

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

YVETTE VILLEREAL MANCILLAS,)	Case No. 5:13-cv-02522-PSG
)	
Plaintiff,)	ORDER DENYING PLAINTIFF’S
v.)	MOTION FOR SUMMARY
)	JUDGMENT, DENYING
CAROLYN COLVIN, Acting Commissioner,)	DEFENDANT’S MOTION FOR
Social Security Administration,)	SUMMARY JUDGMENT AND
)	REMANDING FOR FURTHER
Defendant.)	ADMINISTRATIVE PROCEEDINGS
)	
)	(Re: Docket Nos. 19, 21)

Plaintiff Yvette Villereal Mancillas appeals the decision by Defendant Carolyn Colvin, Acting Commissioner of Social Security, denying her supplemental security income disability benefits.¹ Mancillas moves for summary judgment. The Commissioner opposes the motion and cross-moves for summary judgment. The matter was submitted without oral argument pursuant to Civ. L.R. 16-5. Having reviewed the papers, the court DENIES Mancillas’ motion for summary

¹ The challenged decision was rendered by Administrative Law Judge Brenton L. Rogozen on May 9, 2012. The ALJ’s decision became final on April 4, 2013, when the Appeals Council of the Social Security Administration denied Mancillas’ request for administrative review of the decision.

1 judgment, DENIES the Commissioner's cross-motion for summary judgment, and REMANDS for
2 further administrative proceedings.

3 I. BACKGROUND

4 The following facts are taken from the decision by the ALJ and the accompanying
5 administrative record. Mancillas was born July 23, 1967.² She has completed the eleventh grade
6 and does not have a GED.³ She has minimal work history; she has worked for brief periods during
7 two of the past 15 years and has not worked at all since 2001.⁴ Mancillas alleges that she has been
8 disabled since April 1, 1998⁵ by back, hip and leg pain resulting from spina bifida occulta and
9 scoliosis and by emotional problems resulting from depression and bipolar II disorder.⁶ Mancillas
10 applied for disability benefits on September 8, 2010.⁷ Her application was denied upon initial
11 review and upon reconsideration.⁸ She then requested a hearing before an ALJ.⁹

13 A. The ALJ Held a Hearing on Mancillas' Present Claim

14 The ALJ held a hearing on March 6, 2012.¹⁰ Mancillas appeared at the hearing with her
15 counsel.¹¹ She testified that she suffered from constant and worsening back, hip and leg pain.¹²

17 ² See AR at 44.

18 ³ See *id.* at 32.

19 ⁴ See *id.* at 101-02, 107-8.

20 ⁵ See *id.* at 96.

21 ⁶ See *id.* at 107, 128. These emotional problems included feelings of worthlessness and moodiness.
22 See *id.* at 38-39.

23 ⁷ See *id.* at 96.

24 ⁸ See *id.* at 48, 58.

25 ⁹ See *id.* at 65.

26 ¹⁰ See *id.* at 23.

1 The pain limited her ability to walk, stand and sit comfortably, and she required a cane to balance
2 when standing upright.¹³ She further testified that she suffered from emotional problems, including
3 depression and moodiness.¹⁴

4 Mancillas submitted her prison medical records from 2000 and 2001.¹⁵ She explained that
5 she obtained prescription pain medication from the emergency room because she was unaware of
6 her eligibility for health insurance.¹⁶ Four health assessments were submitted into evidence – one
7 physical Consultative Evaluation completed by Dr. Wood, one psychological CE completed by Dr.
8 Dahl, one physical Residual Functional Capacity assessment completed by Dr. Quint and one
9 psychological RFC assessment completed by Dr. Rabinowitz – but no medical professionals
10 testified.¹⁷ The ALJ took the case under submission.

11 **B. The ALJ Concluded That Mancillas Has The RFC To Perform Sedentary Work and**
12 **Thus Is Not Disabled**

13 The ALJ issued his decision on May 9, 2012.¹⁸ Pursuant to 20 C.F.R. § 416.920(a), the
14 ALJ conducted a five-step, sequential evaluation process for determining whether an individual is
15 disabled. At step one, the ALJ found that Mancillas had not engaged in substantial gainful activity
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17 ¹¹ *See id.*

18 ¹² *See id.* at 33.

19 ¹³ *See id.* at 33-34.

