STEP FOUR, TREATING PHYSICIAN, MENTAL IMPAIRMENT, CREDIBILITY, FAILURE TO FOLLOW, LAY-WITNESS, BOILERPLATE

IN THE UNITED STATES DISTRICT COURT
FOR THE XXXXX DISTRICT OF XXXXX

FIRSTNAME LASTNAME,	)	
	)	
Plaintiff,	)	No. XXXXX
	)	
v.	)	
	)	PLAINTIFF'S BRIEF
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

I. Statement of the General Issue

Does substantial evidence support the Commissioner's decision that Plaintiff, Firstname Lastname, was not disabled and thus not entitled to Supplemental Security Income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1382, 1382c(a)? See 42 U.S.C. § 405(g); see also 42 U.S.C. § 1383(c)(3) (incorporating for SSI claims 42 U.S.C. § 405(g)).

II. Procedural Background

In DATE, Lastname applied for SSI. (Tr. at 66, 98.) After his application was denied initially and on reconsideration, he requested a de novo hearing before an administrative law

judge (ALJ). (Tr. at 69, 75. 78.) On April 25, 2001, Lastname appeared with counsel and testified at an administrative hearing before ALJ Firstname Lastname. (Tr. at 38.) In addition, XXXXX testified. (Tr. at 38, 60.) On DATE, the ALJ decided that Lastname was not disabled at step four of the well-known five-step sequential evaluation. (Tr. at 30.) 20 C.F.R. § 416.920(e) (2003) (step four). On November 25, 2002, the ALJs decision became the "final decision" of the Commissioner when the Appeals Council denied Lastname's request for review. (Tr. at 8.) 20 C.F.R. § 422.210(a) (2003). Lastname then initiated this civil action for judicial review of the Commissioner's final decision. 42 U.S.C. § 405(g).

III. Statement of the Facts

A. Age

Lastname was born on DATE. (Tr. at 66.) Therefore, he was forty-seven years old on DATE, the date of the ALJ's decision. (Tr. at 31.)

B. Education

Lastname obtained a GED (Tr. at 121, 323) and, in about 2001, completed a two-year college program in multimedia communication (Tr. at 43, 158). His college grade point average was about 3.6 or 3.7. (Tr. at 48.) Lastname stated that when he attended college, he took naps during the day. (Tr. at 49.)

C. Work Experience

The ALJ found Lastname not disabled based on his ability to do his past work as a marine upholsterer. (Tr. at 30.) From February 1993 until May 1993, Lastname worked as a

marine upholsterer. (Tr. at 129.) The job required walking half of the workday, standing half of the workday, and lifting ten pounds. (Tr. at 134) Lastname "did upholstery work on speed boats using a [pneumatic] stapler." (Tr at 134.)

The record includes Lastname's earnings record, showing intermittent employment for two decades. (Tr. at 108-12.)

D. Living Situation

Lastname lived with his mother and step-father. (Tr. at 42.) He received general assistance. (Tr. at 44.)

E. Medical Evidence: Impairments

1. Hepatitis C

Lastname had Hepatitis C. (E.g.. Tr. at 187, 201, 210, 258.)

2. Migraine Headaches

Lastname had migraine headaches which were treated with medication. (E.g., Tr. at 192, 195, 197, 207, 258 .)

3. Mental Impairments

Lastname has been diagnosed with depression (e.g., Tr. at 258, 286, 309, 325) and a personality disorder (e.g., Tr. at 224, 309, 326). In the remote past, Lastname was a heroin addict and an alcoholic. (Tr. at 224, 325.)

4. Chronic Fatigue Syndrome

A physician diagnosed Lastname with chronic fatigue syndrome. (Tr. at 199, 203, 258.)

F. Medical Evidence: Sources

1. Treating Physician Dr. DoctorOne

Firstname DoctorOne, M.D., has been Lastname's primary care physician since March 1997. (Tr. at 330-31; id. at 374-77 (evidence submitted to the Appeals Council).) She treated Lastname for Hepatitis C, migraine headaches, depression, and fatigue. (Tr. at 331.)

On August 19, 1999, Dr. DoctorOne diagnosed chronic fatigue syndrome, Hepatitis C, migraine headaches, and depression. (Tr. at 261.) Dr. DoctorOne reported that Lastname was unable to perform even sedentary work. (Tr. at 261.) Lastname had severe fatigue with unpredictable symptoms. (Tr. at 261.) Dr. DoctorOne noted that Lastname could not afford medications or evaluations. (Tr. at 261.)

On July 11, 2000, Dr. DoctorOne summarized again Lastname's medical conditions and functional limitations. (Tr. at 235.) Lastname was still unable to perform even sedentary work. (Tr. at 236.)

