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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

MIGUEL CARLOS PATRICIO,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

Case No. 18-cv-02896-RMI

**ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 22, 23, 24

Plaintiff, Miguel Carlos Patricio, seeks judicial review of an administrative law judge (“ALJ”) decision denying his application for benefits under Title XVI of the Social Security Act. Plaintiff’s request for review of the ALJ’s unfavorable decision was denied by the Appeals Council, thus, the ALJ’s decision is the “final decision” of the Commissioner of Social Security, which this court may review. *See* 42 U.S.C. §§ 405(g), 1383(c)(3). Both parties have consented to the jurisdiction of a magistrate judge (dkt. 3 & 12), and both parties have moved for summary judgment (dkt. 22, 23 & 34).¹ For the reasons stated below, the court will grant Plaintiff’s amended motion for summary judgment and will deny Defendant’s motion for summary judgment.

LEGAL STANDARD

Commissioner’s findings “as to any fact, if supported by substantial evidence, shall be conclusive.” 42 U.S.C. § 405(g). A district court has a limited scope of review and can only set aside a denial of benefits if it is not supported by substantial evidence or if it is based on legal

¹ Plaintiff filed a Motion for Summary Judgment (dkt. 22) and an Amended Motion (dkt. 23).

1 error. *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Substantial
2 evidence is “more than a mere scintilla but less than a preponderance; it is such relevant evidence
3 as a reasonable mind might accept as adequate to support a conclusion.” *Sandgathe v. Chater*, 108
4 F.3d 978, 979 (9th Cir. 1997). “In determining whether the Commissioner’s findings are supported
5 by substantial evidence,” a district court must review the administrative record as a whole,
6 considering “both the evidence that supports and the evidence that detracts from the
7 Commissioner’s conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). The
8 Commissioner’s conclusion is upheld where evidence is susceptible to more than one rational
9 interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

10 **PROCEDURAL HISTORY**

11 Plaintiff initially filed applications for Title XVI benefits, which were denied at hearings on
12 March 5, 2010, and on November 29, 2012. *See Administrative Record “AR”*² at 50 & 60. On June
13 25, 2013, Plaintiff filed another application for benefits alleging an onset date of December 1,
14 2012. *AR* at 20. The ALJ denied the application on February 7, 2017, finding that Plaintiff had not
15 sufficiently rebutted the presumption of continuing non-disability pursuant to Social Security
16 Acquiescence Ruling (AR) 97-4(9) and *Chavez v. Bowen*, 844 F.2d 691 (9th Cir. 1988). *Id.* at 20-
17 27. The Appeals Council denied Plaintiff’s request for review on March 19, 2018. *Id.* at 1-6.

18 **SUMMARY OF THE RELEVANT EVIDENCE**

19 When he filed his most recent application for benefits, Plaintiff was 49 years old and had
20 suffered chronic homelessness for the previous 20 years. *AR* at 20 & 482. In his application for
21 disability, Plaintiff alleged that he suffered from the following physical and mental impairments:
22 back and neck pain, fibromyalgia, hernia, kidney problems, cyst in kidney, migraines, chemical
23 sensitivity, neurological problems, anxiety, depression, Somatic Symptom Disorder, and
24 Personality Disorder. *Id.* at 20, 97-101, 108-13, 216-28, 182-92, 241, 269, 426-27, 482. Plaintiff
25 presented many of these impairments at a hearing before an ALJ in support of his application for
26 benefits in 2012, following which the ALJ issued an unfavorable decision that included a finding
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² The *AR* is independently paginated and is generally filed along with the Answer. *See* (dkt. 18).

1 that Plaintiff suffered the following severe impairments: degenerative disc disease, degenerative
2 joint disease, a major depressive disorder, and marijuana dependence. *Id.* at 53.

