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

PETER CHONG THAO,

Plaintiff,

No. 2:08-cv-03061 KJN

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security
Administration,

ORDER

Defendant.

_____ /

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) terminating plaintiff’s previously granted Disability Insurance Benefits under Title II of the Social Security Act (“Act”) and Supplemental Security Income under Title XVI of the Act.¹ In his motion for summary judgment, plaintiff contends that the Administrative Law Judge Peter Belli (“ALJ Belli”), who affirmed the decision to terminate benefits, erred in two respects. First, plaintiff contends that ALJ Belli erred by finding that plaintiff had improved medically without reviewing the evidence that supported the initial

¹ This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(15) and 28 U.S.C. § 636(c), and both parties have voluntarily consented to proceed before a United States Magistrate Judge. (Dkt. Nos. 7, 9.) This case was reassigned to the undersigned by an order entered February 9, 2010. (Dkt. No. 20.)

1 decision in 2002, entered by Administrative Law Judge Mark Ramsey (“ALJ Ramsey”), that
2 found plaintiff to be disabled within the meaning of the Act. Second, plaintiff argues that, even
3 assuming a proper finding of medical improvement, ALJ Belli erred by determining plaintiff’s
4 present residual functional capacity without consideration of evidence in the administrative
5 record that plaintiff had alleged mental impairments. (See Dkt. No. 17.) The Commissioner
6 filed an opposition to plaintiff’s motion for summary judgment.² (Dkt. No. 19.)

7 For the reasons stated below, the court grants plaintiff’s motion for summary
8 judgment in part and remands this matter for further proceedings.

9 I. BACKGROUND

10 Plaintiff initially filed an application seeking Disability Insurance Benefits on
11 May 31, 2000, and an application seeking Supplemental Security Income on April 28, 2000, both
12 alleging that he had been disabled since March 22, 2000. (Def.’s Opp’n to Mot. for Summ. J.,
13 Ex. 1, Doc. No. 19-2 at 5³; see also Administrative Transcript (“AT”) 14.) On March 20, 2002,
14 ALJ Ramsey found that plaintiff was disabled within the meaning of the Act as of March 22,
15 2000. (Doc. No. 19-2 at 7.) This favorable determination was premised on plaintiff’s severe
16 impairments: “lumbar disc disease and right shoulder internal derangement.” (Doc. No. 19-2 at
17 6.) ALJ Ramsey’s decision noted that “[t]he claimant shall undergo a continuing disability
18 review within three years following the date of this decision.” (Def.’s Opp’n to Mot. for Summ.
19 J., Ex. 1, Doc. No. 19-2 at 8.)

21 ² Although the Commissioner filed an opposition to plaintiff’s motion for summary
22 judgment, he did not file a cross-motion for summary judgment.

23 ³ The Commissioner has not lodged with the court the administrative transcript related to
24 plaintiff’s applications for benefits filed in 2000. However, the Commissioner has attached the
25 following as Exhibit 1 to his opposition to plaintiff’s motion for summary judgment: (1) a
26 “Supplemental Certification” stating that the original hearing decision dated March 20, 2002 was
unavailable when the agency compiled the administrative record in this case in March 4, 2009
(Doc. No. 19-2 at 1); (2) a copy of the notice of a fully favorable decision, dated March 20, 2002
(Doc. No. 19-2 at 2-4); and (3) a copy of ALJ Ramsey’s favorable written decision, dated March
20, 2002 (Doc. No. 19-2 at 5-8).

1 As noted above, although the Commissioner filed a copy of ALJ Ramsey's March
2 20, 2002 written decision with his opposition brief, he has not lodged with this court the
3 administrative transcript that relates to plaintiff's prior favorable disability determination.

4 On June 10, 2005, the Social Security Administration determined that plaintiff's
5 disability ceased as of June 1, 2005, and terminated plaintiff's benefits effective August 1, 2005,
6 having determined that plaintiff had experienced "medical improvement" that rendered him no
7 longer disabled within the meaning of the Act. (See AT 48; see also AT 50-64 (notice of
8 disability hearing decision and Disability Hearing Officer's Report of Disability Hearing).)
9 Plaintiff, who is represented by counsel, requested a hearing before an administrative law judge.
10 (AT 65.) On March 29, 2007, ALJ Belli conducted a hearing at which plaintiff and David
11 Dettmer, a vocational expert, testified. (AT 24-47.)

12 In a written decision dated April 25, 2007, ALJ Belli affirmed the agency's
13 cessation of benefits decision. (AT 14-23.) This decision does not reference plaintiff's alleged
14 mental impairments that are the subject of much of the briefing before the court, ostensibly
15 because plaintiff did not submit those records until after ALJ Belli issued his decision.