On May 15, 2001, Dr. DoctorOne provided, in a declaration, a summary statement of her treatment and assessment of Lastname's functional limitations. (Tr. at 330-34.) She treated Lastname for Hepatitis C, migraine headaches, depression, and fatigue. (Tr. at 331.) She last saw Lastname in July 2000. (Tr. at 331.) Dr. DoctorOne thought that it was "nearly

impossible" to determine whether Lastname had the specific diagnosis of chronic fatigue syndrome. (Tr. at 331.) Laboratory findings were consistent with Hepatitis C. (Tr. at 331-32.) Based on her observations of Lastname through July 2000, Lastname was unable to work full-time. (Tr. at 332, 334.) "He has very severe depression that he generally does not allow anyone to treat very well." (Tr. at 332.) Lastname was afraid of side effects from medication. (Tr. at 333.) Dr. DoctorOne had no reason to doubt Lastname's statements that he had severe fatigue. (Tr. at 333.) According to Dr. DoctorOne, Lastname would frequently have fatigue severe enough to interfere with his concentration. (Tr. at 333.) Lastname had "fairly classic" migraine headaches. (Tr. at 333.) There were "very few objective findings of headaches, since they're mostly subjective." (Tr. at 333.) The medication Imitrex helped his headaches, but it was reasonable to expect that the medication did not always help. (Tr. at 333.) Dr. DoctorOne agreed that it was reasonable to expect that Lastname would need to lie down because Imitrex caused some sleepiness. (Tr. at 334.)

After the ALJ rendered a decision, Lastname submitted to the Appeals Council additional evidence from Dr. DoctorOne. (Tr. at 374-77.) Dr. DoctorOne continued to report that Lastname was unable to work. (Tr. at 375, 377.)

2. Examining Sources

The record includes reports of consultative examinations:

Source	Type	Date	Tr.
Firstname DoctorTwo, M.D.	psychiatrist	12/99	220
Firstname DoctorThree, M.D.	family practice	5/00	237
Firstname DoctorFour, M.D.	psychiatrist	9/00	306
Firstname DoctorFive, Ph.D.	psychologist	4/01	322

3. Non-Examining Sources

The record includes determinations by non-examining state-agency sources:

Source	Type	Date	Tr.
Firstname DoctorSix, Ph.D.	psychologist	1/00	66, 226
Firstname Docotor Seven, Ph.D.	psychologist	7/00	68, 226,
Firstname DoctorEight, M.D.	physician	7/00	68, 243

IV. *Background*: Substantial Evidence is the Standard of Review.

Substantial evidence is the standard of judicial review. 42 U.S.C. § 405(g); Reddick v. Chater, 157 F.3d at 715, 720 (9th Cir. 1998).

At issue on judicial review are the ALJ's findings. 42 U.S.C. § 405(g); 20 C.F.R. § 422.210(a) (2003). A court does not review the Commissioner's post hoc rationalizations offered in litigation. Pinto v. Massanari, 249 F.3d 840, 847-48 (9th Cir. 2001).

V. *Background*: The ALJ Rendered a Step-Four Decision.

A. Disability is Evaluated With the Five-Step Sequential Evaluation.

A claimant is disabled if he or she has a medical impairment(s) that prevented him or her from performing substantial gainful activity for at least twelve consecutive months or that

can be expected to prevent him or her from performing substantial gainful activity for at least twelve consecutive months or result in death. 42 U.S.C. § 1382c(a). A five-step sequential evaluation is used to adjudicate claims of disability. 20 C.F.R. § 416.920 (2003).

B. Social Security Rulings Guide the Analysis of Step Four.

Under the Social Security Act, a claimant is not disabled if he or she can do his or her "previous work." 42 U.S.C. § 1382c(a). This corresponds to step four. 20 C.F.R. § 416.920(e) (2003). At step four, the agency only considers "past relevant work." 20 C.F.R. §§ 416.920(e), 416.965 (2003). Social Security Ruling 96-8p [1], SSR 82-62[2], and SSR 82-61[3] are the main binding interpretive rulings about step four. See 20 C.F.R. § 402.35 (2003) (Social Security Rulings are binding on agency adjudicators).

1. Past Relevant Work Defined

There are three requirements for a job to be "past relevant work." 20 C.F.R. § 416.920(e) (2003). First, a job must have been "substantial gainful activity." 20 C.F.R. § 416.965(a) (2003); SSR 96-8p; SSR 82-62. Second, a claimant must have performed the job long enough to learn how to do it. Id. Third, the job usually must have been performed within fifteen years of the date of adjudication or the date the claimant's insured status expired. 20 C.F.R. § 416.965(a) (2003); SSR 82-62.

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[1] Available at http://www.ssa.gov/OP_Home/rulings/di/01/SSR96-08-di-01.html.

[2] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-62-di-02.html.

[3] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-61-di-02.html.

2. Two Types of Step-Four Decisions

Under SSR 82-61, a claimant is not disabled if he or she can do the "actual functional demands and job duties of a particular past relevant job" or if he or she can do the "functional demands and job duties of the occupation as generally required by employers throughout the national economy." SSR 82-61. In other words, an ALJ may make an as-actually-performed and/or an as-generally-performed step-four decision. Id.

3. Three Specific Findings

Apart from the fact that there are two types of step-four decisions, an ALJ must make three distinct findings at step four:

> 1. A finding of fact as to the individual's [residual functional capacity].
> 2. A finding of fact as to the physical and mental demands of the past job/occupation.
> 3. A finding of fact that the individual's [residual functional capacity] would permit a return to his or her past job or occupation.

SSR 82-62. A residual functional capacity finding is a determination of the most a claimant can do despite the total limiting effect of all his or her impairments. 20 C.F.R. § 416.945 (2003). Social Security Ruling 96-8p brings together SSR 82-61 and SSR 82-62 by providing that an ALJ's residual functional capacity assessment is first used for a function-by-function comparison with the functional demands of an individual's past relevant work as he or she actually performed it and then, if necessary, as the work is generally performed in the national economy. SSR 96-8p.

C. The ALJ Found That Lastname Could Do His Past Relevant Work as a Marine Upholsterer as Actually Performed.

At step one, the ALJ determined that Lastname had not engaged in substantial gainful activity. (Tr. at 30.) 20 C.F.R. § 416.920(b) (2003) (step one). At step two, the ALJ determined that Lastname had a "severe" impairment. (Tr. at 30.) 20 C.F.R. § 416.920(c) (2003) (step two). At step three, the ALJ concluded that Lastname did not have an impairment or combination of impairments that met or equaled a listed impairment. (Tr. at 30.) 20 C.F.R. § 416.920(d) (2003) (step three). At step four, the ALJ determined that Lastname retained the residual functional capacity to do "light" work. (Tr. at 30.) 20 C.F.R. § 416.920(e) (2003) (step four); 20 C.F.R. § 416.967(b) (2003) (defining "light" work). The ALJ decided that Lastname was not disabled because he could do his past relevant work as a marine upholsterer as actually performed:

> The evidence in this case establishes that the claimant has past relevant work as a marine upholsterer (Exhibit 4E), which involved working on speed boats with a stapler, and lifting and carrying ten pounds maximum. By his description, it involved standing and walking half the day each.
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> Based on the residual functional capacity, the claimant could return to his past relevant work as [a] marine upholsterer. . . . .

(Tr. at 29.)

VI. Argument

A. *Demands of Past Work*: Lastname Could Not Do His Past Work as a Marine Upholsterer Given the ALJ's Physical Residual Functional Capacity Finding.

Lastname shows at the outset that the ALJ's own rationale does not provide a basis for affirmance of the ALJ's step-four decision. The ALJ found that Lastname retained the residual functional capacity to perform "light" work. (Tr. at 30.) Lastname could not do his past work as a marine upholsterer given the ALJ's own residual functional capacity finding. "Light" work requires the ability to stand and/or walk for about six hours in an eight-hour day. SSR 83-10[4] ("the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday"). Lastname's past job as a marine upholsterer required standing for half of an eight- or nine-hour workday and walking for half of an eight- or nine-hour workday. (Tr. at 134 (referring to "Walk? ½," "Stand?½," and "Write, type or handle small objects? 9" hours).) Since eight or nine hours of standing and/or walking is greater than six hours of standing and/or walking of light work, Lastname could not do his past relevant work as actually performed assuming as true the ALJ's physical residual functional capacity finding.

[4] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR83-10-di-02.html.

There is another way of understanding the ALJ's error. The ALJ relied heavily on the determinations of non-examining state-agency sources such as Dr. DoctorEight. (Tr. at 22-23 (relying on id. at 243-47).) Dr. DoctorEight's determined that Lastname could stand and/or walk six hours in an eight-hour day. (Tr. at 243-44.) Thus, given Dr. DoctorEight's determination, Lastname could not do his past work as a marine upholsterer—the job required more than six hours of standing and/or walking. (Tr. at 134.) And the ALJ gave no specific reason to reject Dr. DoctorEight's opinion about standing and/or walking. (Tr. at 22-23.) Because even non-examining state-agency physician Dr. DoctorEight believed that Lastname could not stand and/or walk for eight or nine hours per workday, substantial evidence does not support the ALJ's finding that Lastname could do his past work as a marine upholsterer as he had actually performed that job. (Tr. at 29.) Rephrased, substantial evidence would not support any finding that Lastname could do the eight or nine hours of standing and/or walking that his past job as a marine upholsterer required.

Because Lastname established that he could not do his past work as a marine upholsterer as actually performed given the ALJ's own residual functional capacity finding, substantial evidence does not support the ALJ's decision. Lastname demonstrates below in detail that substantial evidence does not support the ALJ's residual functional capacity finding for light work.

B. *Treating Physician Dr. DoctorOne*: The ALJ Did Not Give Legally Sufficient Reasons for Rejecting Treating Physician Dr. DoctorOne's Opinions.

1. A Treating Physician's Opinion is Important.

A treating physician's opinion is important. Under Ninth Circuit law, an ALJ must present "clear and convincing" reasons for rejecting the uncontroverted opinion of a claimant's treating physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) (internal quotation marks and citation omitted). When the treating physician's opinion is controverted, an ALJ must give "specific and legitimate" reasons for rejecting the opinion.[5] Id. (internal quotation marks and citation omitted). Similarly, by regulation, an ALJ must "always give good reasons" for the weight accorded to a treating physician's opinion. 20 C.F.R. § 416.927(d)(2) (2003).

2. Residual Functional Capacity Refers to Full-Time Work.

Through SSR 96-8p, the Commissioner defines residual functional capacity on a "regular and continuing basis" as work "8 hours a day, for 5 days a week, or an equivalent work schedule." SSR 96-8p (footnote omitted). Lastname will refer to working eight hours per day, five days per week as "full-time" work. There is a narrow exception to the rule that residual functional capacity concerns full-time work. If at step four a claimant had part-time past relevant work, the claimant may be found not disabled based on his or her ability to do

[5] The ALJ did not mention that the Ninth Circuit requires "clear and convincing" reasons or "specific and legitimate" reasons to reject a treating physician's opinion. (Tr. at 21-29)

his or her part-time past relevant work. SSR 96-8p n.2. This exception does not apply here because the ALJ did not find Lastname "not disabled" at step four based on his ability to do part-time work, but full-time work, as a marine upholsterer.[6] (Tr. at 29-30.)

