IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SHERRY PARRISH, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. CV-08-969-HU FINDINGS & RECOMMENDATION

Tim Wilborn
WILBORN LAW OFFICES
P.O. Box 2768
Oregon City, Oregon 97045

Attorney for Plaintiff

Kent S. Robinson
ACTING UNITED STATES ATTORNEY
District of Oregon
Adrian L. Brown
ASSISTANT UNITED STATES ATTORNEY
1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204-2902

L. Jamala Edwards
SPECIAL ASSISTANT UNITED STATES ATTORNEY
Social Security Administration
Office of the General Counsel
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075

Attorneys for Defendant

HUBEL, Magistrate Judge:

Plaintiff Sherry Parrish brings this action for judicial review of the Commissioner's final decision to deny supplemental security income (SSI). This Court has jurisdiction under 42 U.S.C. § 405(g) (incorporated by 42 U.S.C. § 1383(c)(3)).

The Commissioner concedes that the case should be remanded. The only issue remaining is whether the remand is for a determination of benefits, or for additional proceedings before the Administrative Law Judge (ALJ). I recommend that the case be remanded for a determination of benefits.

PROCEDURAL HISTORY

Plaintiff filed for SSI on October 10, 2003. Tr. 10, 61-64. Her application was denied initially and upon reconsideration. Tr. 32-33. On August 17, 2005, plaintiff, represented by counsel, appeared for a hearing before the ALJ. Tr. 204-231. On September 15, 2005, the ALJ found plaintiff not disabled. Tr. 10-16. The Appeals Council denied plaintiff's request for review of the ALJ's decision. Tr. 4-6.

Plaintiff then sought judicial review of the ALJ's decision. The case was assigned to Judge Hogan. Based on the stipulation of the parties, by order dated Marsh 12, 2007, Judge Hogan reversed the final order of the ALJ and remanded the matter to the ALJ for a de novo hearing. Parrish v. Commissioner, No. CV-06-685-HO (D. Or. Mar. 12, 2007) (dkt #24). Tr. 245-46. Judge Hogan ordered that

> [o]n remand, the [ALJ] will re-evaluate the medical evidence, in particular the opinion of Dr. Johnson. The ALJ will consult with a mental health medical expert in determining the nature and severity of Plaintiff's mental impairments. In addition, the ALJ will obtain

> supplemental evidence from a vocational expert to clarify the effect of all the assessed limitations on the occupational base, including the restriction to simple, routine, and repetitive work.

Id.

Upon remand, plaintiff was referred by her disability examiner to psychologist Richard M. Kolbell, Ph.D, for a psychodiagnostic evaluation. Tr. 282-92. The evaluation took place in October 2007. Id. Next, the ALJ conducted a supplemental hearing on February 6, 2008. Tr. 316-36. Although a vocational expert (VE) was present at the hearing, the ALJ took no testimony from the VE. Id.

On April 22, 2008, the ALJ found plaintiff not disabled. Tr. 232-44. Pursuant to 20 C.F.R. § 416.1484(d), the ALJ's decision became the final decision of the Agency. Plaintiff then filed this action for judicial review.

DISCUSSION

Plaintiff contends that the ALJ erred in several respects, including improperly rejecting the opinions of plaintiff's examining psychologists, improperly rejecting plaintiff's testimony, and failing to address third-party lay witness testimony. In the motion for remand, the Commissioner concedes that the ALJ erred in evaluating the record and that the ALJ's errors compel reversal of the ALJ's decision. Deft's Mem. in Sup. of Remand at pp. 6, 8. As noted above, the only issue remaining is whether the remand should be for additional evidence or for a determination of benefits.

Defendant argues that remand for additional evidence is appropriate here because "there are unresolved issues" and the

record does not clearly require a finding of disability. Id. at pp. 6, 7. Defendant requests a remand so that the ALJ can (1) "fully address and explain the weight assigned to the medical evidence as a whole"; (2) "reassess Plaintiff's maximum residual functional capacity"; (3) "re-evaluate the subjective testimony"; (4) "Perform new step four, and if necessary step five analyses"; and (5) "obtain vocational expert testimony." Id. at p. 8.

Defendant acknowledges the Ninth Circuit's "crediting as true rule," but contends that the Court's application of it is discretionary. Defendant, citing Connett v. Barnhart, 340 F.3d 871 (9th Cir. 2003), argues that the Court retains flexibility in applying the "crediting as true" rule to improperly rejected evidence and that the Court may instruct an ALJ to reevaluate such evidence on remand.