3 After that hearing, Plaintiff filed a new application for benefits, in which he presented new
4 evidence in support of the additional impairments of an anxiety disorder, Somatic Symptom
5 Disorder, and Personality Disorder. Specifically, in April of 2014, agency examiner Jodi D.
6 Snyder, PsyD, diagnosed Plaintiff with Depressive Disorder, Major Depressive Disorder, Anxiety
7 Disorder, and GAD. *Id.* at 427. On August 27, 2014, Plaintiff was examined by Elizabeth Walser,
8 MSW, Psy.D. and Lesleigh Franklin, PhD, who diagnosed Plaintiff with Major Depressive
9 Disorder, without Psychotic Features; Somatic Symptom Disorder, Persistent, Severe; Other
10 Specified Personality Disorder, with Mixed Personality Features; and Allergies, Unspecified. *Id.* at
11 488. Dr. Franklin prescribed Baclofen for muscle spasms, Amitriptyline for depression and pain,
12 Loratadine for allergies, Montelukast for bronchoconstriction, Fluticasone nasal spray, and Ibuprofen
13 for pain. *Id.* at 483.

14 **THE FIVE-STEP SEQUENTIAL ANALYSIS FOR DETERMINING DISABILITY**

15 A person filing a claim for social security disability benefits (“the claimant”) must show
16 that she has the “inability to do any substantial gainful activity by reason of any medically
17 determinable physical or mental impairment” which has lasted or is expected to last for twelve or
18 more months. *See* 20 C.F.R. §§ 416.920(a)(4)(ii), 416.909. The ALJ must consider all evidence in
19 the claimant’s case record to determine disability (*see id.* § 416.920(a)(3)), and must use a five-
20 step sequential evaluation process to determine whether the claimant is disabled (*see id.* §
21 416.920). “[T]he ALJ has a special duty to fully and fairly develop the record and to assure that
22 the claimant’s interests are considered.” *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983).
23 Here, the ALJ evaluated Plaintiff’s application for benefits under the required five-step sequential
24 evaluation process. *AR* at 20-27. At Step One, the claimant bears the burden of showing he has not
25 been engaged in “substantial gainful activity” since the alleged date the claimant became disabled.
26 *See* 20 C.F.R. § 416.920(b). If the claimant has worked and the work is found to be substantial
27 gainful activity, the claimant will be found not disabled. *See id.* The ALJ found that Plaintiff had
28 not engaged in substantial gainful activity since the application date. *AR* at 22.

1 At Step Two, the claimant bears the burden of showing that he has a medically severe
 2 impairment or combination of impairments. *See* 20 C.F.R. § 416.920(a)(4)(ii), (c). “An
 3 impairment is not severe if it is merely ‘a slight abnormality (or combination of slight
 4 abnormalities) that has no more than a minimal effect on the ability to do basic work activities.’”
 5 *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (quoting S.S.R. No. 96–3(p) (1996)). The
 6 ALJ found that Plaintiff suffered from the following severe impairments: degenerative disc
 7 disease; degenerative joint disease; affective disorders diagnosed as a depressive disorder and
 8 anxiety disorder. *AR* at 23.

9 At Step Three, the ALJ compares the claimant’s impairments to the impairments listed in
 10 appendix 1 to subpart P of part 404. *See* 20 C.F.R. § 416.920(a)(4)(iii), (d). The claimant bears the
 11 burden of showing her impairments meet or equal an impairment in the listing. *Id.* If the claimant
 12 is successful, a disability is presumed and benefits are awarded. *Id.* If the claimant is unsuccessful,
 13 the ALJ assesses the claimant’s residual functional capacity (“RFC”) and proceeds to Step Four.
 14 *See id.* § 416.920(a)(4)(iv), (e). Here, the ALJ found that Plaintiff did not have an impairment or
 15 combination of impairments that met or medically equaled one of the listed impairments. *AR* at 23.
 16 Next, the ALJ determined that Plaintiff retained the RFC “to perform light work . . . with
 17 occasional bilateral overhead reaching,” with an ability to “perform simple routine tasks equating
 18 to unskilled work with occasional public contact.” *Id.* at 24.