16 In summarizing the favorable disability decision from 2002, referred to as the
17 "comparison point decision" or "CPD," ALJ Belli stated:

18 **2. At the time of the CPD, the claimant had the following medically**
19 **determinable impairments: back disorder and right shoulder**
20 **derangement. These impairments were found to result in the residual**
21 **functional capacity to perform sedentary work. This was**
22 **compromised by from [sic] performing prolonged sitting, standing,**
23 **walking, bending, and lifting 10 pounds or more.**

24 At the time of the CPD, the claimant was being treated for right-sided
25 rotator cuff tendonosis and disc disease of the lumbar spine secondary to a
26 work injury on March 18, 2000. He failed conservative therapy and was
referred to an orthopedic specialist who performed a series of injections to
the right shoulder, all of which provided only temporary relief. X-rays
were performed on January 26, 2001 with abnormal findings at the L4-5
and L5-S1 disc levels. Orthopedic testing revealed severe back spasms
and limited range of motion, positive straight leg raising and back pain
radiating into the lower extremities. An orthopedic exam was performed
on January 19, 2002 and findings revealed that claimant was using

1 crutches and he was unable to sit or stand unsupported due to back pain.
2 There was decreased neck and back movement with poor effort noted by
3 the examining physician. The right shoulder arm revealed decrease [*sic*]
4 range of motion and a lot of guarding and fairly diffuse pain. An
5 examination of the lumbar spine revealed diffuse guarding, decreased
6 range of motion, and some tenderness.

7 (AT 16 (emphasis in original).) This summary does not include citations to the administrative
8 transcript related to the CPD, reference the nature or state of the record before ALJ Belli, or
9 reveal what evidence, if any, ALJ Belli specifically considered in drafting this summary.

10 ALJ Belli's decision became final after the Appeals Council denied plaintiff's
11 request for review. (AT 3-6 (notice of denial), 8-9 (request for review).) In its notice of denial of
12 review, the Appeals Council noted that it had considered additional evidence submitted by
13 plaintiff, which consisted of a cover letter dated August 25, 2008, and 36 pages of attachments.
14 (AT 3, 7, 174-209.) That newly submitted evidence consisted of medical records and other
15 evidence related to plaintiff's alleged mental impairments: major depressive disorder and post-
16 traumatic stress disorder. The Appeals Council concluded that the evidence submitted was "new
17 but not material," and that the information provided "does not provide a basis for changing the
18 Administrative Law Judge's decision."⁴ (AT 4.)

19 ⁴ The Appeals Council stated:

20 The additional evidence submitted with the request for review indicates
21 that you went to mental health services and did an adult intake screening
22 assessment on February 21, 2007, a month before your hearing date. The
23 social worker and Oscar Jaurigue, M.D., diagnosed you with major
24 depressive disorder, recurrent, severe without psychotic features and post
25 traumatic stress disorder and assigned a GAF of 50 at the initial intake.
26 Medication was prescribed. By May 15, 2007, you reported to Dr.
Jaurigue that you were helping your wife with household chores and
supervision of your eight kids (ages 6 to 17). The progress notes indicate
that your mental impairments continue to be under control with
medication. No side effects from the medications were reported. On
February 29, 2008, H. J. Savalia, M.D., a staff psychiatrist, conducted a
mental health exam and noted that you did not have a crippling mental
disorder which would qualify you for disability and opined that the "only
barrier he has is the language barrier, English, and low level of education

1 II. DISCUSSION

2 Plaintiff contends that ALJ Belli committed two errors in reviewing the decision
3 terminating plaintiff's benefits. Plaintiff first contends that ALJ Belli erred by making a finding
4 that plaintiff had experienced medical improvement without reviewing the evidence that
5 supported ALJ Ramsey's 2002 decision that found plaintiff to be disabled. (Dkt. No. 17 at 15-
6 16.) Because plaintiff's first argument is persuasive and a remand for further proceedings is
7 warranted as a result, the undersigned does not reach plaintiff's second argument, that, even
8 assuming a proper finding of medical improvement, ALJ Belli erred by determining plaintiff's
9 present residual functional capacity without considering evidence of plaintiff's alleged mental
10 impairments. (Dkt. No. 17 at 17-20.)