In a 2004 Findings & Recommendation, I previously rejected defendant's argument. In Kirkpatrick v. Barnhart, No. CV-03-657-HU (D. Or. July 22, 2004), I explained as follows:

> When an ALJ improperly rejects evidence, as occurred here in the rejection of the opinions of the three examining psychologists, the court should credit such evidence and remand for an award of benefits when: "'(1) the ALJ failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.'" Moore v. Commissioner, 278 F.3d 920, 926 (9th Cir. 2002) (quoting Smolen v. Commissioner, 80 F.3d 1273, 1292 (9th Cir. 1996)); see also Lester [v. Chater], 81 F.3d [821,] 834 [(9th Cir. 1995)] ("Where the Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, we credit that opinion 'as a matter of law.'").
>
> * * *
>
> . . . [D]efendant argues that remand for an award of

benefits is not required. Defendant suggests that the "crediting as true" rule is no longer mandatory. In Connett v. Barnhart, 340 F.3d 871 (9th Cir. 2003), the Ninth Circuit, in a panel decision, stated that it was not convinced that the rule was mandatory. Id. at 876. The Connett court noted that despite the compulsory language found in certain Ninth Circuit cases, other Ninth Circuit cases have remanded for the ALJ to articulate specific findings for rejecting the claimant's subjective testimony. Id. The court concluded that it had flexibility in applying the "crediting as true" rule.

I agree with plaintiff that earlier Ninth Circuit cases suggesting that the "crediting as true" rule is mandatory, are the cases that should guide the district court. The rule was firmly established in Varney v. Secretary, 859 F.2d 1396 (9th Cir. 1988). The issue there was whether the Ninth Circuit should adopt the "crediting as true" rule of the Eleventh Circuit. In adopting the rule, the Ninth Circuit noted that the rule promotes certain objectives: "Requiring the ALJs to specify any factors discrediting a claimant at the first opportunity helps to improve the performance of the ALJs by discouraging them from reaching a conclusion first, and the attempting to justify it by ignoring competent evidence in the record that suggests an opposite result." Id. at 1398 (internal quotation omitted). The court also noted that the rule "helps to ensure that pain testimony will be carefully assessed and its importance recognized" and that it avoids "unnecessary duplication in the administrative hearings and reduces the administrative burden caused by requiring multiple proceedings in the same case." Id. The court stated that most importantly, "by ensuring that credible claimants' testimony is accepted the first time around, the rule reduces the delay and uncertainty often found in this area of the law[,]" and "ensures that deserving claimants will receive benefits as soon as possible." Id. at 1398-99 (internal quotation and citation omitted).

The rule has been followed and reaffirmed in numerous subsequent Ninth Circuit cases. E.g., Edlund v. Massanari, 253 F.3d 1152, 1160 (9th Cir. 2001); Harman v. Apfel, 211 F.3d 1171, 1178-79 (9th Cir. 2000); Lester, 81 F.3d at 834; Reddick [v. Chater], 157 F.3d [715,] 728 [(9th Cir. 1998)]. While Connett notes a handful of cases that have failed to follow the rule, a circuit court panel has no authority to disavow the holdings of a prior panel. E.g., Baker v. City of Blaine, 221 F.3d 1108, 1110 n.2 (9th Cir. 2000). That certain panels have failed to apply the rule adopted by a prior panel is no basis for the district court to ignore the law established by the earlier panel. Thus, I follow the "crediting as true" rule.

Kirkpatrick, Findings & Rec. at pp. 39-42.

Judge Marsh adopted the Kirkpatrick Findings & Recommendation in a September 13, 2004 Order. In doing so, he noted that Connett and other cases in which the court had exercised discretion in applying the "crediting as true" doctrine involved only instances where the issue was whether to credit the claimant's subjective pain testimony and that "[n]o case law suggest[ed] that this discretionary principle likewise applies to crediting as true improperly rejected medical reports." Kirkpatrick, Order at p. 3 (D. Or. Sept. 13, 2004).

Following Judge Marsh's September 13, 2004 Order, the defendant moved to reconsider, arguing that the "crediting as true" doctrine was not mandatory in instances where the issue is whether to credit as true improperly rejected medical reports. Judge Marsh denied the motion in an October 28, 2004 Order. There, Judge Marsh noted the three-part test in Smolen, quoted in Kirkpatrick, above, and further noted that if "'the Smolen test is satisfied with respect to the improperly rejected medical evidence, then remand for determination and payment of benefits is warranted regardless of whether the ALJ *might* have articulated a justification for rejecting the medical opinion.' Harman, 211 F.3d at 1179 (emphasis in original." Kirkpatrick, Order at p. 3 (D. Or. Oct. 28, 2004) (brackets omitted). Judge Marsh concluded that I had properly concluded that the Smolen test was satisfied when crediting the improperly rejected medical reports of the three examining psychologists. Id. at p. 4. Thus, he concluded I did not err in following the crediting as true rule in the case. Finally, he alternatively concluded that even if the rule were discretionary,

there was no utility in a remand for further development of the record and thus, there was good reason to credit as true the improperly rejected testimony.

I adhere to my analysis in Kirkpatrick. First, I reject defendant's argument that Connett changed the law. Second, if it did, it did so only as to improperly rejected subjective pain and limitations testimony, not medical opinions and evidence. Third, under the three-part Smolen test, it is appropriate in this case to credit the improperly rejected testimony. Fourth, even if the application of the credit as true rule is not mandatory for improperly rejected medical testimony, I exercise my discretion in favor of recommending its application here.

Defendant has conceded that the ALJ erred in evaluating the record. In its briefing on the remand motion, defendant does not expressly identify the errors he concedes the ALJ made. Defendant does, however, refer to "errors" in the plural and he expressly notes that the ALJ erred in evaluating the record. Importantly, defendant's list of issues that it would like the ALJ to reevaluate upon defendant's requested remand compels the conclusion that defendant agrees with plaintiff that the ALJ erred in rejecting the examining psychologists' evidence. Thus, the first factor under the Smolen test is met.

Psychologist Jim Johnson, Ph.D., examined plaintiff on September 7, 2004. Tr. 177-84. Dr. Johnson performed a clinical interview of plaintiff and conducted approximately eight separate psychological tests. Tr. 177.

In his report, Dr. Johnson noted that plaintiff was "distractible" and had difficulty with focus and concentration.

Id. He further noted plaintiff's complaints of poor energy, difficulty with sleep onset and duration, with nighttime awakening, and decreased appetite resulting in an approximate twenty-pound weight loss in the previous year. Tr. 178. He also noted her complaint of being tired all the time. Tr. 179. He found her cooperative on testing and putting a good effort into everything she did. Id.

Dr. Johnson's Axis I impressions were (1) major depressive disorder, severe without psychotic features; (2) adjustment disorder with anxious mood; and (3) cognitive disorder, secondary to depression. Tr. 181. He also opined that she had a Global Assessment of Functioning (GAF) score of 50. Id.

In his narrative summary, Dr. Johnson wrote that

> [Plaintiff] . . . is severely depressed and is having significant impairment in her cognitive processing as a result. She is having difficulty coping on a day to day basis and although she can complete most of the tasks of daily living, she does this with considerable effort and intermittent tearfulness. Her impairments in concentration and mood are sufficient to make her an unacceptable candidate for employment.
>
> It is likely that she would have difficulty maintaining her mood appropriate to be in social situations and that minimal amounts of stress would be overwhelming to her. She is likely to have difficulty with hearing and responding to directions, staying focused and being able to keep her mind on her work. This is complicated by the fact that she has not worked since the early 1970's and has not developed job skills. In her current state of mind she is a poor candidate for vocational rehabilitation.

Tr. 182.

In the impairment rating section of his report, Dr. Johnson assessed plaintiff as having a marked limitation in social functioning, a marked limitation in concentration, persistence, or pace, and a moderate impairment in restrictions in activities of

daily living. Tr. 183. He also concluded that she had suffered three or four episodes of decompensation. Tr. 184. Finally, he stated that plaintiff demonstrated a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause her to decompensate. Id.

Dr. Kolbell examined plaintiff in October 2007. Tr. 282-91. His Axis I diagnoses were of (1) generalized anxiety disorder with prominent social anxiety; (2) panic disorder without agoraphobia; and (3) dysthymia. Tr. 286. He noted that plaintiff "clearly suffers from anxiety," including "appear[ing] broadly anxious in more circumstances than not over a fairly constant period[,]" "social anxiety features that are longstanding," and "panic attacks." Tr. 286. He assessed her as having moderate limitations in interactions with supervisors, and the ability to respond appropriately to usual work situations and to changes in a routine work setting. Tr. 290. He also assessed her as having mild limitations on interactions with the public and with co-workers. Id.

In both of his decisions, the ALJ rejected Dr. Johnson's opinion of plaintiff's limitations. Tr. 14, 239-40. In his April 2008 decision, the ALJ rejected Dr. Kolbell's mild and moderate limitations. Tr. 243.

In his September 15, 2005 decision, the ALJ discussed whether plaintiff met the criteria for Listed Impairment 12.04 concerning affective disorders. Tr. 13; see 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04. The ALJ noted that Listing 12.04 required medical documentation of a disturbance of mood, accompanied by a full or

partial manic or depressive syndrome. Id. He also noted that satisfaction of both the (A) and then the (B) or (C) criteria were required for the plaintiff to be considered disabled under the listing. He concluded that the plaintiff had failed to meet the section (B) criteria because she failed to demonstrate a marked level of impairment in the categories described in section (B). Id. He also concluded that she failed to meet the section (C) criteria. Id.

The ALJ reached a similar conclusion in his 2008 decision. Tr. 241. There, he addressed Listed Impairments 12.04 and 12.06. He concluded, in plaintiff's favor, that she has mental health impairments consistent with the 12.04 and 12.06 listings. Id. But, he again found that her section (B) limitations were only mild or moderate, and thus, she had no marked limitations to satisfy the section (B) criteria. Id. He also found none of the section (C) criteria established by the medical evidence. Id.

The ALJ's findings indicate that plaintiff satisfied the section (A) criteria for Listed Impairments 12.04 and 12.06. When Dr. Johnson's opinion is credited as true, plaintiff satisfies the requirement of section (B) that she have a marked limitation in at least two of the following functions: (1) activities of daily living; (2) maintaining social functioning; (3) maintaining concentration, persistence, or pace; or (4) the presence of repeated episodes of decompensation, each of extended duration. 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.04, 12.06. As noted above, Dr. Johnson concluded that plaintiff had marked limitations in social functioning and in maintaining concentration, persistence, and pace. Thus, plaintiff meets the section (B)

criteria.

With this, the second and third parts of the Smolen test are satisfied. When Dr. Johnson's opinions are credited, it is clear that the record would require the ALJ to find plaintiff disabled. There are no outstanding issues to discuss. The case should be remanded for an award of benefits.

Finally, even if the crediting as true rule were discretionary, I apply it in this case. Given Dr. Johnson's testimony, there is no utility in remanding for additional proceedings. Furthermore, as the Ninth Circuit explained in a 2004 case:

> we need not return the case to the ALJ to make a residual functional capacity determination a second time. Allowing the Commissioner to decide the issue again would create an unfair "heads we win; tails, let's play again" system of disability benefits adjudication. See Moisa [v. Barnhart], 367 F.3d [882,] 887 [(9th Cir. 2004)] (noting that the "Commissioner, having lost this appeal, should not have another opportunity ... any more than Moisa, had he lost, should have an opportunity for remand and further proceedings").
>
> Remanding a disability claim for further proceedings can delay much needed income for claimants who are unable to work and are entitled to benefits, often subjecting them to "tremendous financial difficulties while awaiting the outcome of their appeals and proceedings on remand." Varney, 859 F.2d at 1398. Requiring remand for further proceedings any time the vocational expert did not answer a hypothetical question addressing the precise limitations established by improperly discredited testimony would contribute to waste and delay and would provide no incentive to the ALJ to fulfill her obligation to develop the record. See, e.g., Celaya v. Halter, 332 F.3d 1177, 1183 (9th Cir. 2003) (reversing the denial of disability benefits where the ALJ failed in his duty to fully and fairly develop the record).

Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004). Here, defendant has twice conducted de novo hearings in plaintiff's case and twice rendered a decision with legal errors requiring remand.

The crediting as true rule is properly applied in this case because it is clear that the improperly discredited evidence of Dr. Johnson establishes disability when properly credited. Defendant should not be given endless opportunities to correct his mistakes while plaintiff, who is of advanced age, Tr. 243, and has had her application pending for more than six years, waits for an error-free decision. See Hammock v. Bowen, 879 F.2d 498 (9th Cir. 1989) (appropriate for court to credit improperly rejected testimony as true when claimant was of advanced age and had already experienced a severe delay in her application).

CONCLUSION

I recommend that the Commissioner's decision be reversed and remanded for a determination of benefits.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due November 24, 2009. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due December 8, 2009. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 9th day of November, 2009.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge