(SS) Marchel v. Commissioner of Social Security

2015 | Cited 0 times | E.D. California | February 10, 2015

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

TANYA R. MARCHEL,

Plaintiff, v. CAROLYN W. COLVIN, Commissioner of Social Security,

Defendant.

No. 2:13-cv-1416 DAD

ORDER

This social security action was submitted to the court without oral argument for ruling on opening brief, construed by the court as a motion for summary judgment, and -motion for summary judgment. For -motion is denied, the decision of the Commissioner of Social

consistent with this order.

PROCEDURAL BACKGROUND On December 29, 2009, plaintiff filed an application for Supplemental Security Income (SSI) under Title XVI of the Social Security Act alleging disability beginning on June 14, 2010. 25.) Plain as denied initially, (id. at 98- 102), and upon reconsideration. (Id. at 113-17.) Thereafter, plaintiff requested an administrative hearing and a hearing was held before an Administrative Law Judge (ALJ) on February 6, 2012. (Id. at 40.) Plaintiff was represented by an attorney and testified at the administrative hearing. (Id. at 40-41.) In a decision issued on March 27, 2012, the ALJ found that plaintiff was not disabled. (Id. at 35.) The ALJ entered the following findings:

1. The claimant has not engaged in substantial gainful activity since December 29, 2009, the application date (20 CFR 416.971 et seq.). 2. The claimant has the following severe impairments: chronic neck pain with radiculopathy, pain disorder, posttraumatic stress disorder (PTSD), bipolar disorder type II, and methamphetamine abuse in early remission (20 CFR 416.920(c)). 3. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926). 4. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform light work as defined in 20

CFR 416.967(b) except lift/carry less than 10 pounds occasionally and frequently and occasionally reach, handle, finger, and feel with right arm and had no limitation with left arm. She should avoid climbing, balancing, stooping, crawling, and kneeling. Mentally, she can perform low stress, simple, and repetitive work. The claimant is capable of interacting with supervisors but should minimize public contact and with co-workers and is capable of performing work activities on a consistent basis. 5. The claimant is unable to perform any past relevant work (20 CFR 416.965). 6. The claimant was born on May 4, 1962 and was 47 years old, which is defined as a younger individual age 18-49, on the date the application was filed (20 CFR 416.963). 7. The claimant has at least a high school education and is able to communicate in English (20 CFR 416.964). 8. Transferability of job skills is not an issue in this case because

residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 416.969 and 416.969(a)). /////

10. The claimant has not been under a disability, as defined in the Social Security Act, since December 29, 2009, the date the application was filed (20 CFR 416.920(g)). (Id. at 27-35.) On May 22, 2013, March 27, 2012 decision. (Id. at 1-3.) Plaintiff sought judicial review pursuant to 42 U.S.C. §

405(g) by filing the complaint in this action on July 16, 2013.

LEGAL STANDARD

Hill v. Astrue, 698 F.3d 1153, 1158-59 (9th Cir. 2012). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgathe v. Chater, 108 F.3d 978, 980 (9th Cir. 1997). [A] reviewing court must consider the entire record as a whole and may not affirm si Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006) (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)). McCartey v. Massanari, 298 F.3d

1072, 1075 (9th Cir. 2002). A five-step evaluation process is used to determine whether a claimant is disabled. 20 C.F.R. § 404.1520; see also Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). The five-step process has been summarized as follows:

Step one: Is the claimant engaging in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two. If so, proceed to step three. If not, then a finding of not disabled is appropriate. Step three: Does the claimant s impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P, App. 1? If so, the claimant is automatically determined disabled. If not, proceed to step four. Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five. Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled. Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995). The claimant bears

the burden of proof in the first four steps of the sequential evaluation process. Bowen v. Yuckert, 482 U.S. 137, 146 n. 5 (1987). The Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.; Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999).