11 A. Relevant Legal Standards Governing Termination of Benefits Premised on a
12 Finding of "Medical Improvement"

13 Once a Social Security benefits claimant has been found to be disabled, "a
14 presumption of continuing disability arises in [his or] her favor." Bellamy v. Sec'y of Health &
15 Human Servs., 755 F.2d 1380, 1381 (9th Cir. 1985) (citing Murray v. Heckler, 722 F.2d 499, 500
16 (9th Cir. 1983)); accord Parra v. Astrue, 481 F.3d 742, 748 (9th Cir. 2007). However, a
17 claimant's continuing entitlement to Disability Insurance Benefits ("DIB") and Supplemental
18 Security Income ("SSI") is subject to mandatory periodic review. 20 C.F.R. §§ 404.1594(a)
19 (governing DIB determinations), 416.994(a) (governing SSI determinations).

20 Relevant here, a claimant's benefits may be terminated where the Commissioner
21 produces substantial evidence that: "(A) there has been any medical improvement in the
22 individual's impairment or combination of impairments (other than medical improvement which

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24 which does not make him disabled and he can function mentally and can
25 work." You agreed with Dr. Savalia's findings. The Appeals Council
26 therefore finds this evidence new but not material. . . . We found that this
information does not provide a basis for changing the Administrative Law
Judge's decision.

(AT 4.)

1 is not related to the individual's ability to work), and (B) the individual is now able to engage in
2 substantial gainful activity.”⁵ 42 U.S.C. § 423(f)(1). The regulations applicable to both DIB and
3 SSI define “medical improvement” as follows:

4 Medical improvement is any decrease in the medical severity of your
5 impairment(s) which was present at the time of the most recent favorable
6 medical decision that you were disabled or continued to be disabled. A
7 determination that there has been a decrease in medical severity must be
8 based on changes (improvement) in the symptoms, signs and/or laboratory
9 findings associated with your impairment(s). . . .

10 20 C.F.R. § 404.1594(b)(1); accord 20 C.F.R. § 416.994(b)(1)(I). The Commissioner has the
11 “burden of producing evidence sufficient to rebut [the] presumption of continuing disability.”
12 Bellamy, 755 F.2d at 1381; see also Murray, 722 F.2d at 500 (“The Secretary . . . has the burden
13 to come forward with evidence of improvement.”). However, a reviewing court will not set aside
14 a decision to terminate benefits unless the determination is based on legal error or is not
15 supported by substantial evidence in the record as a whole.⁶ Allen v. Heckler, 749 F.2d 577, 579
16 (9th Cir. 1984).

17 The Commissioner evaluates whether a claimant continues to be entitled to DIB
18 or SSI under two similar multi-step tests. In a DIB case, the Commissioner employs an eight-
19 step test. See 20 C.F.R. § 404.1594(f)(1)-(8). Where SSI is concerned, the Commissioner
20 applies a seven-step test. 20 C.F.R. § 416.994(b)(5)(I)-(vii). These tests are substantially

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23 ⁵ Section 423(f) also states: “Any determination under this section shall be made on the
24 basis of all the evidence available in the individual’s case file, including new evidence
25 concerning the individual’s prior or current condition which is presented by the individual or
26 secured by the Commissioner of Social Security.” 42 U.S.C. § 423(f).

⁶ “Substantial evidence means more than a mere scintilla but less than a preponderance;
it is such relevant evidence as a reasonable mind might accept as adequate to support a
conclusion.” Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1222 (9th Cir. 2009)
(quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)); accord Valentine v. Comm’r
of Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009).

1 similar.⁷ Central here, is that at step three of the DIB-related framework and step two of the SSI-
2 related framework, the Commissioner inquires whether there has been “medical improvement” as
3 defined in the respective regulations. 20 C.F.R. §§ 404.1594(f)(3), 416.994(b)(ii). The
4 Commissioner’s regulations further provide that for the purposes of determining whether medical
5 improvement has occurred, the Commissioner “will compare the current medical severity of that
6 impairment(s) which was present at the time of the most recent favorable medical decision that
7 you were disabled . . . to the medical severity of that impairment(s) at that time.” 20 C.F.R. §
8 404.1594(b)(7); accord 20 C.F.R. § 416.994(b)(vii).

9 B. Finding of Medical Improvement In the Present Case

10 Here, plaintiff contends that ALJ Belli applied an “improper legal standard” in
11 evaluating whether plaintiff experienced a medical improvement. (Pl.’s Mot. for Summ. J. at 15-
12 16.) Specifically, he argues that the Commissioner failed to meet his burden of producing
13 evidence of medical improvement because he did not produce any medical records regarding
14 plaintiff’s medical condition at the time plaintiff was initially found to be eligible for benefits.⁸
15 Plaintiff posits that the ALJ merely provided a summary of the findings in the 2002 decision (the
16 CPD), which he argues appears to be based on a consultative request form from 2005. (Id. at 16
17 (citing AT 114).) Plaintiff argues that, as a result, it is impossible to accurately assess his
18 medical improvement and, accordingly, the Commissioner did not meet his burden of production
19 and plaintiff’s disabled status continues. (Id.)

