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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHRISTINA McCUNE,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security Administration,

Defendant.

CASE NO. 10-cv-5074RJB

ORDER

This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrates Rule MJR 4(a)(4); and, as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261, 271-72 (1976). This matter has been fully briefed. (See ECF Nos. 24, 33, 36.)

After considering and reviewing the record, the undersigned concludes that the new material at issue that was submitted by plaintiff to the Appeals Council was not considered by the Appeals Council in the context of denying plaintiff's request for review, and as a result, may not be considered properly by the Court. Therefore, plaintiff's motion to correct the record to include new material dated after the decision by ALJ Schellentrager is denied.

1 BACKGROUND

2 Plaintiff was born on June 23, 1964. (Tr. 69.) She has work experience in restaurants and
3 doing pedicures for senior citizens. (Tr. 24.)

4 PROCEDURAL HISTORY

5 On January 29, 2003, plaintiff filed applications for social security and supplemental
6 security income benefits, alleging disability since May 1, 2000. (Tr. 69-72.) Plaintiff's
7 applications were denied initially, and on reconsideration. (Tr. 60-61, 63-66.) On October 27,
8 2004 plaintiff filed an application for disability insurance benefits, and on October 28, 2004, she
9 applied for supplemental security income. (Tr. 12.) Again, plaintiff's applications were denied
10 initially and on reconsideration. (Tr. 53-54, 56-59, 550-51.) Plaintiff requested a hearing, and a
11 video hearing was held on December 18, 2007 before Administrative Law Judge Marguerite
12 Schellentrager (hereinafter "ALJ Schellentrager"). (Tr. 566-605.) On March 4, 2008, ALJ
13 Schellentrager issued a decision in which she found plaintiff not disabled. (Tr. 12-28.)

14 On September 26, 2008, plaintiff filed a statement of contention with the Appeals
15 Council, and requested an additional thirty days within which to submit new evidence. (Supp. Tr.
16 3-4.) In approximately May, 2009, plaintiff submitted over sixty-eight pages of medical records,
17 many of which were dated after the decision by ALJ Schellentrager. (See ECF No. 33, p. 2.) On
18 December 2, 2009, the Appeals Council denied plaintiff's request for review. On August 13,
19 2010, the Appeals Council sent plaintiff a letter, indicating that it had considered evidence dated
20 March 23, 2008, and evidence of results covering the period from April 11, 2007 through March
21 3, 2008. (Supp. Tr. 1.) This information is included in the administrative record.

22 However, the Appeals Council also "looked at medical records covering the period
23 March 5, 2008 through January 1, 2009." (Id.) Apparently, because this new information related
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1 to a period of time after the ALJ's decision, the Appeals Council indicated its conclusion that
2 this second set of new evidence did "not affect the decision about whether you were disabled . .
3 . . before March 4, 2008." (Id.) The Appeals Council suggested that plaintiff could use this new
4 material in a new claim, and returned this portion of the new evidence to plaintiff.

5 On February 4, 2010, plaintiff filed the underlying complaint. (ECF No. 3.) On April 30,
6 2010, the Commissioner filed a Sealed Administrative Record with the Court. (See ECF No. 9.)
7 On June 16, 2010, the attorney for plaintiff contacted the attorney for defendant to inform her
8 that the transcript was missing evidence that had been submitted to the Appeals Council. (See
9 ECF No. 24, at p. 2.) On September 17, 2010, defendant filed a Sealed Administrative Record
10 (ECF No. 20), which still did not include the portion of the evidence sent to the Appeal Council
11 that was dated after the decision by the ALJ. (See ECF No 24, at p. 2.) On November 17, 2010,
12 plaintiff filed a motion to correct the record. (ECF No. 24.) On December 16, 2010, defendant
13 filed a response, and on January 6, 2011, plaintiff filed a reply. (ECF Nos. 33, 36.)