20 ¹⁴ *See id.* at 38-39.

21 ¹⁵ *See id.* at 26, 190-203. The ALJ deemed her prison medical records irrelevant because they were
22 collected in 2000 and 2001, nine years before she applied for supplemental security income
23 benefits. *See id.* at 26.

24 ¹⁶ *See id.* at 36, 40.

25 ¹⁷ *See id.* at 204, 207, 211, 217.

26 ¹⁸ *See id.* at 19.

1 since her application date, August 30, 2010.¹⁹ At step two, the ALJ found that Mancillas’ spina
2 bifida was a severe impairment but that her “medically determinable impairment of bipolar II
3 disorder” was not.²⁰ At step three, the ALJ found that her spina bifida, though severe, did not
4 meet or medically equal the severity of any of the listed impairments in 20 C.F.R. § 404app. 1.²¹
5 At step four, the ALJ found that Mancillas had the RFC to perform sedentary work as defined in
6 20 C.F.R. § 416.967(a).²² Finally, at step five, the ALJ found that based on her age, education,
7 work experience, RFC and the directives of the medical-vocational guidelines (the “grids”),
8 Mancillas was not disabled.²³ Accordingly, the ALJ concluded that she did not qualify for
9 supplemental security income disability benefits.²⁴ Mancillas then appealed the ALJ’s decision to
10 the Appeals Council.²⁵

11 **C. Mancillas Submitted Additional Evidence to The Appeals Council**

12 On September 19, 2012, Mancillas obtained an additional RFC assessment completed by a
13 therapist, Eduardo Marcus, and co-signed by a psychiatrist, Dr. Fernandez.²⁶ In the assessment,
14 Marcus stated that he began treating Mancillas on May 1, 2012.²⁷ He diagnosed Mancillas with
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18 ¹⁹ *See id.* at 14.

19 ²⁰ *See id.*

20 ²¹ *See id.* at 14-15.

21 ²² *See id.* at 16.

22 ²³ *See id.* at 19.

23 ²⁴ *See id.*

24 ²⁵ *See id.* at 8.

25 ²⁶ *See* Docket No. 19-2 at 5.

26 ²⁷ *See id.* at 1.

1 major depressive disorder and opined that her mental state seriously limited or precluded her
2 ability to perform various work-related tasks.²⁸

3 On November 26, 2012, Mancillas submitted the assessment to the Appeals Council, which
4 was then considering her request for review.²⁹ On April 4, 2013, the Appeals Council denied her
5 request for review. In doing so, the Appeals Council “looked at” the new assessment but declined
6 to consider it, stating that it pertained to a period after the ALJ decided the case.³⁰

7 II. LEGAL STANDARDS

8 A. Standard for Reviewing The Commissioner’s Decision

9 Pursuant to 42 U.S.C. § 405(g), this court has the authority to review the Commissioner’s
10 decision denying Mancillas’ benefits. The Commissioner’s decision (here, the underlying decision
11 of the ALJ) will be disturbed only if it is not supported by substantial evidence or if it is based
12 upon the application of improper legal standards.³¹ In this context, the term “substantial evidence”
13 means “more than a scintilla but less than a preponderance – it is such relevant evidence a
14 reasonable mind might accept as adequate to support the conclusion.”³² When determining
15 whether substantial evidence exists to support the administrative record as a whole, the court must
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19 ²⁸ See *id.* at 3.

20 ²⁹ See AR at 186.

21 ³⁰ See AR at 2 (“We looked at the medical source statement from Z. G. Fernandez, M.D. dated
22 September 19, 2012 (7 pages). The Administrative Law Judge decided your case through May 9,
23 2012. This new information is about a later time. Therefore, it does not affect the decision about
24 whether you were disabled beginning on or before May 9, 2012. If you want us to consider
whether you were disabled after May 9, 2012, you need to apply again.”).

25 ³¹ See *Moncada v. Chater*, 6 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*, 966 F.2d 1255,
1257 (9th Cir. 1992).

26 ³² See *Moncada*, 60 F.3d at 523; *Drouin*, 966 F.2d at 1257.

1 consider adverse as well as supporting evidence.³³ Where evidence exists to support more than one
2 rational interpretation, the court must defer to the decision of the ALJ.³⁴ “If additional proceedings
3 can remedy defects in the original administrative proceedings, a social security case should be
4 remanded.”³⁵

5 **B. Standard for Determining Disability**

6 Disability claims are evaluated using a five-step, sequential evaluation process. In the first
7 step, the Commissioner must determine whether the claimant currently is engaged in substantial
8 gainful activity; if so, the claimant is not disabled and the claim is denied.³⁶ If the claimant is not
9 currently engaged in substantial gainful activity, the second step requires the Commissioner to
10 determine whether the claimant has a “severe” impairment or combination of impairments that
11 significantly limits the claimant’s ability to do basic work activities; if not, a finding of “not
12 disabled” is made and the claim is denied.³⁷ If the claimant has a “severe” impairment or
13 combination of impairments, the third step requires the Commissioner to determine whether the
14 impairment or combination of impairments meets or equals an impairment in the Listing of
15 Impairments;³⁸ if so, disability is conclusively presumed and benefits are awarded.³⁹ If the
16 claimant’s impairment or combination of impairments does not meet or equal an impairment in the
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20 ³³ See *Drouin*, 966 F.2d at 1257; *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989).

21 ³⁴ See *Moncada*, 60 F.3d at 523; *Drouin*, 966 F.2d at 1258.

22 ³⁵ *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981).

23 ³⁶ See *id.*

24 ³⁷ See *id.*

25 ³⁸ See 20 C.F.R. § 404app. 1.

26 ³⁹ See *id.*

1 Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient
2 “residual functional capacity”⁴⁰ to perform his or her past work; if so, the claimant is not disabled
3 and the claim is denied.⁴¹ The claimant has the burden of proving that he or she is unable to
4 perform past relevant work.⁴² If the claimant meets this burden, a prima facie case of disability is
5 established. The Commissioner then bears the burden of establishing that the claimant can perform
6 other substantial gainful work;⁴³ the determination of this issue comprises the fifth and final step in
7 the sequential analysis.

8 III. DISCUSSION

9 A. The Appeals Council Improperly Refused to Consider the Additional Evidence

10 Mancillas argues that the Appeals Council improperly refused to consider Marcus’ RFC
11 assessment.⁴⁴ The Appeals Council declined to consider the assessment because it was completed
12 more than four months after the ALJ issued his decision on May 9, 2012.⁴⁵ However, although the
13 assessment is dated September 19, 2012, the assessment indicates that it was based on treatment
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19 ⁴⁰ A claimant’s RFC is what he or she can still do despite existing exertional and nonexertional
20 limitations. *See Cooper v. Sullivan*, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

21 ⁴¹ *See Drouin*, 966 F.2d at 1257; *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984).

22 ⁴² *See id.*

23 ⁴³ There are two ways for the Commissioner to meet the burden of showing that there is work in
24 significant numbers in the national economy that claimant can perform: (1) by the testimony of a
25 vocational expert or (2) by reference to the grids. *See Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th
26 Cir. 1999).

27 ⁴⁴ *See* Docket No.19 at 7; *see also* Docket No. 19-1.

28 ⁴⁵ *See* AR at 2.

1 rendered beginning on May 1, 2012.⁴⁶ The Commissioner does not contest that the assessment
2 indicates treatment prior to the ALJ's decision.⁴⁷

3 Pursuant to 20 C.F.R. § 404.970(b), "if new and material evidence is submitted, the
4 Appeals Council shall consider the additional evidence only where it relates to the period on or
5 before the date of the administrative law judge hearing decision." The Ninth Circuit considered
6 Section 404.970(b) in *Taylor v. Commissioner*.⁴⁸ In that case, Taylor applied for disability
7 insurance benefits.⁴⁹ The ALJ issued his decision finding Taylor not disabled on March 29,
8 2006.⁵⁰ Taylor submitted two pieces of additional evidence to the Appeals Council: a psychiatric
9 evaluation and a medical source statement.⁵¹ The psychiatric evaluation was dated September 7,
10 2006 but was based on treatment rendered in 2001 and 2003.⁵² Similarly, the medical source
11 statement was dated November 15, 2006 but was based on treatment rendered beginning in 1999.⁵³
12 The Appeals Council failed to consider the additional evidence, either because it was misplaced or
13 because the Appeals Council erroneously believed that it pertained to a period after the expiration
14 of Taylor's disability insurance coverage in 2004 and after the ALJ's decision in March 2006.⁵⁴
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18 ⁴⁶ See Docket No. 19-2 at 1 ("Initial assessment was 05/01/2012. Then, she has been followed five
19 times more.").