20 As an initial matter, the undersigned addresses plaintiff’s citation to, and partial
21 reliance on, proposed findings and recommendations filed in Bell v. Barnhart, No. CIV-00-2586

22 ⁷ The difference between these two evaluative frameworks is that in the DIB-related
23 framework, the first step asks whether the claimant is engaging in substantial gainful activity. 20
24 C.F.R. § 404.1594(f)(1). The SSI-related framework does not require this inquiry. See 20 C.F.R.
§ 416.994(b)(5).

25 ⁸ Plaintiff also notes that the Commissioner failed to produce a copy of ALJ Ramsey’s
26 2002 decision finding that plaintiff was disabled. (Pl.’s Mot. for Summ. J. at 15.) The
Commissioner cured that failing by supplementing the record with the 2002 written decision.

1 WBS DAD, by another United States Magistrate Judge of this court. (Pl.’s Mot. for Summ. J. at
2 16.) Plaintiff has not appended a copy of those unpublished findings and recommendations to his
3 motion, and they are not available on common electronic databases like Westlaw or Lexis.
4 Plaintiff’s failure to submit a copy of the relied-upon findings and recommendations constitutes a
5 violation of this court’s Local Rule 133(i)(3) and, accordingly, the undersigned has not reviewed
6 or considered the findings and recommendations in Bell.⁹

7 Nevertheless, plaintiff’s remaining argument is persuasive to the extent that a
8 remand is appropriate in this case. The Ninth Circuit Court of Appeals appears not to have
9 addressed the precise manner of the comparison an administrative law judge must perform in
10 evaluating whether a claimant has experienced a medical improvement. However, the law in
11 other Circuits is that in assessing medical improvement the administrative law judge must
12 evaluate not only the current medical evidence, but also the medical evidence upon which the
13 claimant’s original disabled status was premised. See Byron v. Heckler, 742 F.2d 1232, 1236
14 (10th Cir. 1984) (per curiam) (“In order for evidence of improvement to be present, there must
15 also be an evaluation of the medical evidence for the original finding of disability.”); Vaughn v.
16 Heckler, 727 F.2d 1040 (11th Cir. 1984) (holding that the administrative law judge erred by
17 focusing only on the current evidence of the claimant’s impairments and that without an
18 evaluation of the medical evidence upon which the claimant was originally found disabled, “no
19 adequate finding of *improvement* could be rendered” (emphasis in original)).

20 Here, ALJ Belli does not appear to have compared the current evidence and the
21 evidence supporting the CPD. His summary does not cite to any medical records from the
22 administrative transcript related to the CPD, and the Commissioner has not lodged that prior
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24 ⁹ Plaintiff and his counsel are advised to review the court’s Local Rules, as failure to
25 adhere to the Local Rules may be grounds for the imposition of sanctions. See Local Rule 110
26 (“Failure of counsel or of a party to comply with these Rules or with any order of the Court may
be grounds for imposition by the Court of any and all sanctions authorized by statute or Rule or
within the inherent power of the Court.”).

1 administrative transcript with the court. Moreover, the undersigned cannot discern from ALJ
2 Belli's written decision whether he had the 2002 administrative transcript before him when
3 evaluating plaintiff's continuing disability. Accordingly, the undersigned cannot conclude on the
4 present record that ALJ Belli compared the current evidence and the actual evidence—not merely
5 ALJ Ramsey's written decision or a consultative report—supporting the CPD.

6 The Commissioner argues that unlike the Vaughn and Byron cases, each of which
7 involved an administrative law judge's excessive focus on the current medical evidence to the
8 exclusion of the medical evidence supporting the CPD, ALJ Belli provided an adequate summary
9 of the CPD's findings and properly relied on a prior evaluation of the medical evidence. (See
10 Def.'s Opp'n to Mot. for Summ. J. at 4, 5 n.3.) He notes that "there is no rule requiring the ALJ
11 to revisit or re-litigate the prior evidence described in prior findings." (Id.) The Commissioner
12 also cites to one unpublished decision where a district court found that an administrative law
13 judge who affirmed the termination of benefits did not err by not revisiting the prior favorable
14 decision. See Jackson v. Astrue, No. EDCV 07-1449-MLG, 2008 WL 4501858, at *4 (C.D. Cal.
15 Oct. 2, 2008) (unpublished). The court in Jackson stated:

16 Although the prior medical records are certainly relevant to determining
17 whether there has been a medical improvement, ALJ Varni was not
18 required to revisit ALJ Tierney's decision. Instead, ALJ Tierney's
19 decision, which is based on Plaintiff's prior medical records, is the
20 baseline for ALJ Varni's evaluation of whether Plaintiff has medically
improved in recent years. None of the cases Plaintiff cites indicate that the
ALJ in a termination of benefits case must incorporate prior medical
records into the improvement analysis in the same way as for an initial
disability determination.

