on February 26, 2008, the ALJ found plaintiff not
13 disabled. (Tr. at 8-11.) First, ALJ Ramsey determined that the findings enumerated by ALJ
14 Villere on June 21, 2005 had not changed. (Tr. at 11.) The 2005 findings were as follows.

- 15 1. The claimant has not engaged in substantial gainful activity
16 since the alleged onset of disability.
- 17 2. The claimant has the following medically determinable
18 impairment(s): anemia.
- 19 3. The claimant does not have any impairment or impairments that
20 significantly limit her ability to perform basic work-related
21 activities; therefore, the claimant does not have a "severe"
22 impairment (20 CFR § 416.920).
- 23 4. The claimant was not under a "disability" as defined in the
24 Social Security Act, at any time through the date of this decision
25 (20 CFR § 416.920(c)).

26 (Tr. at 46.) After determining that these findings were unchanged, ALJ Ramsey entered the
following findings in his February 26, 2008 decision:

1. The claimant has not performed any substantial gainful activity
since her alleged date of disability.

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1 2. The claimant does not have impairment, or impairments that
2 significantly limit her ability to perform the basic work-related
3 activities; therefore, the claimant does not have a severe
4 impairment.

5 3. The claimant is not under a disability as defined by the Social
6 Security Act and Regulations, at any time through the date of this
7 decision.

8 (Tr. at 11.)

9 On June 21, 2008, the Appeals Council denied plaintiff's request for review of the
10 ALJ's decision, thereby making it the final decision of the Commissioner. (Tr. at 1-4.) Plaintiff
11 sought judicial review pursuant to 42 U.S.C. § 405(g) by filing the complaint in this action on
12 August 20, 2008.

13 LEGAL STANDARD

14 The Commissioner's decision that a claimant is not disabled will be upheld if the
15 findings of fact are supported by substantial evidence in the record as a whole and the proper
16 legal standards were applied. Schneider v. Comm'r of the Soc. Sec. Admin., 223 F.3d 968, 973
17 (9th Cir. 2000); Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

18 The findings of the Commissioner as to any fact, if supported by substantial evidence, are
19 conclusive. Miller v. Heckler, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is such
20 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

21 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) (citing Morgan, 169 F.3d at 599); Jones
22 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985) (citing Richardson v. Perales, 402 U.S. 389, 401
23 (1971)).

24 A reviewing court must consider the record as a whole, weighing both the
25 evidence that supports and the evidence that detracts from the ALJ's conclusion. Jones, 760 F.2d
26 at 995. The court may not affirm the ALJ's decision simply by isolating a specific quantum of
supporting evidence. Id.; see also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If
substantial evidence supports the administrative findings, or if there is conflicting evidence

1 supporting a finding of either disability or nondisability, the finding of the ALJ is conclusive,
2 Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987), and may be set aside only if an
3 improper legal standard was applied in weighing the evidence, Burkhart v. Bowen, 856 F.2d
4 1335, 1338 (9th Cir. 1988).

5 In determining whether or not a claimant is disabled, the ALJ should apply the
6 five-step sequential evaluation process established under Title 20 of the Code of Federal
7 Regulations, Sections 404.1520 and 416.920. Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).
8 The five-step process has been summarized as follows:

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

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

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

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

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

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

20 The claimant bears the burden of proof in the first four steps of the sequential
21 evaluation process. Yuckert, 482 U.S. at 146 n.5. The Commissioner bears the burden if the
22 sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094, 1098
23 (9th Cir. 1999).

24 APPLICATION

25 Plaintiff argues in support of her motion for summary judgment that the ALJ erred
26 when he did not find that she had a severe impairment at step two and, as a result of this finding,

1 failed to complete the sequential evaluation. Plaintiff seeks an order reversing and remanding
2 her case to the Commissioner for a new hearing.

3 At step two of the sequential evaluation process, the ALJ must determine if the
4 claimant has any medically severe impairment or combination of impairments. Smolen v.
5 Chater, 80 F.3d 1273, 1289-90 (9th Cir. 1996) (citing Yuckert, 482 U.S. at 140-41). The
6 Commissioner’s regulations provide that “[a]n impairment or combination of impairments is not
7 severe if it does not significantly limit [the claimant’s] physical or mental ability to do basic work
8 activities.” 20 C.F.R. §§ 404.1521(a) & 416.921(a). Basic work activities are “the abilities and
9 aptitudes necessary to do most jobs,” and those abilities and aptitudes include (1) physical
10 functions such as walking, standing, sitting, lifting, and carrying, (2) capacities for seeing,
11 hearing, and speaking, (3) understanding, carrying out, and remembering simple instructions, (4)
12 use of judgment, (5) responding appropriately to supervisors, co-workers, and usual work
13 situations, and (6) dealing with changes in a routine work setting. 20 C.F.R. §§ 404.1521(b) &
14 416.921(b).

