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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN RICHARD AZZOLINO,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

Case No. [15-cv-02601-JD](#)

ORDER RE SUMMARY JUDGMENT

Re: Dkt. Nos. 17, 18

Plaintiff John Richard Azzolino challenges a decision by a Social Security Administration Administrative Law Judge that denied him disability benefits under both Title II and Title XVI. Dkt. No. 17. The Commissioner of Social Security (“Commissioner”) filed a cross-motion for summary judgment to uphold the ALJ’s determination. Dkt. No. 18. At oral argument, Azzolino conceded he does not have enough evidence to support a Title II claim. Consequently, The Court grants the Commissioner’s cross-motion on Title II (Dkt. No. 18). The Court finds for plaintiff on the motion for summary judgment under Title XVI (Dkt. No. 17) and remands the case to the Social Security Administration for further proceedings consistent with this order.

In our Circuit, an ALJ’s decision to deny benefits “will only be disturbed if it is not supported by ‘substantial evidence or it is based on legal error.’ . . . A decision of the ALJ will not be reversed for errors that are harmless.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The ALJ found that Azzolino had established multiple severe impairments, including “an affective mood disorder; an anxiety-related disorder;” and an “orthopedic degenerative impairment” that “more than minimally affect” his “ability to perform basic work functions.” AR at 22. Because the ALJ determined that Azzolino had “no past relevant work,” AR at 29, the ALJ denied benefits based on his determination that Azzolino had the residual functional capacity (“RFC”) “to perform

1 *at least* the full range of light work,” and that despite his non-exertional limitations, he still
2 retained the ability “to engage in simple repetitive tasks equating to unskilled work.” AR at 25.

3 The RFC determination was not supported by substantial evidence and contained legal
4 errors that the Court cannot say were harmless. In assessing a claimant’s RFC, the ALJ “must
5 consider all relevant evidence in the record” including “medical records, lay evidence, and ‘the
6 effects of symptoms, including pain, that are reasonably attributed to a medically determinable
7 impairment.’” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) (citation omitted);
8 *see also* 20 C.F.R. § 416.945; 20 C.F.R. § 404.1545. The ALJ erred in failing to provide at least
9 “specific and legitimate reasons that are supported by substantial evidence” for partially rejecting
10 the opinion of examining psychiatrist Deborah von Bolschwing, Ph.D. *Lester v. Chater*, 81 F.3d
11 821, 830–31 (9th Cir. 1996); AR at 27. The ALJ was required to set out “a detailed and thorough
12 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
13 making findings.” *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) (internal quotation
14 omitted). The ALJ reasonably summarized Dr. von Bolschwing’s opinions, including that
15 Azzolino was limited in “maintaining attention and concentration,” understanding, remembering,
16 and carrying out complex instructions, and “enduring stress, adaptation, and interacting” with co-
17 workers and supervisors. AR at 27. But although the ALJ stated that he would give these
18 opinions “weight to the extent consistent with this finding in light of the record as a whole,” he did
19 not identify which of her opinions he discounted or provide any reasons at all for doing so. *Id.*
20 That was error.

21 The Commissioner’s contention that ALJ did not reject Dr. von Bolschwing’s opinions,
22 but merely interpreted them in a way Azzolino disagrees with, is undermined by the failure of the
23 RFC to reflect the full range of mental limitations found by the doctor. The ALJ did not clearly
24 explain, nor did the Commissioner’s briefing address, how the RFC incorporates Azzolino’s full
25 range of limitations in attention, concentration, following instructions, enduring stress, adapting,
26 and interacting with others. Because the ALJ failed to specifically discuss these limits, the record
27 is insufficient for the Court to determine whether they were silently subsumed in the RFC’s
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1 limitation to unskilled work or erroneously left out. Consequently, the ALJ’s determination of the
2 RFC lacks the support of substantial evidence.