20 ⁴⁷ See Docket No. 21 at 6.

21 ⁴⁸ 659 F.3d 1228, 1233 (9th Cir. 2011).

22 ⁴⁹ See *id.* at 1230.

23 ⁵⁰ See *id.* at 1231.

24 ⁵¹ See *id.*

25 ⁵² See *id.*

26 ⁵³ See *id.* at 1232.

27 ⁵⁴ See *id.* at 1232-33.

1 The court found that the Appeals Council had erred under Section 404.970(b)⁵⁵ and held that
2 “where the Appeals Council was required to consider additional evidence, but failed to do so,
3 remand to the ALJ is appropriate so that the ALJ can reconsider its decision in light of the
4 additional evidence.”⁵⁶

5 The *Taylor* court’s holding is applicable here. As in *Taylor*, the additional evidence in this
6 case is dated after the ALJ’s decision but was based on treatment rendered prior to the ALJ’s
7 decision. Given the eight-day period between Mancillas’ alleged first treatment and the ALJ’s
8 decision, the Appeals Council should have considered Marcus’ opinion and erred in refusing to do
9 so.

11 **B. The Error Was Not Harmless**

12 The Ninth Circuit has recognized that harmless error principles apply in the Social Security
13 Act context.⁵⁷ It has articulated the general principle that “an ALJ’s error is harmless where it is
14 inconsequential to the ultimate nondisability determination.”⁵⁸ For example, if an ALJ errs in
15 failing to provide “germane” reasons for rejecting lay witness testimony,⁵⁹ “a reviewing court
16 cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when
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19 ⁵⁵ See *id.* at 1233 (“Because Dr. Thompson’s opinion concerned his assessment of Taylor’s mental
20 health since his disability onset date in 1999, it related to the period before Taylor’s disability
21 insurance coverage expired in 2004, and before the ALJ’s decision in 2006. Thus, Dr. Thompson’s
22 opinion should have been considered.”).

23 ⁵⁶ See *id.* (citing C.F.R. § 404.970(b)).

24 ⁵⁷ See *Molina v. Astrue*, 674 F.3d 1104, 1115 (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d
25 1050, 1054 (9th Cir., 2006)).

26 ⁵⁸ See *id.* (quoting *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))
27 (internal quotations omitted).

28 ⁵⁹ See *id.* (citing *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)).

1 fully crediting the testimony, could have reached a different disability determination.”⁶⁰ Thus,
2 such error is harmless if the testimony at issue describes the same limitations as testimony that the
3 ALJ properly rejected.⁶¹ But such error is not harmless if the testimony at issue describes different
4 limitations or might otherwise have affected the ultimate nondisability determination.⁶²

5 Here, the impact of the Appeals Council’s error is not clear. Marcus’ assessment described
6 different limitations than the other psychological assessments. Both the psychological CE and the
7 RFC assessment in the record diagnosed bipolar II disorder and reported no more than moderate
8 impairment in work-related functions,⁶³ while Marcus’ assessment diagnosed major depressive
9 disorder and reported serious limitations and an inability to meet competitive standards in all work-
10 related functions.⁶⁴ In finding Mancillas not disabled, the ALJ concluded that her “medically
11 determinable impairment of bipolar II disorder” was not a severe impairment at step two.⁶⁵ If the
12 Appeals Council had considered Marcus’ assessment, it might well have concluded that Mancillas
13 also suffered from a medically determinable impairment of major depressive disorder and
14 furthermore that the impairment was severe at step two.⁶⁶

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⁶⁰ See *Stout*, 454 F.3d at 1056.

18 ⁶¹ See *Molina*, 674 F.3d at 1117.

19 ⁶² See *Stout*, 454 F.3d at 1056; see also *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir.
20 2006).

21 ⁶³ See AR 209-10, 231.

22 ⁶⁴ See Docket No. 19-2 at 3.

23 ⁶⁵ See AR at 14.

24 ⁶⁶ Moreover, the Commissioner characterizes Marcus’ assessment as that of a treating physician.
25 Although the assessment was completed by Marcus, a therapist, and only co-signed by Fernandez,
26 a psychiatrist, the Commissioner identifies it as Fernandez’ assessment and states that “the *doctor*
27 *made extreme conclusions*” and that “Plaintiff allegedly established care with a brand new *doctor*.”
See Docket No. 21 at 6-7 (emphasis added). “As a general rule, more weight should be given to

1 The Commissioner asserts that even a finding of severe mental impairment at step two
2 would not have affected the ultimate nondisability determination.⁶⁷ The Commissioner relies
3 exclusively on *Hoopai v. Astrue*⁶⁸ to argue that a claimant who is found to suffer from a severe
4 mental impairment at step two may still be found not disabled, since the claimant may be deemed
5 capable of performing unskilled work under the grids.⁶⁹ In *Hoopai*, the Ninth Circuit did indeed
6 hold that a severe mental impairment at step two does not preclude a finding of not disabled
7 through application of the grids at step five.⁷⁰ In *Hoopai*'s words, "satisfaction of the step-two
8 threshold requirement that a claimant prove her limitations are severe is not dispositive of the step-
9 five determination of whether the non-exertional limitations are sufficiently severe such as to
10 invalidate the ALJ's exclusive use of the grids."⁷¹ However, that holding offers little guidance
11 here. If the Appeals Council had considered Marcus' assessment, it might have found that
12 Mancillas suffered from major depressive disorder and that the impairment was both "severe" at
13 step two and "sufficiently severe" to invalidate the ALJ's use of the grids at step five.
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15 Because the Appeals Council failed to consider Marcus' assessment, this court can do no
16 more than speculate about how the assessment might or might not have affected the ultimate
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21 the opinion of a treating source than to the opinion of doctors who do not treat the claimant." *See*
Lester v. Chater, 81 F.3d 821, 830 (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)).

22 ⁶⁷ *See* Docket 21 at 5.

23 ⁶⁸ 499 F.3d 1071 (9th Cir. 2007).

24 ⁶⁹ *See* Docket 21 at 5.

25 ⁷⁰ *See Hoopai*, 499 F.3d at 1076.

26 ⁷¹ *See id.*

1 nondisability determination.⁷² Because it is not clear that the failure to consider Marcus'
2 assessment was inconsequential to the ultimate nondisability determination, the error was not
3 harmless.⁷³

4 **C. Remand to the ALJ Is Appropriate**

5 Mancillas next argues that because the Appeals Council improperly refused to consider the
6 assessment, the assessment should be included in the AR for consideration by this court.⁷⁴

7 Mancillas' reliance on *Brewes v. Astrue*⁷⁵ on this point is misguided. In that case, the court held
8 that new evidence that has been considered by the Appeals Council is properly included in the AR
9 for consideration by the district court.⁷⁶ *Brewes* does not apply here, since Marcus' assessment
10 was never considered by the Appeals Council at all. More instructive as to the procedural
11 consequences of the Appeals Council's improper refusal to consider additional evidence is *Taylor*,
12 which directed that "where the Appeals Council was required to consider additional evidence, but
13 failed to do so, remand to the ALJ is appropriate so that the ALJ can reconsider its decision in light
14 of the additional evidence."⁷⁷ Accordingly, this court remands to the ALJ for consideration of
15 Marcus' psychological RFC assessment.
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19 ⁷² See *Stout*, 454 F.3d at 1056 ("This silent disregard thus leaves us...with nothing to review to
20 determine whether the error materially impacted the ALJ's ultimate decision.").

21 ⁷³ See *Molina*, 674 F.3d at 1115.

22 ⁷⁴ See Docket No. 19 at 7.

23 ⁷⁵ 682 F.3d 1157 (9th Cir. 2012).

24 ⁷⁶ See *id.* at 1163 ("We hold that when the Appeals Council considers new evidence in deciding
25 whether or not to review a decision of the ALJ, that evidence becomes part of the administrative
record, which the district court must consider when reviewing.").

26 ⁷⁷ See *Taylor*, 659 F.3d at 1233 (citing C.F.R. § 404.970(b)).
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IV. CONCLUSION

Mancillas' motion for summary judgment is DENIED, the Commissioner's cross-motion for summary judgment is DENIED and the case is REMANDED to the ALJ for consideration of Marcus' opinion evidence and for reconsideration of Mancillas' disability claims. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: June 26, 2014



PAUL S. GREWAL
United States Magistrate Judge