14 STANDARD OF REVIEW

15 The Appeals Council shall consider new and material evidence submitted to it "only
16 where it relates to the period on or before the date of the administrative law judge hearing
17 decision." 20 C.F.R. § 404.970(b). According to 20 C.F.R. § 404.970(b), "[t]he Appeals Council
18 will consider all the evidence in the administrative law judge hearing record as well as any new
19 and material evidence submitted to it which relates to the period on or before the date of the
20 administrative law judge hearing decision." This regulation also provides that if a claimant
21 submits "evidence which does not relate to the period on or before the date of the administrative
22 law judge hearing decision, the Appeals Council will return the additional evidence to [the
23 claimant] with an explanation as to why it did not accept the additional evidence." Id.

1 The Ninth Circuit reviewed on appeal an ALJ's decision, and also considered in this
2 review, "the additional material submitted to the Appeals Council." Ramirez v. Shalala, 8 F.3d
3 1449, 1452 (9th Cir. 1993) (*citing* Bates v. Sullivan, 894 F.2d 1059, 1063-64 (9th Cir. 1990); 20
4 C.F.R. § 404.970(b)). In Ramirez, the Appeals Council had reached its decision declining to
5 review the decision of the ALJ "after considering the case on its merits; examining the entire
6 record, including the additional material; and concluding that the ALJ's decision was proper and
7 that the additional material failed to 'provide a basis for changing the hearing decision.'" Id. The
8 Ninth Circuit considered the additional material submitted to the Appeals Council, in part,
9 because the Appeals Council had examined the additional material, and had indicated
10 specifically that this additional material did not provide a basis for changing the decision of the
11 ALJ. Id.; see also Harmen v. Apfel, 211 F.3d 1172, 1180 (9th Cir. 2000) (*citing* Ramirez, 9 F.3d
12 1449) (when reviewing a decision by an ALJ, it is proper to consider additional material
13 submitted to the Appeals Council where "the Appeals Council [has] addressed [the additional
14 material] in the context of denying [claimant's] request for review").

17 DISCUSSION

18 Here, the Appeals Council indicated specifically that it had looked at, but not considered ,
19 the additional material dated after the ALJ's decision. (Supp. Tr. 2.) The Appeals Council further
20 indicated that this additional material was not considered in making its conclusion regarding
21 review because the additional material "does not affect the decision about whether [plaintiff]
22 w[as] disabled" on or before the date of the ALJ's decision (Id.) The Appeals Council suggested
23 that plaintiff could use the material in a new claim. Here, the new material was dated after the
24 decision by ALJ Schellentrager. The Court finds that the Appeals Council must have concluded
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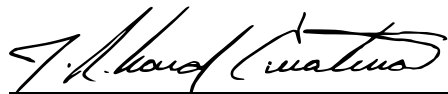
1 that the new material does not relate to the period on or before the date of ALJ Schellentrager's
2 decision. (See id.)

3 New and material evidence submitted to the Appeals Council shall be considered by the
4 Appeals Council "only where it relates to the period on or before the date of the administrative
5 law judge hearing decision." 20 C.F.R. § 404.970(b). In addition, new evidence may be
6 considered properly by the reviewing court where "the Appeals Council [had] addressed [the
7 additional material] *in the context of denying [claimant's] request for review.*" Harmen, 211 F.3d
8 at 1180 (*citing Ramirez*, 9 F.3d 1449) (emphasis added). This Court concludes that the new
9 material was not considered by the Appeals Council in the context of denying plaintiff's request
10 for review, but was considered by the Appeals Council in the context of determining whether or
11 not it related to the period on or before the date of the decision. Therefore, this new evidence
12 may not be considered properly by the Court. See Harmen, 211 F.3d at 1180. For these reasons,
13 plaintiff's motion to correct the record is denied.
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16 CONCLUSION

17 For the aforesaid reasons, plaintiff's motion to correct the record to include new
18 material dated after the decision by ALJ Schellentrager is denied.

19 Dated this 18th day of January, 2011.

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22 J. Richard Creatura
23 United States Magistrate Judge
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