21 Id. The court did not cite a statutory, regulatory, or precedential basis for its conclusion.

22 The ALJ appears to have made a good faith effort to recount the basis for the
23 CPD. However, the problem here is not that ALJ Belli failed to "re-litigate" the medical
24 evidence afresh. Rather, the problem here is that: (1) the present record suggests that the ALJ did
25 not consider the administrative transcript related to the CPD; and (2) the record related to the
26 CPD is not before this court such that the court could review the basis for the CPD.

1 Although not binding on this court, the Second Circuit Court of Appeals’s
2 decision in Veino v. Barnhart, 312 F.3d 578 (2d Cir. 2002), is persuasive. There, a disability
3 hearing officer concluded that the claimant had experienced medical improvement since the CPD
4 issued in 1982, and an administrative law judge concluded that the claimant’s medical condition
5 had improved such that the claimant was no longer disabled. The district court affirmed, and the
6 claimant appealed arguing that the Commissioner failed to prove medical improvement since the
7 CPD because the record contained no medical evidence regarding the claimant’s condition in
8 1982. Id. at 586.

9 In considering the claimant’s argument, the Court of Appeals noted that the
10 administrative law judge had received, and the Commissioner had submitted to the court,
11 substantial medical evidence as to the state of the claimant’s current impairments, but that the
12 record before the court contained no medical evidence regarding the claimant’s condition at the
13 time of the CPD. Id. at 587. It further noted that the administrative law judge had stated at the
14 hearing that she had the records upon which the original disability determination was made, but
15 “did not mark as a hearing exhibit, or cite in her decision, any medical record that existed at the
16 time of the 1982 decision, and none of those early records [were] before [the court].” Id. The
17 Court of Appeals concluded that “[i]n the absence of the early medical records, the
18 administrative record lacks a foundation for a reasoned assessment of whether there is substantial
19 evidence to support the Commissioner’s finding that Veino’s 1997-1998 condition represents an
20 ‘improvement.’” Id.

21 Similar to the present case, in Veino the Commissioner argued on appeal that the
22 record before the court was adequate because the prior evidence supporting the CPD was
23 summarized in the hearing officer’s decision and that the hearing officer’s decision and the
24 administrative law judge’s decisions are evidence of the claimant’s prior medical condition. Id.
25 The Court of Appeals rejected this argument:

26 The difficulty with the Commissioner’s position is that these decisions are

1 not evidence. The ALJ did not cite or include in the record the 1982
2 medical evidence itself but only the DHO's summary; and without any of
3 the 1982 medical evidence in the record before us, this Court cannot make
4 a reasoned determination as to whether the DHO's summary is accurate or
adequate. Accordingly, the matter will be remanded to the Commissioner
for supplementation of the record and for further consideration.

5 Id.

6 As noted above, the undersigned finds that the reasoning of the Veino decision is
7 persuasive. Remand is warranted here where the Commissioner has not presented this court with
8 the record supporting the CPD. Perhaps more importantly, it is entirely unclear whether ALJ
9 Belli possessed, reviewed, or considered the medical evidence underlying the CPD in assessing
10 whether plaintiff experienced medical improvement.¹⁰ Here, ALJ Belli summarized plaintiff's
11 prior impairments, but without citation to the relevant medical records or elucidation as to the
12 basis for his summary. Accordingly, this matter will be remanded for supplementation of the
13 record and further proceedings.

14 Because a remand is warranted in this case, the undersigned does not reach
15 plaintiff's argument that, even assuming a proper finding of medical improvement, ALJ Belli
16 erred by determining plaintiff's present residual functional capacity without considering evidence
17 of plaintiff's alleged mental impairments.

18 III. CONCLUSION

19 Based on the foregoing, IT IS HEREBY ORDERED that:

- 20 1. Plaintiff's motion for summary judgment is granted, in part;

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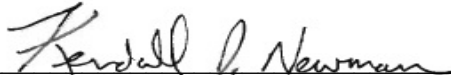
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26 ¹⁰ The Commissioner has not argued to the contrary in his opposition brief.

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2. This matter is remanded for further proceedings consistent with this order.

See 42 U.S.C. § 405(g).

DATED: May 3, 2010


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE