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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVEN L. MCCARTY,

No. C 09-05753 MHP

Plaintiff,

MEMORANDUM & ORDER

v.

**Plaintiff's Motion for Remand and
Defendant's Motion for Summary Judgment**MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Plaintiff Steven L. McCarty ("McCarty") seeks judicial review, pursuant to 42 U.S.C. § 405(g), of a final decision of defendant Michael J. Astrue, Commissioner of Social Security ("Commissioner"). Now before the court are the Commissioner's cross-motions for summary judgment and McCarty's motion for remand under sentence six of section 405(g). Having considered the parties' arguments and submissions, and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

In two separate previous actions, this court remanded to the Commissioner for a redetermination of McCarty's claims under Titles II and XVI of the Social Security Act. In Case No. C 03-02425, the parties stipulated to remand in order to reconcile the denial of benefits for the period of December 31, 1998 through January 22, 2003 with a subsequent favorable determination. On November 21, 2003 the matter was remanded to the Appeals Council with instructions to "reconcile the subsequent allowance of benefits with the Administrative Law Judge's previous

1 denial." Docket No. 16, Case No. C 03-02425. On remand, the Appeals Council granted disability
2 insurance benefits beginning March 21, 2002. AR 510a-510e. In Case No. C 04-05060, McCarty
3 challenged the denial of benefits prior to March 21, 2002 on several grounds. On October 14, 2005,
4 this court issued a memorandum and order finding numerous errors in the Appeals Council's
5 decision. The court concluded that the Appeals Council failed to (1) adequately reconcile McCarty's
6 unsuccessful and successful applications for benefits, (2) consider both McCarty's severe and non-
7 severe impairments in determining his residual functional capacity, and (3) apply the special
8 technique specified in 20 C.F.R. § 404.1520a for evaluating mental impairments. Docket No. 29,
9 Case No. C 04-05060. The court granted summary judgment to McCarty and stated in conclusion,
10 "This action is hereby REMANDED to the Commissioner *pursuant to sentence four* of 42 U.S.C.
11 section 405(g), for further proceedings consistent with the foregoing order. The clerk shall close the
12 file." *Id.* (emphasis added). Judgment in favor of McCarty was entered the same day. Docket No.
13 30, Case No. C 04-05060.

14 On remand from the court's October 2005 order, the Appeals Council assigned the matter to a
15 new ALJ who arranged for another hearing, to include testimony from multiple experts. AR 844.
16 At the May 3, 2007 hearing, McCarty appeared with counsel. At the hearing, through his attorney,
17 McCarty withdrew his request for a hearing. The relevant exchange is as follows:

18 ALJ: It did appear to me that there's certainly a good case to be made for disability at March
19 of 2002, when the hand problem and Raynaud's problem started being very apparent. And
20 before that, it was somewhat questionable and I didn't, but I didn't know what . . . the medical
21 experts who will be testifying today that have looked at the records might find. They might
22 move it back up to 2004 or some other date that would be less advantageous to you. So,
23 rather than roll the dice and, [] test the fates, it's my understanding that you had a chance to
24 discuss that with Mr. Wall, as your attorney, and would be willing to, essentially what would
25 happen, you'd withdraw your request for a hearing and everything would stay the way it is.
26 So you'd be, have your benefits from March 2002 up through the present and the future and
27 that would be maybe the best way to resolve it. Is that your understanding also?

28 CLMT: Yes, sir, that's the best way to go.

ALJ: Okay. And, Mr. Wall, I take it you can confirm that you did have discussions with
your client and explained to him the ramifications of that?

ATTY: I did, Judge.

ALJ: So I will accept your withdrawal of the hearing, request for hearing with respect to
only the portion from December 1998 to March of 2002. The rest of the decision will stand

1 as found by the Appeals Council with disability awarded from March, whatever the date was,
2 2002 through the present.

3 ATTY: March 21st.

4 ALJ: March 21st 2002.

5 CLMT: Thank you, Your Honor.

6 AR 847-49. On August 31, 2007, the ALJ issued a written order of dismissal "based on the claimant
7 and his attorney's withdrawal on the record at the hearing." AR 745-46. The ALJ stated that
8 "Section 205(g) of the Social Security Act does not preclude dismissal of a court remanded case
9 under sentence four of that section , because such remands are final judgments, which conclude the
10 district court's jurisdiction of the case . . . The Supreme Court has held that a district court order
11 remanding a Social Security disability benefit claim to the agency for further proceedings is a final
12 judgment . . ." AR 745 (citing *Forney v. Apfel*, 524 U.S. 266 (1998)). The notice of the order of
13 dismissal informed McCarty of his right to file an appeal requesting that the Appeals Council review
14 and vacate the order. AR 743.

15 On September 24, 2007, McCarty appealed the order of dismissal to the Appeals Council
16 "because he claim[ed] that ALJ Reite was without authority to dismiss his case because he was
17 required to follow the Law of the Case as established by Judge Patel of the Northern District of
18 California." AR 738. In a letter dated September 18, 2008, Mr. Wall stated that "Mr. McCarty's
19 basic argument is that neither he nor ALJ Reite had the power and authority to withdraw and dismiss
20 the claim. In order for either or both of them to do so, they are required to seek dismissal from
21 Judge Patel, N.D. California, who issued the order." AR 730. The Appeals Council declined to
22 assume jurisdiction, rendering the ALJ's decision the final decision of the Commissioner. AR 722-
23 725. McCarty brought the instant action on December 8, 2009.

24

25 LEGAL STANDARD

26 Summary judgment is proper when the pleadings, discovery, and affidavits show that there is
27 "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
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1 law” Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the
2 proceedings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for
3 summary judgment bears the burden of identifying those portions of the pleadings, discovery, and
4 affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*,
5 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, the nonmoving party
6 must go beyond the pleadings and, by its own affidavits or discovery, show that a fact is genuinely
7 disputed. Fed. R. Civ. P. 56(c). Mere allegations or denials do not defeat a moving party’s
8 allegations. *Id.*; *see also Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir.
9 1994). The court may not make credibility determinations, and inferences drawn from the facts must
10 be viewed in the light most favorable to the party opposing the motion. *Anderson*, 477 U.S. at 249;
11 *Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991).

12 13 DISCUSSION

14 I. Authority of the ALJ to Dismiss McCarty's Request for a Hearing

15 McCarty argues that the ALJ was without authority to dismiss his request for a hearing,
16 because his disability claims were subject to a remand order from this court and accordingly only the
17 undersigned had authority to dismiss the hearing. Under the "law of the case" and "rule of mandate"
18 doctrines, he argues, the ALJ committed error by not following this court's October 2005
19 instructions on remand regarding the reconciliation of his favorable and unfavorable applications.
20 This is so, apparently, notwithstanding McCarty's clear withdrawal, through counsel, of his request
21 for a hearing.

22 The ALJ had authority to dismiss the request for a hearing, as this court no longer had
23 jurisdiction over McCarty's claims. A remand under sentence four of 42 U.S.C. § 405(g) constitutes
24 a "final judgment," *Akopyan v. Barnhart*, 296 F.3d 852, 857 (9th Cir. 2002), "which terminates the
25 litigation with victory for the plaintiff," *Shalala v. Schaefer*, 509 U.S. 292, 301 (1993). Sentence
26 four authorizes the district court to remand in conjunction with "a judgment affirming, modifying, or
27 reversing the decision of the Commissioner of Social Security." 42 U.S.C. § 405(g); *Melkonyan v.*
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1 *Sullivan*, 501 U.S. 89, 99-100 (1991). The court must immediately enter judgment following an
2 order of remand under sentence four, and it is error for the court to retain jurisdiction pending
3 completion of the administrative proceedings. *Schaefer*, 509 U.S. at 297, 299-300. By contrast, the
4 court may remand under sentence six of section 405(g) "without making any substantive ruling as to
5 the correctness of the Secretary's decision," *Melkonyan*, 501 U.S. at 100, in which case the litigation
6 does not terminate and judgment can only be entered "after postremand agency proceedings have
7 been completed and their results filed with the court." *Schaefer*, 509 U.S. at 297, 301. This court's
8 October 2005 remand was explicitly under sentence four of section 405(g), and the court
9 immediately entered judgment with the issuance of its memorandum and order. The court's sentence
10 four remand terminated the prior litigation, divesting this court of jurisdiction over McCarty's
11 claims.¹

12 McCarty's claims no longer being subject to this court's jurisdiction, it appears to have been
13 entirely proper for the ALJ to issue a notice of dismissal. Under 20 C.F.R. § 404.957(a), an ALJ
14 may dismiss a request for a hearing "at any time before notice of the hearing decision is mailed when
15 the party who initially requested the hearing asked to withdraw his or her request." *Fernandes*, 2009
16 WL 3823922, at *5. "The dismissal of a request for a hearing is binding, unless it is vacated by an
17 administrative law judge or the Appeals Council." 20 C.F.R. § 404.959. An ALJ or the Appeals
18 Council may vacate any dismissal of a hearing request if the claimant "request[s] that the dismissal
19 be vacated and show[s] good cause why the hearing request should not have been dismissed" within
20 sixty days of receiving the dismissal notice. 20 C.F.R. § 404.960.

21 The Hearings, Appeals and Litigation Law Manual ("HALLEX") further details the ALJ's
22 authority to dismiss a request for hearing upon the claimant's voluntary withdrawal, including on
23 remand from the district court.² An ALJ may dismiss a request for hearing at any time before
24 mailing a notice of decision if: (1) the claimant has submitted a withdrawal in writing or orally on
25 the record at the hearing; (2) the record shows that the claimant understands the effects of the
26 withdrawal; (3) there are no other claimants who may be adversely affected; (4) the voluntary
27 withdrawal does not follow a sentence six remand; and (5) the ALJ determines that dismissal is

1 appropriate. HALLEX I-2-4-20. Where such dismissal follows a sentence four remand, HALLEX
2 requires the ALJ's decision to contain: (a) a statement of the procedural history on remand; (b) a
3 discussion of the facts surrounding the conclusion that claimant has withdrawn the claim; (c) a
4 discussion of the supporting documents entered in the record; (d) an explanation that claimant's
5 action renders the controversy moot; and (e) a statement adopting the prior final decision of the
6 Commissioner, as modified. HALLEX I-2-8-18.

7 The ALJ's dismissal here complied with the all the above requirements. McCarty, through
8 his attorney, withdrew his request for a hearing on the record at the hearing, and the ALJ made sure
9 that McCarty was aware of the consequences of the withdrawal. The withdrawal did not follow a
10 sentence six remand, and the ALJ explained that dismissal was reasonable given the possibility that
11 the new hearing would yield a less favorable result than the prior final decision. The ALJ's later
12 written decision further complied with all of the requirements of HALLEX and adequately explained
13 the facts and circumstances surrounding the remand, the withdrawal and the reinstatement of the
14 prior decision. On appeal to the Appeals Council, McCarty did not provide "good cause" for
15 vacating the ALJ's dismissal, for example some type of misunderstanding or changed circumstance.
16 The sole proffered basis for vacatur was the ALJ's lack of authority to dismiss on remand from this
17 court, and for the reasons stated above the Appeals Council rightfully denied review.