3 The ALJ also erred in rejecting out of hand the opinions of social worker Jennifer
4 Silverstein, who had several sessions with Azzolino and concluded he suffers from PTSD and
5 would likely be absent from a job three or more days per month. *See* AR at 28. Even if
6 Silberstein is not an “acceptable medical source[]” for establishing a diagnosis, her opinions are
7 relevant evidence to show the “severity of [his] impairment(s), and how it affects [his] ability to
8 work.” 20 C.F.R. § 416.913(a), (d); 20 C.F.R. § 404.1513. The ALJ failed to give “germane”
9 reasons for discounting her evidence, given his statement that it was “not contradicted by the
10 record as a whole.” AR at 28; *see Britton v. Colvin*, 787 F.3d 1011, 1013 (9th Cir. 2015) (per
11 curiam) (holding that ALJ may discount testimony from “other sources” by giving reasons
12 germane to that witness). In addition, the ALJ discounted her evidence based on its reliance on
13 claimant’s self-reported symptoms, which the ALJ found not credible. Because the Court finds
14 that credibility determination in error, as follows, the ALJ lacked adequate evidentiary basis for
15 rejecting Silverstein’s opinions as well. *See Ghanim v. Colvin*, 763 F.3d 1154, 1162-63 (9th Cir.
16 2014).

17 In determining the RFC, the ALJ also improperly rejected Azzolino’s “statements
18 concerning the intensity, persistence and limiting effects” of his symptoms as not credible. AR at
19 26. Because the ALJ determined that Azzolino suffered “from an impairment that could
20 reasonably produce the symptoms of which he complains,” his adverse credibility finding “must
21 be based on ‘clear and convincing reasons.’” *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533
22 F.3d 1155, 1160 (9th Cir. 2008) (internal quotation omitted). This standard was not met.

23 The ALJ’s rejection of Azzolino’s claimed symptoms of paranoia, anxiety and other
24 psychological issues as inconsistent with his school attendance is fatally undercut by the ALJ’s
25 failure to acknowledge all the disabled student services Azzolino depends on to make school
26 participation possible, as well as his current use of medication to control his condition. AR at 26-
27 28, 39, 41-42. The ALJ’s cursory listing of Azzolino’s uneven history of medical treatment,
28 extended periods of joblessness, and periods of relative control over his symptoms fair no better as


1 clear and convincing reasons to reject his testimony. The Ninth Circuit has cautioned that “it is
2 error to reject a claimant’s testimony merely because symptoms wax and wane in the course of
3 treatment” for mental health issues, and so the ALJ cannot show clear and convincing reasons to
4 reject claimant testimony about mental health symptoms by singling out “a few periods of
5 temporary well-being from a sustained period of impairment.” *Garrison v. Colvin*, 759 F.3d 995,
6 1017-18 (2014) (finding error in ALJ’s reliance on claimant’s non-compliance with medication
7 and failure to seek treatment, given that these were in part caused by poor judgment resulting from
8 her mental illness). Here, the ALJ addressed medical information from each source in isolation
9 and did not attempt to assemble them into a showing that Azzolino had failed to demonstrate any
10 “sustained period of impairment.” *See id.* And the ALJ’s characterization of Azzolino’s “non-
11 compliance” with medications and “exaggerated symptoms and limitations” lack citation and
12 specific support. The ALJ failed to provide clear and convincing reasons for discrediting this
13 testimony.

14 The ALJ improperly evaluated Azzolino’s residual functional capacity because of these
15 errors, and that misstep affects the determinations based on the RFC. *Lingenfelter v. Astrue*, 504
16 F.3d 1028, 1040-41 (2007); *Craig v. Colvin*, No. 13-36111, 2016 WL 3033322, at *1 (9th Cir.
17 May 27, 2016). On this record, the Court concludes that the ALJ’s decision to deny benefits is not
18 supported by substantial evidence and is based on non-harmless legal errors.

19 The Court consequently remands the case to the Social Security Administration for further
20 review consistent with this order. The Court declines to reach plaintiff’s other arguments of error
21 in the ALJ’s decision.

22 **IT IS SO ORDERED.**

23 Dated: June 14, 2016

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27 JAMES DONATO
28 United States District Judge