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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHERIE BLASQUEZ-TRACY,
Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

No. 2:15-cv-02621 CKD

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying an application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”). For the reasons discussed below, the court will grant plaintiff’s motion for summary judgment and deny the Commissioner’s cross-motion for summary judgment.

BACKGROUND

Plaintiff, born January 9, 1988, applied for SSI in September 2010, alleging disability beginning November 8, 2008. Administrative Transcript (“AT”) 74, 214. Plaintiff alleged she was unable to work due to bipolar disorder, mood disorder, attention deficit disorder, and depression. AT 757. An administrative law judge (“ALJ”) issued an unfavorable decision on July 20, 2012. AT 32-42. The Appeals Council declined review. AT 43-45. Plaintiff then filed

1 an appeal to this court in case No. 2:13-cv-00570 CKD. After plaintiff filed a motion for
2 summary judgment, the parties stipulated to a remand for further proceedings. AT 60-61.

3 On remand, a second ALJ held a hearing on August 18, 2014. AT 814-850. Plaintiff was
4 represented by counsel, and the ALJ also heard testimony from Dr. Arnold Ostrow, an internist
5 and pulmonologist, and Alina Sala, a vocational expert. AT 814-850. After the hearing, the ALJ
6 obtained a consultative evaluation of plaintiff's mental health from clinical psychologist Dr. Sara
7 Bowerman. AT 720-728. In a decision dated March 23, 2015, the ALJ determined that plaintiff
8 was not disabled.¹ AT 13-29. The ALJ made the following findings (citations to 20 C.F.R.
9 omitted):

10 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
11 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to
12 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in
13 part, as an "inability to engage in any substantial gainful activity" due to "a medically
14 determinable physical or mental impairment. . . ." 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A).
A parallel five-step sequential evaluation governs eligibility for benefits under both programs.
See 20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S.
137, 140-142, 107 S. Ct. 2287 (1987). The following summarizes the sequential evaluation:

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

17 Step two: Does the claimant have a "severe" impairment?
18 If so, proceed to step three. If not, then a finding of not disabled is
appropriate.

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

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

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

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

27 The claimant bears the burden of proof in the first four steps of the sequential evaluation
28 process. Bowen, 482 U.S. at 146 n.5, 107 S. Ct. at 2294 n.5. The Commissioner bears the
burden if the sequential evaluation process proceeds to step five. Id.

- 1 1. The claimant last met the insured status requirements of the
2 Social Security Act on December 31, 2008.
- 3 2. The claimant has not engaged in substantial gainful activity
4 since November 7, 2008, the alleged onset date.
- 5 3. The claimant has the following severe impairments: bipolar
6 disorder and generalized anxiety disorder.
- 7 4. The claimant does not have an impairment or combination of
8 impairments that meets or medically equals one of the listed
9 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 10 5. After careful consideration of the entire record, the undersigned
11 finds that the claimant has the residual functional capacity to
12 perform a full range of work at all exertional levels but with the
13 following nonexertional limitations: she can perform simple,
14 routine, repetitive tasks with occasional decisionmaking, occasional
15 workplace changes, and no fast paced production. She can
16 occasionally interact with the public, coworkers and supervisors.
- 17 6. The claimant has no past relevant work.
- 18 7. The claimant was born on January 9, 1988 and was 20 years old,
19 which is defined as a younger individual age 18-49, on the alleged
20 disability onset date.
- 21 8. The claimant has at least a high-school education and is able to
22 communicate in English.
- 23 9. Transferability of job skills is not an issue in this case because
24 the claimant does not have past relevant work.
- 25 10. Considering the claimant's age, education, work experience,
26 and residual functional capacity, there are jobs that exist in
27 significant numbers in the national economy that the claimant can
28 perform.
- 29 11. The claimant has not been under a disability, as defined in the
30 Social Security Act, from November 7, 2008, through the date of
31 this decision.

32 AT 16-29.

33 ISSUES PRESENTED

34 Plaintiff argues that the ALJ committed the following errors in finding plaintiff not
35 disabled: (1) the ALJ failed to follow the parties' stipulation and order for voluntary remand in
36 December 2013; (2) the ALJ erred in failing to explain the mental residual functional capacity
37 (MRFC) finding; and (3) the ALJ improperly weighed the medical evidence.