3. The ALJ Erroneously Rejected Dr. DoctorOne's Opinions.

Treating primary care physician Dr. DoctorOne consistently reported that Lastname could not perform even sedentary work due to his combination of medical conditions, including depression, Hepatitis C, and migraine headaches. (Tr. at 261 (August 1999); id. at 236 (July 2000); id. at 330-34 (May 2001); see also id. at 375 (June 2001, submitted to Appeals Council); id. at 377 (June 2002 submitted to Appeals Council).)[7] Dr. DoctorOne's

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[6] Cf. also Rollins v. Massanari, 261 F.3d 853, 859 (9th Cir. 2001) (acknowledging SSR 96-8p's full-time work rule); Myers v. Apfel, 238 F.3d 617, 620 & n.2 (5th Cir. 2001) (applying SSR 96-8p's full-time work rule); Bladow v. Apfel, 205 F.3d 356, 360 (8th Cir. 2000) (same); Ross v. Apfel, 218 F.3d 844, 849 (8th Cir. 2000) (same); Kelley v. Apfel, 185 F.3d 1211, 1214 (11th Cir. 1999) (same).

The Ninth Circuit has applied provisions of SSR 96-8p other than its full-time work rule. See Reed v. Massanari, 270 F.3d 838, 843 (9th Cir. 2001) (applying SSR 96-8p rule concerning step four); Pinto, 249 F.3d at 845 (same).

[7] This Court may look to evidence submitted to the Appeals Council. In Ramirez v. Shalala, 8 F.3d 1449 (9th Cir. 1993), the Ninth Circuit reviewed together evidence submitted to the ALJ and Appeals Council evidence and held that claimant Ramirez was disabled. Id. at 1451-52; see also id. at 1454 ("We now examine the full record, including the supplemental material submitted to the Appeal Council, to determine what it reveals with respect to Ramirez's eligibility for benefits"); see also Gomez v. Chater, 74 F.3d 967, 971 (9th Cir. 1996) ("Although the Appeals Council affirmed the decision of the ALJ denying benefits to Gomez, this evidence is part of the record on review to this court.") (citing Ramirez). In Harman v. Apfel, 211 F.3d 1172 (9th Cir. 2000), the Ninth Circuit held, "We properly may consider the additional materials because the Appeals Council addressed them in the context of denying Appellant's request for review." Id. at 1180 (citing Ramirez). But the Harman Court did not hold that Harman was disabled on the existing record since although it was clear that the ALJ erroneously evaluated medical opinions, it was unclear whether Harman was disabled in light of those opinions. Id. at

opinions are important because a claimant is disabled at step five if he cannot work full-time. See SSR 96-8p. The ALJ did not give legally sufficient reasons for rejecting Dr. DoctorOne's opinions. (Tr. at 24.)

a. Expertise in Hepatitis C

In May 2001, Dr. DoctorOne addressed laboratory findings related to Lastname's Hepatitis C. (Tr. at 331-32.) Although unclear, the ALJ may have rejected Dr. DoctorOne's opinions on the ground that Dr. DoctorOne was not an "expert" in liver disorders. (Tr. at 24.) On the contrary, Dr. DoctorOne understood the laboratory findings related to Lastname's Hepatitis C. (Tr. at 331-32.) But even if Dr. DoctorOne were not a specialist in the treatment of liver disease, she still had a much firmer ground upon which to assess the severity of Lastname's Hepatitis C than the ALJ. There is no evidence that the ALJ himself is an expert in liver disorders; there is no evidence that between Dr. DoctorOne and the ALJ, the ALJ had more expertise in the treatment of liver disorders. Cf. Green v. Apfel, 204 F.3d 780, 781 (7th Cir. 2000) ("No medical expert testified, although the procedure for adjudicating social security disability claims departs from the adversary model to the extent of requiring the [ALJ] to summon a medical expert if that is necessary to provide an informed basis for

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In Mayes v. Massanari, 276 F.3d 453 (9th Cir. 2001), the Ninth Circuit in dictum referred to the holding of Ramirez with respect to Appeals-Council evidence as a concession. Id. at 461 n.3. The Mayes Court, however, did not consider Harman's direct application of Ramirez. The Mayes Court only considered Harman with respect to the appellate standard of review. Id. at 970.

determining whether the claimant is disabled. Instead of doing that the [ALJ] played doctor"). If the ALJ felt that he needed the opinion of an expert in liver disease, the ALJ should have obtained such an opinion. See 20 C.F.R. § 416.1444 (2003) ("At the hearing the administrative law judge looks fully into the issues, questions you and the other witnesses, and accepts as evidence any documents that are material to the issues. The administrative law judge may stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing."); 20 C.F.R. § 416.919a(b) (2003) (regulatory authority to order a consultative examination); 20 C.F.R. § 416.927(f) (2003) (regulatory authority to obtain medical-expert testimony).

b. Hepatitis C and Exhibit 7F

The ALJ may have rejected Dr. DoctorOne's assessment of Lastname's Hepatitis C on the basis of Exhibit 7F. (Tr. at 24, 237-42.) The ALJ attributed to Dr. DoctorOne the statement in Exhibit 7F that Lastname "'does not have the physical exam stigmata of chronic severe illness that I would expect in someone with fatigue from hepatitis C.'" (Tr. at 24 (quoting id. at 240).) But Exhibit 7F is not from Dr. DoctorOne. Exhibit 7F is the report of Dr. DoctorThree who examined Lastname for the agency adjudicating Lastname's claim of disability. (Tr. at 237-40.) The false attribution to Dr. DoctorOne of the statements in Exhibit 7F is not a good reason to reject Dr. DoctorOne's opinions.

c. Alleged Equivocal, Speculative, and Conjectural Nature

The ALJ disparaged Dr. DoctorOne's May 2001 opinions as "generally equivocal, speculative, and conjectural." (Tr. at 24.) The ALJ thereby mischaracterized Dr. DoctorOne's May 2001 opinions. (Tr. at 330-34.) Dr. DoctorOne explained that Lastname had multiple medical conditions impeding his ability to work: Hepatitis C, depression, migraine headaches, and fatigue. (Tr. at 331-34.) Although Dr. DoctorOne could not state with absolute certainty which impairment caused precisely which limitations—Lastname could have fatigue from depression, Hepatitis C, or chronic fatigue syndrome—Dr. DoctorOne reported that Lastname's symptoms were due to bona fide medical conditions. (Tr. at 331-34.) If the ALJ based his decision on the notion that a physician must know with absolute precision the limiting effect of each impairment, the ALJ made an error of law. An ALJ must consider the combined or aggregate effect of all impairments. See 42 U.S.C. § 1382c(a) ("the Commissioner . . . shall consider the combined effect of all of the individual's impairments"); 20 C.F.R. § 416.923 (2003) ("we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity."). Restated, there is no reasonable interpretation of Dr. DoctorOne's May 2001 opinions that she did not firmly believe that Lastname was unable to work full-time due to his multiple medical conditions. And, Dr. DoctorOne's opinions before and after May 2001 confirm that Lastname was unable to work full time. (Tr. at 261 (August 1999); id. at 236 (July 2000); id. at 375 (June 2001); id. at 377 (June 2002).)

d. Depression

The ALJ disputed Dr. DoctorOne's opinions based in part on Lastname's depression because Dr. DoctorOne was "a family practitioner and not a specialist in the treatment of mental illness." (Tr. at 20.) An ALJ may take into account a physician's expertise. 20 C.F.R. § 416.927(d)(5) (2003) ("We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist."); Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996) ("the opinions of a specialist about medical issues related to his or her area of specialization are given more weight than the opinions of a nonspecialist."). However, an ALJ may discount wholesale a treating primary care physician's assessment of a claimant's mental condition. Primary care physicians treat as many patients as specialist mental healthcare providers.[8] And, Dr. DoctorOne's assessments of Lastname's functional limitations is especially probative because she took into account Lastname's physical as well as mental conditions. (Tr. at 258-61, 331-

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[8] In a recent report, a federal agency noted:

> . . . Altogether, slightly less than 6 percent of the adult population and about 8 percent of children and adolescents (ages 9 to 17) use specialty mental health services in a year. The general medical/primary care sector consists of health care professionals such as general internists, pediatricians, and nurse practitioners in office-based practice, clinics, acute medical/surgical hospitals, and nursing homes. More than 6 percent of the adult U.S. population use the general medical sector for mental health care, with an average of about 4 visits per year—far lower than the average of 14 visits per year found in the specialty mental health sector.

U.S. Dep't of Health and Human Servs., Mental Health: A Report of the Surgeon General (1999), Chap. 6, available at http://www.surgeongeneral.gov/library/mentalhealth/home.html.

34, 374-77.) See Smolen, 80 F.3d at 1283 (noting significance of opinions relating to a claimant's combined conditions).

Further, Dr. DoctorOne's evaluation of Lastname's mental condition is consistent with psychiatrist Dr. DoctorFour's report (Tr. at 306-09) and psychologist Dr. DoctorFive's report (Tr. at 322-27). (Lastname also discusses below his mental illness.)

e. Migraine Headaches

Dr. DoctorOne acknowledged that Lastname's migraine headaches were marked or severe. (Tr. at 235, 258, 260, 374.) Medication usually alleviated his migraine headaches, but not always. (Tr. at 333-34.) It was reasonable to expect that Lastname would have about two migraine headaches per week and that he would usually need to lie down due to a side effect from medication. (Tr. at 334.) Despite this evidence, the ALJ found that Lastname's migraine headaches did not constitute a "severe" impairment.[9] (Tr. at 20.)

The ALJ gave as a reason for finding that Lastname's migraine headaches were not severe the fact that his headaches would not "prevent work." (Tr. at 20.) The ALJ thereby applied an improper legal standard. Lastname did not need to prove that his headaches in and of themselves prevented him from working. The ALJ was required to take into account all severe, i.e., more-than-minimal, impairments and all non-severe impairments. 42 U.S.C. §

[9] A "severe" impairment is the technical term for an impairment that imposes more-than-minimal limitations on a claimant's ability to perform basic work activities. See Smolen, 80 F.3d at 1290 (discussing the definition of a "severe" impairment). In normal medical parlance, "severe" means more serious than "mild" or "moderate." E.g., Amer. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994), at 339.