19 At Step Four, the ALJ determined that Plaintiff had no past relevant work, but upon
 20 considering Plaintiff’s age, education, work experience and RFC, and with the aid of the Medical-
 21 Vocational Guidelines, the ALJ determined that Plaintiff could perform some “jobs that exist in
 22 significant numbers in the national economy.” *Id.* at 26. Thus, the ALJ found that Plaintiff “ha[d]
 23 not been under a disability, as defined in the Social Security Act, at any time since June 25, 2013,
 24 the date on which the application was filed.” *Id.* at 27.

25 **ISSUES PRESENTED**

26 Plaintiff presents nine questions for this court’s review: “(1) Was the ALJ’s finding that
 27 Plaintiff did not rebut a presumption of non-disability based on substantial evidence?”; (2) “Did
 28 the ALJ err in ignoring Somatic Symptom Disorder and Personality Disorder?”; (3) “Did the ALJ

1 fail to evaluate Plaintiff’s Anxiety Disorder?”; (4) “Did the ALJ err by failing to evaluate
2 Plaintiff’s impairments in combination?”; (5) “Was the ALJ’s rejection of the examining and
3 treating source medical opinions based on substantial evidence?”; (6) “Did the ALJ err in
4 evaluating Plaintiff’s credibility?”; (7) “Was the ALJ’s residual functional capacity finding based
5 on substantial evidence?”; (8) “Did the ALJ err by failing to consult a vocational expert?”; and (9)
6 “Should the Court remand for payment of benefits or further proceedings?”

7 **DISCUSSION**

8 Many, if not all, of Plaintiff’s arguments in support of reversal are related or otherwise
9 affected by the first issue presented; the ALJ’s finding that Plaintiff did not rebut the presumption
10 of non-disability. “A prior administrative finding of non-disability gives rise to a presumption of
11 continuing non-disability that can only be overcome if the claimant proves ‘changed
12 circumstances’ indicating a more severe condition.” *Johnson v. Berryhill*, No. 16-CV-01332-JCS,
13 2017 WL 3670025, at *16 (N.D. Cal. Aug. 24, 2017) (citing *Chavez v. Bowen*, 844 F.2d 691, 693
14 (9th Cir. 1988)). “Similarly, ‘a previous ALJ’s findings concerning residual functional capacity,
15 education, and work experience are entitled to some *res judicata* consideration and such findings
16 cannot be reconsidered by a subsequent judge absent new information not presented to the first
17 judge.” *Id.* (quoting *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1173 (9th Cir. 2008) (applying
18 *Chavez*, 844 F.2d at 694)). This is what is commonly referred to as the *Chavez* presumption. *See*
19 *Chavez*, 844 F.2d at 693 (“The claimant, in order to overcome the presumption of continuing
20 nondisability arising from the first administrative law judge’s findings of nondisability, must
21 prove ‘changed circumstances’ indicating a greater disability.”); *see also*, Social Security
22 Acquiescence Ruling 97-4(9). In the present case, the ALJ determined that Plaintiff
23 had not sufficiently rebutted the presumption of continuing non-disability that attached to his
24 unsuccessful application in 2012. *AR* at 20.

25 Plaintiff contends that this was error because “the ALJ fail[ed] to note that, in addition to a
26 change of age category, the Plaintiff had also been diagnosed with additional mental impairments
27 since the prior ALJ decision, including anxiety disorder, somatic symptom disorder and
28 personality disorder.” Pl.’s Am. Mot. (dkt. 23) at 8. While the ALJ did find Plaintiff’s anxiety

1 disorder to be a severe impairment, the ALJ makes no mention of Plaintiff’s diagnoses of somatic
2 symptom disorder and personality disorder. Indeed, the ALJ stated that “[t]he above impairments
3 are the same impairments found to be severe in the most recent ALJ decision, with the exception of
4 marijuana dependence,” even though the previous ALJ decision did not mention an anxiety disorder.
5 *AR* at 23. Thus, the ALJ’s decision finds an additional impairment, fails to address two new diagnoses,
6 and then incorrectly states that the current severe impairments are the same as the previously found
7 severe impairments.

8 The Commissioner addresses this by conceding that “the addition of an additional severe
9 impairment would constitute changed circumstances under *Chavez* and AR 47-4(9),” but offers that
10 “any error in applying the continuing non-disability presumption is harmless because the ALJ properly
11 considered Plaintiff’s anxiety disorder in the new decision.” Def.’s Mot. (dkt. 34) at 3. The
12 Commissioner does not point the court to any passage reflecting the ALJ’s consideration of Plaintiff’s
13 anxiety disorder. Instead, the Commissioner argues “that while the ALJ found a severe impairment of
14 affective disorders as depressive disorder and anxiety disorder – the previous ALJ found severe
15 impairments of depressive disorder without psychotic symptoms,” that “Plaintiff’s anxiety is indeed
16 related to his affective disorder of depression,” and that “[t]here is no significant difference with
17 Plaintiff’s anxiety and depression from the prior decision to warrant changed circumstances.” *Id.* Thus,
18 on the one hand the Commissioner admits that an additional severe impairment would constitute
19 “changed circumstances” under *Chavez*, while asserting that any error is harmless because the ALJ
20 addressed the additional impairment in his decision, while on the other hand, the Commissioner argues
21 that the additional severe impairment provides no significant difference to warrant “changed
22 circumstances.”

23 The first question before the court is whether Plaintiff established “changed circumstances”
24 indicating a greater disability. “The presumption of non-disability does not apply if the claimant
25 proves ‘a change in the claimant’s age category . . . an increase in the severity of the claimant’s
26 impairment(s), the alleged existence of an impairment(s) not previously considered, or a change in the
27 criteria for determining disability.’” *Regina B. v. Berryhill*, No. CV 16-5096-SP, 2019 WL 1242839, at
28 *3 (C.D. Cal. Mar. 15, 2019) (quoting SSAR 97-4(9)). Accordingly, the finding of an additional severe

1 impairment was a “changed circumstance,” which means that the ALJ erred in failing to find that
2 Plaintiff rebutted the non-disability presumption. The Commissioner’s argument that there is no
3 difference between the previous ALJ’s finding of only depressive disorder and the current ALJ’s
4 finding of a depressive disorder and anxiety disorder because they are “related” is unavailing. Plaintiff
5 presented new evidence of an anxiety disorder, including evidence from Drs. Franklin and Walser, as
6 well as the findings by consultative examiner Dr. Snyder. Indeed, as stated above, the ALJ specifically
7 mentioned Dr. Snyder’s diagnosis of an anxiety disorder. *AR* at 25. That the anxiety disorder was
8 significant and distinct is evident by the ALJ finding it to be a separate severe impairment and
9 discussing it as a separate diagnosis, stating: “Dr. Snyder diagnosed depressive disorder and an anxiety
10 disorder.”³ *Id.* Whether or not Plaintiff’s disorders are related in that they stem from the same
11 circumstances or other impairments, they are separate and distinct disorders that were determined to be
12 severe and should have been evaluated individually and in combination with Plaintiff’s other
13 impairments.

14 The ALJ’s error was not harmless because the application of the presumption of non-disability
15 improperly affected the formulation of the RFC. In making the RFC determination, the ALJ
16 specifically stated that “[i]n sum, the above [RFC] assessment is supported by the relevant factors, the
17 *Chavez* presumptions and the weight of the evidence now of record.” *Id.* at 26. That application of the
18 *Chavez* presumption permeates the ALJ’s RFC determination. For example, the ALJ rejected the
19 opinion of Drs. Franklin and Walser in favor of the opinion of Dr. Snyder “to the extent consistent
20 with the record as a whole and with the residual functional capacity found here in *and by the prior*
21 *ALJ.*” *Id.* at 25 (emphasis added). Thus, the ALJ continued to give deference to the previous RFC
22 determination, even though that determination did not account for the “changed circumstances.” The
23 error is compounded then by the ALJ’s rejection of the treating physicians’ opinions, in part, on the
24 basis that they were inconsistent with Dr. Snyder’s opinion. *Id.* Moreover, the ALJ’s assignment of
25 controlling weight to Dr. Snyder and the rejection of Dr. Franklin are both based in part on their
26 consistency, or lack thereof, with the “record as a whole.” *Id.* Regarding Plaintiff’s affective disorders,
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28 ³ Dr. Snyder listed “anxiety Disorder” as a separate Axis I diagnosis. *AR* at 425-28.

1 there is no other evidence of record (outside of Drs. Snyder, Franklin, and Walser’s opinions) other
2 than the previous ALJ decision, thus the ALJ must have relied on the previous ALJ decision.

3 Moreover, the only other reason given by the ALJ for rejecting Drs. Walser and Franklin’s
4 opinions, is that they appeared “to be based in large part upon the claimant’s subjective reports.”
5 *Id.* at 25. However, as Plaintiff points out: “the Walser/Franklin 2.5 hour evaluation (AR 484) was
6 based on nine separate psycho-diagnostic procedures, including five standardized psychological tests,
7 a clinical interview, a general symptom inventory and a records review. AR 481. The evaluation of
8 Drs. Walser and Franklin also included an extensive report and interpretation of Plaintiff’s test scores.
9 AR 484-88.” Pl.’s Reply (dkt. 37) at 10. The court finds then that the ALJ’s rejection of the treating
10 physicians and the assignment of controlling weight to the consultative examiner was not based on
11 substantial evidence. *See Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007) (“If the ALJ wishes to
12 disregard the opinion of the treating physician, he or she must make findings setting forth specific,
13 legitimate reasons for doing so that are based on substantial evidence in the record.”) (quoting *Murray*
14 *v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983)).

15 Turning to Plaintiff’s assertion that the ALJ erred at Step Two by failing to find Plaintiff’s
16 diagnoses of somatic and personality disorders as severe impairments. The Commissioner responds to
17 Plaintiff’s assertion by stating that “[t]he only reference to Plaintiff’s somatic symptom disorder and
18 personality disorder is found in the 2014 psychological evaluation by Lesleigh Franklin, Ph.D.”; and
19 that the ALJ properly rejected Dr. Franklin’s opinion. Def.’s Mot. (dkt. 34) at 5. Having established
20 that the rejection of Dr. Franklin’s opinion was not supported by substantial evidence, the court also
21 finds that the ALJ erred in not at least addressing Plaintiff’s somatic and personality disorders
22 diagnoses at Step Two. This error at Step Two, much like the ALJ’s *Chavez* determination, affects the
23 entirety of the sequential determination. *See e.g. Crain v. Berryhill*, No. 16-CV-06292-RMI, 2018
24 WL 707511, at *4 (N.D. Cal. Feb. 5, 2018); *Richard v. Colvin*, No. C13-6055 RBL, 2015 WL
25 2085610, at *4 (W.D. Wash. May 5, 2015)(“The ALJ’s failure to address plaintiff’s . . .
26 disorder[s] at Step Two indicates that the ALJ may not have accounted for all of plaintiff’s
27 impairments during subsequent steps of the sequential evaluation process.”).

28 Like the *Chavez* court, this court finds that the ALJ’s error with regard to the presumption

1 of continuing non-disability must result in a remand for further proceedings based on Plaintiff's
2 rebuttal of the presumption.

3 **CONCLUSION**

4 For the reasons stated above, the court **GRANTS** Plaintiff's amended motion for summary
5 judgment, **DENIES** Defendant's motion for summary judgment, and **REMANDS** this matter for
6 further proceedings in accordance with this Order.

7 A separate judgment will issue.

8 **IT IS SO ORDERED.**

9 Dated: September 25, 2019



ROBERT M. ILLMAN
United States Magistrate Judge

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