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1 LEGAL STANDARDS

2 The court reviews the Commissioner’s decision to determine whether (1) it is based on
3 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record
4 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
5 evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340
6 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means “such relevant evidence as a reasonable
7 mind might accept as adequate to support a conclusion.” Orn v. Astrue, 495 F.3d 625, 630 (9th
8 Cir. 2007), quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). “The ALJ is
9 responsible for determining credibility, resolving conflicts in medical testimony, and resolving
10 ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).
11 “The court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one
12 rational interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

13 The record as a whole must be considered, Howard v. Heckler, 782 F.2d 1484, 1487 (9th
14 Cir. 1986), and both the evidence that supports and the evidence that detracts from the ALJ’s
15 conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not
16 affirm the ALJ’s decision simply by isolating a specific quantum of supporting evidence. Id.; see
17 also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the
18 administrative findings, or if there is conflicting evidence supporting a finding of either disability
19 or nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226,
20 1229-30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in
21 weighing the evidence. See Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

22 ANALYSIS

23 On December 17, 2013, in Tracy v. Colvin, No. 2:13-cv-00570 CKD (E.D. Cal.), the court
24 approved the following stipulated terms of a voluntary remand pursuant to sentence four of 42
25 U.S.C. § 405(g):

26 Upon remand, the Office of Disability Adjudication and Review
27 will remand this case to an Administrative Law Judge (ALJ) and
28 direct him or her to properly assess the medical evidence and
opinions of record and provide specific and legitimate reasons for
accepting or rejecting these opinions. The ALJ should re-evaluate

1 the medical evidence with the aid of a medical expert to determine
2 the nature and severity of Plaintiff's mental impairments, and if
3 necessary, the ALJ will obtain testimony from a vocational expert.
4 The ALJ will further evaluate the credibility of Plaintiff's
 statements regarding her reported symptoms. If Plaintiff is found
 disabled, the ALJ will perform the necessary analysis to determine
 if drug abuse and alcohol abuse are material.

5 AT 61 (emphasis added).

6 Plaintiff contends that the ALJ did not follow the remand order because the testifying
7 medical expert was an internist and pulmonologist who did not give psychiatric testimony, and as
8 the ALJ acknowledged, "This is basically a psych case[.]" AT 830. Although the ALJ obtained a
9 post-hearing psychiatric evaluation by Dr. Bowerman, plaintiff contends that this consultative
10 review did not amount to "reevaluat[ing] the medical evidence" as directed.

11 Defendant contends that the ALJ complied with the order to obtain medical expert
12 assistance in evaluating plaintiff's mental impairments by considering the opinion of CE
13 Bowerman. Defendant further notes that plaintiff's counsel did not object when informed that Dr.
14 Ostrow would be the only medical expert to testify. Plaintiff retorts that there was no reason to
15 object to Dr. Ostrow, as he offered no testimony about the relevant psychiatric issues.²

16 Thus, the only medical expert arguably responsive to the remand order was Dr.
17 Bowerman, who explained the basis for her report as follows: "Background information was
18 gathered from Ms. Blasquez-Tracy and any available medical records. . . . The source of
19 information for this evaluation for Ms. Blasquez-Tracy, who was an adequate historian." AT
20 728. In the November 2014 evaluation, Dr. Bowerman also administered I.Q., memory, and other
21 tests to plaintiff. AT 725.

22 Dr. Bowerman diagnosed plaintiff with cognitive disorder, posttraumatic stress disorder,
23 mood disorder due to a general medical condition (head trauma), and polysubstance dependence
24 (in partial remission) on Axis I; borderline intellectual functioning on Axis II; and a GAF of 45.³

25 ² Indeed, after Dr. Ostrow testified, the ALJ remarked to plaintiff's attorney: "Remind me to tell
26 people we don't need an IM on a psych case." AT 831. The attorney agreed, saying: "I think we
27 have a medium RFC." AT 831. The ALJ responded in part: "I'm sorry we took the doctor's time
 doing what we did." AT 831.