1382c(a); 20 C.F.R. § 416.923 (2003); Celaya v. Halter, – F.3d –, No. 01-16964 (9th Cir. June 17, 2003).

f. Alleged Singularity

The ALJ dismissed Dr. DoctorOne's May 2001 opinions on the ground that they "stood alone." (Tr. at 24.) Although unclear, if the ALJ meant by "stood alone" that these were Dr. DoctorOne's only such opinions, the ALJ made a harmful mistake of fact. Dr. DoctorOne provided consistent, longitudinal opinions that Lastname could not work full-time and could not do even sedentary work. (Tr. at 261 (August 1999); id. at 236 (July 2000); id. at 330-34 (May 2001); at 375 (June 2001); id. at 377 (June 2002).) Dr. DoctorOne's May 2001 opinions are not aberrant remarks, but merely the most articulate expression of her overall assessment of Lastname's mental and physical conditions.

4. There is a Consequence to the ALJ's Failure To Provide Legally Sufficient Reasons.

There is a consequence to the ALJ's faulty rejection of treating physician Dr. DoctorOne's opinions. Those opinions are accepted as true. Lester, 81 F.3d at 834 ("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.") (internal quotation marks and citation omitted). Once Dr. DoctorOne's opinions restricting Lastname to part-time work are properly evaluated, the record proves that Lastname was disabled at step five. He could not perform any past relevant work at step four and could not perform full-time work at step five. SSR 96-8p. In order for a claimant to be found not disabled at step five, the claimant

must be able to perform full-time work. Id. Lastname could not. Therefore, the Court should conclude that Lastname was disabled at step five on the existing record. Cf. Reddick, 157 F.3d at 729-30 (recognizing that the claimant was disabled at step five).

Alternatively, the Court should order the Commissioner on remand to evaluate fairly and properly treating physician Dr. DoctorOne's opinions.

C. *Mental Condition*: Substantial Evidence Does Not Support The ALJ's Finding of a Non-Severe Mental Impairment.

Substantial evidence does not support the ALJ's finding that Lastname did not even have a "severe," i.e., more-than-minimal, mental impairment. (Tr. at 20.)

1. The ALJ Erroneously Evaluated Dr. DoctorTwo's Report.

Psychiatrist Dr. DoctorTwo examined Lastname for the agency adjudicating Lastname's disability claim. (Tr. at 220.) The ALJ erroneously evaluated Dr. DoctorTwo's report. (Tr. at 17-20.) Dr. DoctorTwo's basic argument was that Lastname could work notwithstanding his dysthymia and schizoid personality disorder because he attended school full-time and had been able "to work and to support himself." (Tr. at 225.) The exhibits include Lastname's earnings record showing only sporadic work over two decades. (Tr. at 108-13.) Although Lastname has been able to survive notwithstanding his mental impairments, Lastname's work history does not prove that his mental condition was not even more-than-minimal. See Lester, 81 F.3d at 833 ("Occasional symptom-free periods--and even the sporadic ability to work--are not inconsistent with disability.").

Dr. DoctorTwo also provided strong evidence that Lastname had a severe mental impairment. (Tr. at 225.) According to Dr. DoctorTwo, Lastname's "[s]ocial interaction is extremely poor." (Tr. at 225 (emphasis added).) When a claimant's social interaction is extremely poor, this is probative evidence that a claimant's ability to perform the basic mental demands of work, which include "[r]esponding appropriately to supervision, co-workers and usual work situations," see 20 C.F.R. § 416.921(b)(5) (2003), is more than minimally diminished. In the area of social functioning, an impairment is non-severe if it generally imposes no limitation or only a mild limitation. 20 C.F.R. § 416.920a(d)(1) (2003).

For the same and similar reasons, the ALJ unreasonably relied on the determinations of non-examining state-agency psychologists Dr. DoctorSix and Dr. DoctorSeven. (Tr. at 18 (referring to id. at 226).) Drs. DoctorSix and DoctorSeven did not acknowledge Lastname's extreme limitation in the area of social functioning. (Tr. at 226-33.)

2. The ALJ Failed to Follow Completely 20 C.F.R. § 416.920a.

The ALJ found that Lastname had two medically-determinable mental impairments: dysthymia and a personality disorder. (Tr. at 17.) However, these impairments were non-severe. (Tr. at 19.) 20 C.F.R. § 416.921 (2003) (defining a "non-severe" impairment). In finding that Lastname's mental impairments were non-severe, the ALJ did not follow completely 20 C.F.R. § 416.920a (2003), the mandatory procedure for evaluating mental impairments. Section 416.920a sets forth the method by which an ALJ determines whether a mental impairment is severe at step two or disabling at step three. 20 C.F.R. § 416.920a

(2003). An ALJ must rate a claimant's mental condition in four areas: activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation. 20 C.F.R. § 416.920a(c)(3) (2003). There is a scale for each area:

> (4) When we rate the degree of limitation in the first three functional areas (activities of daily living; social functioning; and concentration, persistence, or pace), we will use the following five-point scale: None, mild, moderate, marked, and extreme. When we rate the degree of limitation in the fourth functional area (episodes of decompensation), we will use the following four-point scale: None, one or two, three, four or more. The last point on each scale represents a degree of limitation that is incompatible with the ability to do any gainful activity.

20 C.F.R. § 416.920a(c)(4) (2003). Apparently, the ALJ's ratings are:

Area	ALJ's Finding	Non-Severe Level
activities of daily living	?	none / mild
social functioning	less than marked	none / mild
concentration, persistence, or pace	less than moderate	none / mild
episodes of decompensation	none	none

(Tr. at 19-20.) (For these findings, Lastname extrapolates from the ALJ's comments about Ms. Beeman's report. (Tr. at 19-20.)) 20 C.F.R. § 416.920a(c)(4), (d)(1) (2003). The ALJ's decision is unreviewable to the extent that he did not state the exact level of severity for the four areas. The ALJ appears to have rated only one of the areas—episodes of decompensation—according to the required scale. (Tr. at 20.) Activities of daily living are not rated at all. (Tr. at 19-20.) Social functioning and concentration are assessed only in terms of less than a certain level instead of at a certain level. (Tr. at 19-20.)

D. *Activities*: The ALJ Erroneously Evaluated Lastname's Activities.

The ALJ found Lastname not credible because he attended college and "[a]ttendance in school can properly be viewed as inconsistent with an alleged inability to perform all work." (Tr. at 28.) The ALJ's finding with respect to Lastname's activities is flawed.

First, there is no per se rule that school attendance proves that a claimant is not disabled. See Smolen, 80 F.3d at 1285, 1287 (school attendance did not show that the claimant was not credible); Cohen v. Secretary of Dep't of Health and Human Servs., 964 F.2d 524, 528, 530 (6th Cir. 1992) (part-time attendance in law school did not prove that the claimant was not credible) (cited with favor in Reddick, 157 F.3d at 722)); cf. also 20 C.F.R. § 416.972(c) (2003) ("Generally, we do not consider activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity.").

Second, Lastname's activities were punctuated with rest (Tr. at 142) and did not reflect anywhere near the requirements of full-time, exertionally light work (Tr. at 42-43, 52-53). For example, the fact that Lastname painted two canisters for his mother does not show that Lastname could do full-time light work. (Compare Tr. at 28 (ALJ's reference to "painting kitchen canisters"), with id. at 42 ("my mother . . . had a set of canisters").) Nor does the fact that Lastname mowed the lawn. (Tr. at 141 ("I mow the law in the summer & it makes me tired.").) Cf. Reddick, 157 F.2d at 722 ("[The claimant's] activities were sporadic

and punctuated with rest."). Restated, the ALJ mischaracterized the evidence when arguing that Lastname had a "very active lifestyle." (Tr. at 28.)

Third, the ALJ misstated the issue. The question is not whether Lastname was unable to perform "all work" as the ALJ asserted. (Tr. at 28.) The question at step four[10] was whether Lastname could perform his past relevant work as a marine upholsterer. (Tr. at 28.) Similarly, if the ALJ reached step five,[11] the question would not have been whether Lastname could not perform "all work," but whether he could perform full-time jobs in significant numbers. SSR 96-8p; 42 U.S.C. § 1382c(a).

Fourth, there is a public policy reason against a rule that school attendance automatically disqualifies someone from being found disabled. The Court should not structure incentives such that a claimant would not pursue education or vocational training in order to preserve a claim of benefits. Although an ALJ may consider a claimant's school attendance along with other activities when adjudicating whether a claimant is disabled, the Court should not endorse the ALJ's apparent per se rule that school attendance proves that a claimant is not disabled.[12]

E. *Failure to Follow Prescribed Treatment*: The ALJ Misapplied 20 C.F.R. § 416.930.

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[10] 20 C.F.R. § 416.920(e) (2003) (step four).

[11] 20 C.F.R. § 416.920(f) (2003) (step five).

[12] For SSI beneficiaries, the Commissioner has structured rules to facilitate retraining and school attendance. See http://www.ssa.gov/work/ResourcesToolkit/redbook.html.

The ALJ relied on 20 C.F.R. § 416.930 (2003), to decide that Lastname was not disabled at step four. (Tr. at 14.) The ALJ thereby made a harmful mistake of law. Under 20 C.F.R. § 416.930 (2003), an ALJ may find a claimant not disabled based on his or her failure to follow prescribed treatment only in narrow circumstances. 20 C.F.R. § 416.930 (2003). An ALJ must first conclude that a claimant would be disabled without taking into account any failure to follow prescribed treatment. 20 C.F.R. § 416.930 (2003); SSR 82-59[13] ("Individuals with a disabling impairment which is amenable to treatment that could be expected to restore their ability to work must follow the prescribed treatment to be found under a disability, unless there is a justifiable cause for the failure to follow such treatment.") (emphasis in original). Here, the ALJ never found that Lastname would be disabled before taking into account any failure to follow prescribed treatment. (Tr. at 15-31.) As such, the ALJ was not permitted to use section 416.930 to find Lastname not disabled at step four. 20 C.F.R. § 416.930 (2003); Byrnes v. Shalala, 60 F.3d 639, 643 (9th Cir. 1995) (enforcing requirements of failure-to-follow-prescribed-treatment regulation); Shramek v. Apfel, 226 F.3d 809, 812-13 (7th Cir. 2000) (noting that the failure-to-follow-prescribed-treatment regulation applies when treatment would restore a claimant's ability to work).

F. *Lay-Witness Testimony*: The ALJ Did Not Evaluate Lay-Witness Testimony.

[13] Available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-59-di-02.html.

Lastname's step-father with whom Lastname lived confirmed that Lastname's activities were punctuated with rest. (Tr. at 60-61.) If an ALJ "wishes to discount the testimony of the lay witnesses, he [or she] must give reasons that are germane to each witness." Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir.1993). The ALJ did not do so. (Tr. at 15-31.)

G. *Boilerplate*: The ALJ Made Many Errors in His Extended Boilerplate.

The ALJ cited scores of cases, many of them irrelevant or erroneous. (Tr. at 20-29.) Further, many cases do not stand for the proposition that the ALJ suggests. Lastname mentions examples of the ALJ's mistakes in his boilerplate.

1. *Moothart* (7th Cir.) Was Overruled.

The ALJ relied on and quoted the Seventh Circuit case of Moothart v. Bowen, 934 F.2d 114 (7th Cir. 1991), regarding the importance of objective medical evidence. (Tr. at 26.) The Seventh Circuit overruled Moothart in Pope v. Shalala, 998 F.2d 473 (7th Cir. 1993), because Moothart placed too much emphasis on objective medical evidence and thus was inconsistent with the agency's regulations. Id. at 482-87.

2. The ALJ Erroneously Believed That Objective Evidence Always Takes Precedence.

The ALJ seems to have believed that when weighing objective and subjective evidence, an ALJ must accord "precedence" to the objective evidence over the subjective evidence. (Tr. at 25.) This is incorrect. Once a claimant has established a medical impairment by objective evidence and that his or her objective medical condition could cause

the type of the claimant's complaint, e.g., back pain, there is no requirement that an ALJ accord precedence to objective over subjective evidence. 20 C.F.R. § 416.929(c)(2) (2003) ("We must always attempt to obtain objective medical evidence and, when it is obtained, we will consider it in reaching a conclusion as to whether you are disabled. However, we will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements");20 C.F.R. § 416.929(c)(3) (2003) ("Since symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. . . . Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account").

3. Substantial Evidence is Not at Issue Before the ALJ.

The ALJ cited case law for the proposition that a non-examining state-agency physician's opinion "may constitute substantial evidence" that a claimant's impairments neither met nor equaled a listed impairment. (Tr. at 21.) This shows that the ALJ made a fundamental error of law. The substantial-evidence standard is a deferential standard of appellate review. For example, the Appeals Council and federal district and appellate courts

apply the substantial-evidence standard. 20 C.F.R. § 416.1470(a)(3) (2003);[14] 42 U.S.C. § 405(g).[15] This is a deferential standard because substantial evidence may be less than a preponderance of the evidence. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966); Tackett, 180 F.3d at 1098. In contrast, the preponderance-of-the-evidence standard applies to ALJ fact-finding. Jones ex rel. Jones v. Chater, 101 F.3d 509, 512 (7th Cir. 1996) (citing SEC v. Steadman, 450 U.S. 91, 101 n.21 (1981)). By applying the substantial-evidence standard instead of the preponderance-of-the-evidence standard, the ALJ made a profound due process error. Id.

Of course, in litigation the Commissioner may not permissibly argue that the ALJ's error was harmless on the ground that substantial evidence supports the ALJ's decision. The deferential standard of review does not insulate from reversal an ALJ's decision when the ALJ made the legal error of applying an erroneous burden of proof. Charlton v. FTC, 543 F.2d 903, 907 (D.C. Cir. 1976) (by applying the substantial evidence standard, the agency "hopelessly confused two legal cannons designed to serve entirely distinct purposes") (cited in Steadman, 450 U.S. at 99 n.20).

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[14] Section 416.1470(a) provides in part, "(a) The Appeals Council will review a case if– . . . (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence . . . ." 20 C.F.R. § 416.1470(a) (2003).

[15] Sentence five of 42 U.S.C. § 405(g), provides in part that the "findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive[.]" 42 U.S.C. § 405(g).

4. *Nyman* (9th Cir.) Was Superceded By *Bunnell* (9th Cir.).

The ALJ relies on Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985), regarding the standard for the evaluation of subjective complaints. (Tr. at 26.) He should not have. In October 1, 1991, the Ninth Circuit held en banc than an ALJ "may not discredit a claimant's testimony of pain and deny disability benefits solely because the degree of pain alleged by the claimant is not supported by objective medical evidence." Bunnell v. Sullivan, 947 F.2d 341, 346-47 (9th Cir. 1991). In Bunnell, the Ninth Circuit en banc overruled the concurring opinion in Bates v. Sullivan, 894 F.2d 1059 (9th Cir.1990), which had relied on Nyman. Bunnell, 947 F.2d at 324; Bates, 894 F.2d at 1068. On November 14, 1991, the Commissioner promulgated regulations reaching the same conclusion. See 56 Fed. Reg. 57,928 (1991) (codified at, inter alia, 20 C.F.R. § 416.929). Under the 1991 regulations still in effect today:

> . . . [W]e will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements.

20 C.F.R. § 416.929(c)(2) (2003). Instead, an ALJ must consider the objective medical evidence along with other evidence when determining a claimant's residual functional capacity. 20 C.F.R. § 416.929(c)(3) (2003) ("Since symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. ").

Therefore, by relying on Nyman, the ALJ takes the position that the Commissioner lost on October 1, 1991 in Bunnell and slights the regulations promulgated on November 14, 1991.

VII. Conclusion

The Court should enter judgment under sentence four of 42 U.S.C. § 405(g), reversing the Commissioner's final decision with a remand for a rehearing, i.e., for a finding of disability. Consistent with treating physician Dr. DoctorOne's opinions that Lastname could not work full-time, Lastname could not perform any of his past work at step four or any full-time work at step five. Therefore, he was disabled at step five. SSR 96-8p. Alternatively, the Commissioner's final decision should be reversed with a remand for a rehearing, i.e., for further administrative proceedings. The Court should order the Commissioner on remand to evaluate fairly and properly the medical and non-medical evidence.

Respectfully submitted,

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