18 McCarty's invocation of the "law of the case" and "rule of mandate" doctrines is misplaced.
19 Although it is certainly true that "an inferior court is bound by the [appellate court's] decree as the
20 law of the case," *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 719 (9th Cir. 1999), and "[d]eviation from
21 the court's remand order in the subsequent administrative proceedings is itself legal error," *Sullivan*
22 *v. Hudson*, 490 U.S. 877, 886 (1989), none of the cases cited by McCarty involve the situation here,
23 namely, a claimant who knowingly and voluntarily withdraws a request for further hearings. This
24 court's remand order set forth a number of errors in the previous determination of McCarty's benefits
25 and gave instructions on how to remedy such deficiencies upon further administrative review.
26 Additional hearings never took place, however, because of McCarty's intervening withdrawal
27 decision. The record seems to demonstrate that the ALJ was prepared to give McCarty a full hearing
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1 on the merits, and several medical and vocational experts appeared to testify at the hearing. The
2 ALJ and the Appeals Council did not contravene this court's order by honoring McCarty's
3 withdrawal and binding him to that decision.

4 II. Sentence Six Remand

5 McCarty alternatively requests a remand under sentence six of 42 U.S.C. § 405(g) so that the
6 Appeals Council can address the errors identified in this court's October 2005 sentence four remand
7 order. "Sentence six remands may be ordered in only two situations: where the Commissioner
8 requests a remand before answering the complaint, or where new, material evidence is adduced that
9 was for good cause not presented before the agency." *Akopyan*, 296 F.3d at 854. Neither situation is
10 present here. Firstly, the Commissioner has answered the complaint and does not request remand.
11 Secondly, McCarty seeks remand not because he wishes to present new evidence, but instead
12 because he wishes to vacate his previous, binding withdrawal of a request for hearing. Moreover, he
13 has not provided "good cause" for why he should now be entitled to a merits hearing
14 notwithstanding his choice not to proceed with the hearing previously arranged for him. McCarty
15 has provided no explanation for his change of heart, and accordingly there is no basis for a sentence
16 six remand.

17
18 CONCLUSION

19 For the foregoing reasons, defendant's motion for summary judgment is GRANTED, and
20 plaintiff's motion for sentence six remand is DENIED. Because this court already has entered
21 judgment on a remand under sentence four of section 405(g), this order is deemed final and no
22 further judgment will be entered. The Clerk of Court shall close the file.

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24 IT IS SO ORDERED.

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26 Dated: May 23, 2011



MARILYN HALL PATEL
United States District Court Judge
Northern District of California

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ENDNOTES

1. Although the Commissioner's motion for summary judgment apparently is not based on a lack of subject matter jurisdiction, several district courts have dismissed actions for lack of jurisdiction where the claimant withdrew a request for hearing. *See, e.g., Fernandes v. Astrue*, No. 1:08-cv-01775-BAK (DLB), 2009 WL 3823922 (E.D. Cal. Nov. 13, 2009); *Barry v. Sec. of HHS*, No. 83-CV-7380-BC, 1988 WL 252040 (E.D. Mich. 1988). Section 405(g) limits judicial review to a particular type of agency action, namely a "final decision of the Commissioner of Social Security *made after a hearing*." 42 U.S.C. 405(g) (emphasis added). The reviewable decision must further be "a decision on the merits." *Peterson v. Califano*, 631 F.2d 628, 630 (9th Cir. 1980). Because a withdrawal of a request for hearing results in no hearing and accordingly no decision on the merits, these courts have found no statutory basis for judicial review. The fact that there was an extant remand order did not change this conclusion. *See Barry*, 1988 WL 252040, at *6 (rejecting argument that the dismissal order "amount[ed] to a deliberate violation of this Court's Remand Order" where "the Appeals Council repeatedly remanded this case for administrative hearings, but that prior to the taking of any substantive evidence, plaintiff's counsel at each hearing voluntarily withdrew").
2. "HALLEX is strictly an internal Agency manual, with no binding legal effect on the Administration or this court." *Clark v. Astrue*, 529 F.3d 1211, 1216 (9th Cir. 2008). Nevertheless, HALLEX is "entitled to respect . . . to the extent it has the power to persuade" the court. *Id.* (citations omitted). Here, the detailed guidance in HALLEX is entirely consistent with Section 405(g) as well as the regulations and applicable case law.