28 ³ GAF is a scale reflecting the "psychological, social, and occupational functioning on a

1 As to functional abilities, Dr. Bowerman found that plaintiff's ability to understand, remember,
2 and carry out simple one or two-step job instructions was mildly impaired, and that her ability to
3 do so with more complex job instructions was "moderately impaired by her mood and anxiety
4 disorders." AT 721. As discussed below, the ALJ gave this opinion little weight.

5 In step four of the post-remand decision, the ALJ stated: "In accordance with the District
6 Court Order, the undersigned has considered the medical opinions in the record." AT 24. The
7 decision went on to discuss the following medical opinions:

- 8 • A 2009 report by consultative psychologist Dr. Owens (AT 24; see AT 319);
- 9 • A 2011 report by consultative psychologist Dr. Schmidt (AT 24; see 529-530); and
- 10 • 2011 reports by state agency psychological consultants Dr. Garland and Dr.
11 Zukowsky (AT 24; see AT 62-72, 76-91).

12 "These opinions are given great weight because they are generally consistent with each other and
13 the discussed treatment records. The opinions of Drs. Owens and Schmidt were based on direct
14 examination, personal observation and objective testing." AT 24. These opinions generally
15 found plaintiff able to work.

16 In contrast, the decision gave "little weight" to the following opinions of treating
17 physicians:

- 18 • A one-page state disability certificate completed by Dr. Mehtani in 2010,
19 stating that plaintiff was unable to work between December 2009 and the
20 present due to bipolar disorder (AT 25; see AT 565);
- 21 • A mental capacity form completed by Dr. Mehtani in 2012, stating that
22 plaintiff was "severely impaired" and her abilities to "adjust to a job" were
23 "poor to none" (AT 25; see AT 615-617);
- 24 • An August 2014 mental residual functional capacity ("MRFC") assessment by
25 treating psychiatrist Dr. Morales, who also rated most of plaintiff's work-

26 hypothetical continuum of mental health-illness." Diagnostic and Statistical Manual of Mental
27 Disorders at 34 (4th ed. 2000) ("DSM IV-TR"). A 41-50 rating indicates serious symptoms such
28 as suicidal ideation, severe obsessional rituals, or serious impairment in social, work, or school
functioning.

1 related abilities “poor to none” (AT 25-26; see AT 705-707); and

- 2 • The November 2014 report by CE Dr. Bowerman, which the ALJ rejected for
3 several reasons, including that plaintiff’s test scores were significantly lower
4 than earlier scores and inconsistent with plaintiff’s educational history; the
5 report was internally inconsistent; and there was no previous record of plaintiff
6 sustaining a head injury (AT 26-27; see AT 720-728).

7 Based on the above, while the ALJ did obtain new medical opinions and “consider[] the
8 medical opinions in the record” (AT 24), he did not “re-evaluate the medical evidence with the
9 aid of a medical expert[.]” This language does not suggest merely obtaining a third CE opinion
10 that does not “re-evaluate” any evidence but is based on plaintiff’s statements and new tests, and
11 as such is subject to the assignment of little weight. As to the testifying expert, plaintiff’s
12 physical capabilities were not at issue.

13 Because the agency failed to meaningfully comply with the prior remand, the matter must
14 be remanded once again, and the court need not reach plaintiff’s remaining arguments. See
15 Adkison v. Commissioner, Case No. 2:11-cv-01533 CMK (E.D. Cal.), Order dated Sept. 14, 2012
16 (remanding a second time when agency did not comply with first order of remand).

17 CONCLUSION

18 For the reasons stated herein, IT IS HEREBY ORDERED that:

- 19 1. Plaintiff’s motion for summary judgment (ECF No. 19) is granted;
- 20 2. Defendant’s cross-motion for summary judgment (ECF No. 21) is denied;
- 21 3. The Commissioner’s decision is reversed;
- 22 4. This matter is remanded for further proceedings consistent with this order; and
- 23 5. The Clerk of the Court shall enter judgment for plaintiff and close this case.

24 Dated: August 31, 2017

25 
26 CAROLYN K. DELANEY
27 UNITED STATES MAGISTRATE JUDGE