15 The United States Supreme Court has recognized that the Commissioner’s
16 “severity regulation increases the efficiency and reliability of the evaluation process by
17 identifying at an early stage those claimants whose medical impairments are so slight that it is
18 unlikely they would be found to be disabled even if their age, education, and experience were
19 taken into account.” Yuckert, 482 U.S. at 153. However, the regulation must not be used to
20 prematurely disqualify a claimant. Id. at 158 (O’Connor, J., concurring).

21 To prevent premature disqualification of claimants, the Ninth Circuit has held that
22 “[a]n impairment or combination of impairments may be found ‘not severe *only if* the evidence
23 establishes a slight abnormality that has no more than a minimal effect on an individual’s ability
24 to work.’” Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (quoting Smolen, 80 F.3d at
25 1290, and adding emphasis). “If such a finding is not clearly established by medical evidence,
26 however, adjudication must continue through the sequential evaluation process.” Social Security

1 Ruling (SSR) 85-28, 1985 WL 56856, at *3. “Step two, then, is ‘a de minimis screening device
2 [used] to dispose of groundless claims[.]’” Webb, 433 F.3d at 687 (quoting Smolen, 80 F.3d at
3 1290). See also Edlund v. Massanari, 253 F.3d 1152, 1158-59 (9th Cir. 2001); Tomasek v.
4 Astrue, No. C-06-07805 JCS, 2008 WL 361129, at *13 (N.D. Cal. Feb. 11, 2008) (describing
5 claimant’s burden at step two as “low”).

6 In the present case, the analysis of plaintiff’s impairments at step two must take
7 into consideration the fact that the application for disability benefits at issue arises under Title
8 XVI of the Act, as did plaintiff’s prior application for disability benefits in 2003. Acquiescence
9 Ruling 97-4[9] (Chavez) provides that

10 with respect to an unadjudicated period, where the claim arises
11 under the same title of the Social Security Act (the Act) as a prior
12 claim on which there has been a final decision by an
13 Administrative Law Judge (ALJ) or the Appeals Council that the
14 claimant is not disabled, the Social Security Administration (SSA)
15 must: (1) apply a presumption of continuing nondisability and, if
16 the presumption is not rebutted by the claimant, determine that the
17 claimant is not disabled; and (2) if the presumption is rebutted,
18 adopt certain findings required under the applicable sequential
19 evaluation process for determining disability, made in the final
20 decision by the ALJ or the Appeals Council on the prior disability
21 claim.

17 Soc. Sec. Acq. Ruling 97-4[9] (Chavez). In order to rebut the presumption of continuing non-
18 disability, the claimant must demonstrate “changed circumstances” since the prior application.

19 Id.

20 The Ninth Circuit has defined such “changed circumstances” to include both an
21 increase in the severity of an impairment, Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
22 1989); Lester v. Chater, 81 F.3d 821, 827 (9th Cir. 1995), and also an impairment not previously
23 considered, Gregory v. Bowen, 844 F.2d 664, 666 (9th Cir. 1988), Lester, 81 F.3d at 827.

24 Plaintiff argues that ALJ Ramsey erred in finding that plaintiff failed to rebut the
25 presumption of continuing non-disability. In this regard, plaintiff contends that the record
26 reflects both an increase in the severity of her impairments and also impairments not previously

1 considered. Plaintiff asserts that ALJ Ramsey erred in concluding that the medical records
2 submitted after June 21, 2005, the date of ALJ Villere's decision, "do not contain any new or
3 material objective findings which would rebut the presumption of continuing non-disability" and
4 serve to establish the existence of a changed circumstance. (Tr. at 9.) Plaintiff points to
5 evidence demonstrating an increase in the severity of her mental impairment since her first
6 application, together with new diagnoses of PTSD and cholelithiasis, neither of which was
7 considered in ALJ Villere's 2005 decision.

8 The evidence before ALJ Villere on June 21, 2005, included the treating records
9 of We-Care Medical Center for 2003. These records showed that plaintiff sought treatment for
10 leg pain, knee pain, low back pain, headaches, and fatigue; plaintiff had normal laboratory
11 studies except for mildly low glucose levels; she had some tenderness in her back and neck but
12 there were no significant objective findings; a diagnosis of possible osteoarthritis was made,
13 although no x-rays were taken, and she was treated with Tylenol and other pain medications; she
14 was also treated for uncomplicated kidney stones. (Tr. at 44.) Progress notes from 2004 and
15 2005 showed continued complaints of pain with minimal findings and treatment for mild anemia.
16 (Id.)

17 The evidence in 2005 included a 2003 report by consultative examiner J. Martin,
18 M.D. Dr. Martin found plaintiff's musculoskeletal complaints possibly related to osteoarthritis,
19 but also found plaintiff's cooperation poor based on what he viewed as "much grimacing and
20 pain vocalization" that was not noted on casual observation. He observed that plaintiff was able
21 to squat and arise from a squatting position without obvious difficulty. He found no functional
22 limitations. (Id.)

23 The evidence in 2005 include a 2003 report by Joanna T. Koulianos, Ph.D., a
24 psychiatric consultative examiner. Dr. Koulianos noted that plaintiff's claim of disability arose
25 from trauma suffered when escaping from Laos into Thailand. Dr. Koulianos found plaintiff
26 concerned with physical health difficulties and complaints of pain in her back and neck, but the

1 doctor did not endorse “a constellation of symptoms associated with post-traumatic stress
2 disorder.” Dr. Koulianos opined that plaintiff appeared to have borderline intellectual
3 functioning but no significant difficulties communicating her thoughts in a logical and organized
4 fashion, no difficulty reporting information from the past, and no bizarre mentation or internal
5 preoccupation. Dr. Koulianos found no limitations in plaintiff’s ability to do the mental
6 requirements of work. (Id.)

7 Plaintiff was treated at Sacramento County Mental Health, and their records from
8 November 2004 to March 2005 reflected the following: plaintiff reported symptoms of
9 depression corresponding with the time of her mother’s death; she had complaints of neck pain,
10 back pain, and headaches; her GAF assessment of 60 was consistent with mild to moderate
11 limitation in functioning; she was put on medication and by December 2004 her sleep was
12 improved; her mood was also improved, and she improved overall.

13 The record in 2005 included a report by a fraud investigator who interviewed
14 plaintiff in 2004. Plaintiff told him she was disabled due to leg pain when she walks, but he
15 observed that she did not require the use of a cane, crutches, or wheelchair. She stood, without
16 any assistance, during his 24-minute evaluation of her. (Tr. at 45.)

17 Plaintiff states that in 2005 her mental impairment included a diagnosis of a major
18 depressive disorder - single episode with a GAF of 60. In the adjudicated period that
19 followed, plaintiff was diagnosed with PTSD and a GAF of 55. In March 2006, Dr. Koike,
20 plaintiff’s treating psychiatrist, noted that plaintiff appeared to suffer from previously
21 undiagnosed PTSD, continued to be depressed with numerous somatic complaints, and was “very
22 symptomatic.” (Tr. at 302.) In 2007, Dr. Koike submitted an assessment reflecting his opinion
23 that plaintiff had significant work related limitations. (Tr. at 272.) In Dr. Koike’s opinion,
24 plaintiff was unable to meet competitive standards in her ability (a) to maintain regular
25 attendance and be punctual within customary, usually strict tolerances, (b) to sustain an ordinary
26 routine without special supervision, (c) to complete a normal workday and work week without

1 interruptions from psychologically-based symptoms, (d) to perform at a consistent pace without
2 an unreasonable number and length of rest periods, (e) to get along with co-workers or peers
3 without unduly distracting them or exhibiting behavioral extremes, (f) to respond appropriately to
4 changes in a routine work setting, and (g) to deal with normal work stress. (Tr. at 272.) Dr.
5 Koike concluded that plaintiff “can’t handle the needs and responsibilities of a normal work
6 environment.” (Id.) This evidence demonstrates that plaintiff’s depression had worsened and
7 she had a new diagnosis of PTSD.

8 With respect to physical impairments, ALJ Villere had found in 2005 that plaintiff
9 suffered only from anemia. In March 2007, plaintiff was seen in the emergency room at Mercy
10 General Hospital. Abdominal sonography showed “[i]ntense echogenicity and shadowing”
11 arising from the gallbladder area, “consistent with a gallbladder filled with calculi.” (Tr. at 314.)
12 The impression was cholelithiasis, i.e. gallstones. (Id.) In August 2007, Dr. Li, plaintiff’s
13 treating physician, reported that plaintiff’s primary diagnosis, with an onset date of 2006, was
14 gallstones, with secondary diagnoses of neck pain and depression. (Tr. at 265.) Dr. Li noted
15 plaintiff’s reports of pain all over her body, but especially in the neck and radiating to her arms.
16 Dr. Li opined that plaintiff’s chronic pain would impose limits on her walking/standing, sitting,
17 lifting, climbing, bending and stooping. (Tr. at 266.) He noted confusion and disorientation in
18 addition to depression. Dr. Li felt that plaintiff might be able to perform sedentary work but that
19 she could not work an eight-hour day five days per week because the gallstones caused too much
20 pain all over her body and her depression impaired her ability to function normally. (Tr. at 266-
21 67.) Dr. Li also noted that plaintiff experiences Vietnam War syndrome. (Tr. at 267.)

22 Plaintiff contends that the post-2005 evidence, include the evidence described
23 above and various treatment records, served to rebut the presumption of continuing non-disability
24 and that therefore the ALJ in 2008 should not have found the presumption un rebutted and should
25 have continued with the required sequential analysis.

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1 The court agrees. An ALJ is required to consider all evidence in the claimant's
2 record when deciding whether the claimant is disabled. 20 C.F.R. §§ 404.1520(a)(3) &
3 416.920(a)(3). Here, the ALJ asserted that "the record does not contain any new or material
4 objective evidence which shows any change in the severity of the claimant's impairment" and
5 that "the medical records submitted after the June 21, 2005 [sic], do not contain any new or
6 material objective findings which would rebut the presumption of continuing non-disability."
7 (Tr. at 9.) For reasons that are not clear, the ALJ discounted all of the records from the
8 Sacramento County Mental Health Center of July, August and September 2005 on the basis of
9 notations that plaintiff was contemplating applying for citizenship and was taking medication on
10 an intermittent basis. The ALJ acknowledged that plaintiff "was seen with symptoms related to
11 depression" in 2006 and 2007, but dismissed the records from those years with the statement that
12 the "examinations do not reveal any significant work related findings," again emphasizing
13 plaintiff's report that she was taking medication on a sporadic basis and completing paperwork
14 for citizenship. (Id.)

15 Remarkably, when even a state agency physician who did not examine plaintiff
16 found plaintiff's depression "severe," the ALJ gave that opinion minimal weight because the
17 physician did not provide what the ALJ perceived as a rationale for the opinion. The ALJ also
18 rejected the 2007 work function assessment of Dr. Koike, plaintiff's treating psychiatrist, for
19 alleged lack of objective evidence reflected in the doctor's treating notes and due to alleged
20 inconsistency with unspecified evidence of plaintiff's daily activities, including caring for her
21 children. (Id.)

22 The court notes that the post-2005 evidence in the record includes a second
23 consultative report by Dr. Martin, who had examined plaintiff in 2003 and found her
24 musculoskeletal complaints possibly related to osteoarthritis but also found her cooperation poor
25 based on "much grimacing and pain vocalization." When Dr. Martin examined plaintiff again on
26 January 24, 2006, he instead assessed chronic body pain and other impairments, opined that

1 plaintiff “may have difficulty maintaining employment” and suggested that a mental consultation
2 seemed appropriate. (Tr. at 179.)

3 The court finds that the ALJ erred when he failed to find that the evidence of
4 major depression, PTSD, and cholelithiasis was sufficient to rebut the presumption of continuing
5 non-disability. The September 4, 2007 psychiatric report by Dr. Koike, plaintiff’s treating
6 psychiatrist, demonstrates an increase in the severity of plaintiff’s major depression and includes
7 a diagnosis of PTSD, an impairment not previously considered. The August 20, 2007 report by
8 Dr. Li, plaintiff’s treating physician, includes a diagnosis of gall stones, an impairment not
9 previously considered and first established by the March 2007 Mercy General Hospital
10 abdominal sonography. Medical evidence in the record does not clearly establish that these
11 impairments, separately or in combination, are slight abnormalities that have no more than a
12 minimal effect on plaintiff’s ability to work. Thus, these and possibly other impairments are
13 severe impairments for which adjudication must continue through the sequential evaluation
14 process. In reaching this conclusion, the court is mindful that the step-two inquiry is “a de
15 minimis screening device to dispose of groundless claims.” Smolen, 80 F.3d at 1290 (citing
16 Yuckert, 482 U.S. at 153-54).

17 CONCLUSION

18 The court finds that the ALJ erred in finding that plaintiff failed to demonstrate
19 changed circumstances and failed to rebut the presumption of continuing non-disability. The
20 evidence establishes changed circumstances, and the presumption has been rebutted. Remand is
21 required so that the ALJ can proceed with the sequential analysis and fully develop the record.
22 At step two, the ALJ shall include as a severe impairment each of plaintiff’s mental and physical
23 impairments that is more than a slight abnormality having no more than a minimal effect on
24 plaintiff’s ability to work.

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1 In accordance with the above, IT IS HEREBY ORDERED that:

- 2 1. Plaintiff's June 3, 2009 motion for summary judgment (Doc. No. 20) is
3 granted;
- 4 2. Defendant's September 22, 2009 cross-motion for summary judgment (Doc.
5 No. 26) is denied;
- 6 3. The decision of the Commissioner of Social Security is reversed; and
- 7 4. This case is remanded for further proceedings consistent with this order.

8 DATED: March 30, 2010.

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11 _____
12 DALE A. DROZD
13 UNITED STATES MAGISTRATE JUDGE

13 DAD:kw
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