APPLICATION In her pending motion plaintiff asserts the following two principal claims: (1) the Commissioner improperly rejected medical opinion evidence; and (2) the ALJ failed to comply with the requirements of Social Security Rule 00 4p. 1 I. Medical Opinion Evidence Plaintiff argues that the ALJ erred by rejecting the opinion of Dr. David Daurazo, physician. 2

(Pl. s MSJ (Dkt. No. 15) at 21-26. 3

The weight to be given to medical opinions in Social Security disability cases depends in part on whether the opinions are proffered by treating, examining, or nonexamining health professionals. Lester, 81 F.3d at 830; Fair v. Bowen general rule, more weight should be given to the opinion of a treating source than to the opinion Lester, 81 F.3d at 830. This is so because a treating doctor is employed to cure and has a greater opportunity to know and observe the patient as an individual. Smolen, 80 F.3d at 1285; Bates v. Sullivan, 894 F.2d 1059, 1063 (9th Cir. 1 The court has reorganized 2 Damazo. Tr. at 67, 423, 430. It is unclear to the court if these are two different doctors or if one name is the misspelling of the other. 3 system and not to page numbers assigned by the parties. 1990). The uncontradicted opinion of a treating or examining physician may be rejected only for clear and convincing reasons, while the opinion of a treating or examining physician that is controverted by another doctor may be rejected only for specific and legitimate reasons supported by substantial evidence in the record. Lester, 81 F.3d at 830- physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician. (Id. at 831.) Finally, greater weight

Benecke v. Barnhart, 379 F.3d 587, 594 (9th Cir. 2004) (quoting 20 C.F.R. § 404.1527(d)(5)). Although a treating phy

Chaudhry v. Astrue, 688 F.3d 661, 671 (9th Cir. 2012) (quoting , 554 F.3d 1219, 1228 (9th Cir. 2009)). Here, impairment questionnaire in which he indic performing any full-time work at any exertional level. (Tr. at 405.) The questionnaire addressed

e based his opinion and Id. at 405-06.) According to Dr. Daurazo, plaintiff had been disabled by these impairments since 1998. (Id. at 406.) The ALJ minimal weight finding that

(Id. at 35.) That, however, is the complete extent of the support cited by the ALJ for affording minimal weight to . Moreover, there is no discussion of p other evidence of record. As noted above, if an ALJ rejects the opinion of a treating physician that is contradicted by the opinion of an examining physician, the ALJ must give specific and legitimate reasons for doing so. [The ALJ] must set forth his own interpretations and explain why they, rather than the doctors Reddick In other words, an

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ALJ errs when he rejects a medical opinion or assigns it little weight while doing nothing more than ignoring it, asserting without explanation that another medical opinion is more persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his conclusion. Garrison v. Colvin, 759 F.3d 995, 1012-13 (9th Cir. 2014). Moreover, in this case, after the ALJ issued his opinion plaintiff submitted to the Appeals Council the opinion of another treating physician, Dr. John Parsons. In this regard, on August 31, 2012, Dr. Parsons completed the same impairment questionnaire that had been completed by treating physician Dr. Daurazo and therein similarly opined her from performing any full-time work at any exertional level. (Id. at 456.) As was the case the objective findings upon which Dr. Parson b

limitations. (Id. at 456-57.)

Council which then denied review of the ALJ 4.)

[W]hen a claimant submits evidence for the first time to the Appeals Council, which considers that evidence in denying review record, which the district court must consider in determining evidence.

Brewes v. Commissioner of Social Sec. Admin., 682 F.3d 1157, 1159-60 (9th Cir. 2012). Here, the record before the court now contains a second opinion from a treating physician opining that was far more limited than that found by the ALJ. Moreover, court can only speculate as to the weight the ALJ would have assigned to that treating physician opinion. See Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) The ALJ must consider all medical opinion . ///// ///// Accordingly, for the reasons stated above, the court finds that plaintiff is entitled to relief with respect to this claim. 4 II. SSR 00 4p Plaintiff also argues that the ALJ violated SSR 00 4p by failing to ask the vocational expert if her testimony was consistent with the Dictionary of Occupational vocational testimony was inconsistent with the DOT. (Id. at 15-18.)

SSR 00 4p unambiguously p expert] . . . provides evidence about the requirements of a job or occupation, the adjudicator has an affirmative responsibility to ask about any possible conflict between that [vocational expert] . . . evidence and information provided in the [Dictionary of 4p further provides that the expert Titles and obtain a reasonable explanation for any apparent conflict. Massachi v. Astrue, 486 F.3d 1149, 1152-53 (9th Cir. 2007) (alterations in original). Here, the Commissioner concedes that at the administrative hearing the ALJ did not ask the vocational expert whether her testimony conflicted with the DOT. 5 In addition, the ALJ determined that plaintiff residual functional capacity was limited to etical question to the vocational e

6 (Id. at 71.) The vocational expert answered that such a person could perform the jobs of call-out 4 A social worker, however, is not an acceptable medical source . 20 C.F.R. § 404.1513(a)(1)-(5). An ALJ may reject the opinion ich germane reasons for doing so. Turner v. Comm r of the Soc. Sec. Admin., 613 F.3d 1217, 1223- 24 (9th Cir. 2010). Here, the ALJ offered germane reasons, including that plaintiff had only visited Lance Ferris on one occasion. (Tr. at 34.) 5 Despite her failure to make this inquire,

the ALJ nonetheless concluded in his March 27, 2012 decision as] consistent with the information contained

6 The ALJ also admonished the vocational expert to operator and election clerk. (Id. at 72.) Based on that testimony, the ALJ concluded that plaintiff could perform the jobs of call-out operator and election clerk. (Id. at 35.) The jobs of call-out operator and election clerk, however, require the claimant to have a Level 3 reasoning level. See Siqueiros v. Colvin, No. EDCV 12-1790 AN, 2013 WL 6732885, at *2 (C.D. Cal. Dec. 19, 2013); see also DOT 237.367-014; DOT 205.367-030 authority in this circuit, including in this district, has concluded that a limitation to simple,

Celedon v. Colvin, No. 1:13-cv-0449 SMS, 2014 WL 4494507, at *9 (E.D. Cal. Sept. 11, 2014). See also Hackett v. Barnhart, 395 F.3d 1168, 1176 (10th Cir. 2005) (limitation to simple - Tich Pham v. Astrue reasoning required for simple r Gottschalk v. Colvin, Civil No. 6:13-cv-0125-JE, 2014 WL 1745000, at *5 (D. Or. May 1, 2014) (majority of district courts within the Ninth Circuit have concluded that there is a conflict between limitation to simple, routine, repetitive work and level 3 reasoning); Torrez v. Astrue, No. 1:09-0626-JLT, 2010 WL 2555847, at *9 (E.D. Cal. June 21, 2010) that the DOT precludes a person restricted to simple, repetitive tasks, from performing work . . .

(Dkt. No. 18) at 7.) T decision declared that the vocational e of telephone marketer, research subject and sandwich board carrier/demonstrator, as jobs plaintiff

could perform. 7

(Id. at 35.) However, the vocational expert listed those jobs only in an answer to a hypothetical 7

The jobs of telephone marketer and research subject have a level three reasoning requirement and are inconsistent with a limitation to simple, repetitive tasks for the reasons discussed above. See DOT 299.357-014; DOT 359.677-030. functional capacity determination. (Id. at 72-75.) While an ALJ may pose a range of hypothetical questions to a vocational expert based on alternate interpretations of the evidence, nt, must account for all

of the limitations and restrictions of the particular claimant. Admin., 554 F.3d 1219, 1228 (9th Cir. 2009). Here, the ALJ did not ask the vocational expert whether her testimony conflicted with the DOT, and that conflict was left unexplained . judgment will also be granted as to this claim as well.

CONCLUSION With error established, the court has the discretion to remand or reverse and award benefits. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). Plaintiff asks that this matter Where there are outstanding issues that must be resolved before a determination can be made, or it is not clear from the record that the ALJ would be required to find plaintiff disabled if all the evidence were properly evaluated, remand is appropriate. Benecke, 379 F.3d at 594. Here, there are outstanding issues that must be resolved and it is not clear from the record that the ALJ would be required to find

plaintiff disabled if all the evidence were properly evaluated in keeping with this order. Accordingly, the court finds that this matter should be remanded for further proceedings so that the ALJ can properly consider treating physicians, providing specific and legitimate reasons supported by substantial evidence in

the record if the ALJ elects to reject the opinion of any treating physician, and to comply with the requirements of SSR 00 4p. For all the reasons set forth above, IT IS HEREBY ORDERED that: 5) is granted; -motion for summary judgment (Dkt. No. 18) is denied; ///// and 4. This matter is remanded for further proceedings consistent with this order. Dated: February 9, 2015

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